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WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME X.

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Mr. Albert A. Outerbridge, 251 South Fourth Street, Philadelphia.

[During Mr. Outerbridge's absence in May, June, October, and November, Mr. Lawrence Lewis, Jr., acted as Editor.]

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ERRATA.

Page 92, col. i., line 32; *for* "following" *read* "flowing."

Page 93, col. i., line 13 from bottom; *for* "going" *read* "giving effect." The sentence in which this correction is made and the next should be read as one.

Page 146, col. i., lines 35, 36: strike out "a juror of."

Page 173, col. i., line 8 from bottom; *for* "motion for an injunction" *read* "motion to continue injunction;" and in same case, col. ii., line 19, *for* "Bill dismissed" *read* "Injunction dissolved."

Page 251, col. i., line 7; *for* "Sharp's Appeal" *read* "Sarkie's Appeal." Same column, line 5 from bottom, *for* "Common Pleas," *read* "Orphans' Court."

Page 369, col. i., line 20 from bottom; *for* "quantity" *read* "quality."

Page 372, col. ii., line 12 from bottom: *for* "*H. Pleasants*" *read* "*H. F. Weeks.*"

Page 385, col. ii., line 18; *for* "it" *read* "the."

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, APRIL 21, 1881.* [No. 1.

Supreme Court.

Jan. '80, 93. January 4, 1881.

McConnell's Appeal. Hamill's Estate.

Decedents' estates—Claim for wages—Presumption of payment or of gratuitous services—When such presumption will arise.

In this country (as in England), where a person serves in the capacity of a domestic servant and no demand for payment of wages is made for a considerable period after such service has terminated, the inference is, either that the wages have been paid, or that the service was performed on the footing that no payment was to be made.

Gough *v.* Findon (7 Exchequer, 50), approved.

In such cases the presumption rests upon the fact that wages, as a general rule, are paid at stated periods (whether weekly, monthly, or yearly), and upon the further fact that a servant rarely leaves the service of his employer without a settlement of some sort, or at least a demand for settlement.

The presumption is a presumption of fact, and, of course, liable to be rebutted.

Per PAXSON, J. The 21st Section of the Act of Feb. 24, 1834 (P. L. 76), which makes wages for one year a preferred claim, is not inconsistent with this presumption. The Act was not intended to change the rules of evidence or regulate the *quantum* of proof. It means that when a claim for wages is established as required by law it shall be preferred.

GORDON, TRUNKEY, and GREEN, JJ., dissent.

Appeal from the Orphans' Court of Philadelphia County.

Upon the audit of the account of Jane McConnell, administratrix of John Hamill, deceased, Eliza Fletcher, a sister-in-law of Hamill, claimed four years' wages from August, 1871, to August, 1875, upon an alleged contract of living as a domestic servant.

The testimony in support of the claim was that Eliza Fletcher gave up a lucrative business of nursing, from which she made from $20 to $25 per week, at the solicitation of Hamill and his wife (Eliza's sister), with the understanding that she was to receive $4 per week and her board.

That when she first went, Mrs. Hamill was ill, and that she died in 1875; that Hamill, who kept a drinking saloon, was a man of intemperate habits, and was frequently so ill from the effects of over-drinking that he required careful and constant nursing. That she (Eliza) attended to the bar, did the nursing and all the housework. The hiring was alleged to have taken place in the early fall of 1870, but it was admitted that the first year had been paid. Miss Fletcher left Hamill's employ when her sister died in 1875. Hamill died in 1877. There was no evidence that any demand for payment was ever made in Hamill's lifetime.

The testimony on behalf of the accountant was in serious conflict with the above; several of the witnesses went so far as to deny that Miss Fletcher ever resided permanently at Hamill's.

The Auditing Judge, PENROSE, J., allowed the claim in full, whereupon, after exceptions had been overruled by the Court in banc, the accountant took this appeal, assigning for error the decree of the Court.

Richard S. Hunter, for appellant.

The testimony in support of the claim was not of the clear and indisputable character which the law requires in cases of claims against a decedent's estate.

The sound rule appears to be that "when a person serves in the capacity of a domestic servant, and no demand for payment of wages is made by the servant for a considerable period after such service has terminated, the inference is either that the wages have been paid or that the service was performed on the footing that no payment was to be made."

Gough *v.* Findon, 7 Exch. 50.
Sellen *v.* Norman, 4 Carr. and Payne, 80.

These decisions rest upon the fact that suit had not been brought until evidence of payment was difficult or unattainable. So, in the present case, the claimant waited nearly two years after her claim matured, and until John Hamill, the only witness who could have proved its falsity, was dead. She then brought her claim at a time when she herself, being no longer a competent witness, is not compelled to swear to the truth of her claim, and consequently could not be indicted for perjury.

Richard W. Clay, for appellee.

The finding of the Auditing Judge, approved of by the Court below, will not be disturbed except for plain error, and it is submitted that no such plain error exists in the present case.

Such presumptions as to payment for services rendered, as are contended for on behalf of the appellant, are supported only by English authorities; none such can be found here, nor are they in accordance with the spirit and policy of the law of this State. The 21st section of the Act of 24th February, 1834 (P. L. 77), which establishes the order of distribution among the creditors of a decedent, and makes servants' wages

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for *one year* a preferred claim, is inconsistent with such a presumption. Furthermore it has been ruled by the Orphans' Court that no such presumption arises in Pennsylvania.

McCarty's Est., 9 Phila. 319.

Hunter, in reply.

The Act of 1834 does not affect the presumption of payment, but gives a preference only when such presumption has been rebutted.

January 24, 1881. THE COURT. The appellee claimed, in the Court below, for four years' services as a domestic servant at four dollars per week. She admitted having been paid for the first year, but alleged she had not been paid any portion of her wages for the last four years. She left the service of her employer, Mr. Hamill, about two weeks after the death of his wife, in July, 1875, and does not appear to have made any demand upon him during his life. After his death, and nearly two years after she left his employ, this claim was presented. It further appears the appellee was a sister of Hamill's wife, and about the time she left had a quarrel with the decedent. Her brother, Mr. Fletcher, who was her main witness to sustain her claim, says in his testimony: "At the time of Mrs. Hamill's death Eliza (the appellee) and Mr. Hamill had a quarrel—this was two weeks after she left,—and never spoke to him again; he died a year after; she claimed her furniture which was there; she got some, but not all; all but two or three pieces which the arbitrator awarded to the estate."

The Auditing Judge found the contract of hiring, and that the services had been performed, upon which the Court below allowed the full amount of the appellee's claim.

We are not disposed to disturb the finding of fact. There was considerable conflict of testimony, but a verdict for such reason would not be set aside. The report of an auditor, or the finding of an Auditing Judge, is entitled to equal weight. The conclusion of the learned Court, however, upon the facts is not so satisfactory.

It was held, in Gough *v.* Findon (7 Exchequer, 50), that "where a person serves in the capacity of a domestic servant, and no demand for payment of wages is made by the servant for a considerable period after such service has terminated, the inference is, either that the wages have been paid, or that the service was performed on the footing that no payment was to be made." Again, in Sellen *v.* Norman (4 Car. & Payne, 80), it was said by GAZELEE, J.: "In the regular course, if the servant has left a considerable time, the presumption is, that all the wages have been paid."

This is the well settled rule in England. It was either overlooked by the Court below, or considered to have no application here; probably the latter, as it was urged at bar that the rule, however firmly established in England, was not in force in this country. No sufficient reason was shown in support of this view. Such platitudes, as "the spirit of our laws" and the "genius of our institutions" amount to nothing, for the reason, they are not applicable to the question we are considering. A presumption has been defined to be "an inference as to the existence of one fact not certainly known from the existence of some other fact known, or proved, founded on a previous experience of their connection." The presumption referred to in the cases cited rests upon the known fact, that in England servants' wages, as a general rule, are paid at stated periods, and it is entirely immaterial whether such periods are weekly, monthly, or yearly, and upon the further fact that a servant rarely leaves the service of an employer, and remains away for months or years, without a settlement of some sort with his or her employer, or at least a demand for payment. The same facts exist in this country, and there is, therefore, the same presumption. In either case it is a presumption which the law raises from a known state of facts, and a known course of dealing. It is, however, a presumption of fact merely, and liable to be rebutted.

In the case in hand there is nothing to rebut this presumption; on the contrary there is much to strengthen it. There is the conceded fact that the first year's wages were paid. In view of this fact it seems almost incredible that not a dollar of wages should have been paid for the next four years. The payment for the first year created a course of dealing which it is only fair to presume continued thereafter. It is at least sufficient to put the appellee upon some proof to show why she received nothing during the second and subsequent years. Did she demand her wages, and was she refused? This could hardly continue for four years and not come to the knowledge of some one who could have been called as a witness, even if we admit the impossible supposition that the appellee would have worked for Mr. Hamill during all those years in the face of a denial of her wages. Did she agree to make him her banker? A most improbable thing, in view of the evidence produced by her, of his neglect of business, heavy drinking, and constant attacks of *mania potu*. Then there was the fact of her connection by marriage with her employer; she was his sister-in-law, a fact not sufficient to overcome a contract relation, but pregnant with significance in view of her stale claim, made after her sister and brother-in-law were in the grave. Further, there was her quarrel with the latter, and a dispute about the

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furniture after his death, resulting in some sort of arbitration.

We are of opinion there was abundance in this case to raise such a presumption of payment, as to cast upon the appellee the duty of showing something more than the mere contract of hiring. It is always possible for a servant to show such contract, or what is equivalent, to prove services for which a promise to pay will be implied. Such claims may be made and such proof produced years after the death of the employer. Few persons take receipts for payment of servants' wages, and the proof thereof, in many cases, would be exceedingly difficult. This of itself would not be sufficient to defeat a just claim, but it is a good reason why a presumption, based upon sound principles and the known rules which guide human conduct, should be applied.

It was much urged that the 21st section of the Act of 24th February, which makes servants' wages for one year a preferred claim against a decedent's estate, is inconsistent with this presumption. We do not so regard it. The Act was not intended to change the rules of evidence, or regulate the quantum of proof. It means that when a claim for wages is established, as required by law, it shall be a preferred debt to the extent of one year's services. The claim of the appellee was improperly allowed.

The decree is reversed at the cost of the appellee, and it is ordered that distribution be made in accordance with this opinion.

Opinion by PAXSON, J. GORDON, TRUNKEY, and GREEN, JJ., dissent.

Jan. '81, 62. January 25, 1881.

Hoffner et al. v. Wynkoop et al.

Will—Construction of—Inferences to be deduced from—Intestacy as to residuary estate—Act of 24 Feb. 1834, § 15—Specific performance of decedent's contracts—When notice to heirs or devisees necessary—Effect of want of notice.

When a purchaser proceeds in the Orphans' Court by bill or petition, under the Act of 24 Feb. 1834, § 15, to enforce specific performance of a decedent's contract for the sale of land, notice to the heirs or devisees of the real estate is requisite, as well as notice to the executors or administrators.

As to heirs or devisees not so notified, the proceedings are void. Their title will not pass by the deed executed in pursuance of the decree of the Orphans' Court.

A will gave all the testator's real and personal estate to the wife for life, and small legacies to the children living at the time of his decease; there was no residuary devisee, no limitation of the real estate over after the life estate to the wife, and no person named as heir or next of kin. A clause provided that part of the real estate might be converted at the discretion of the widow, and part upon agreement of the widow, sister, and children named, but was silent as to the disposition thereof whether converted or not:

Held, that no intent could be deduced to disinherit those entitled upon the death of the wife to the real estate, under the intestate laws of the Commonwealth.

Error to the Common Pleas No. 4, of Philadelphia County.

Ejectment, by Benjamin J. Wynkoop, H. P. Garabedean and Hannah Matilda his wife, in right of said wife, and Joseph P. Wynkoop and Kate S. Wynkoop, minor children of George H. Wynkoop, deceased, by their next friend Benjamin J. Wynkoop, against Sarah A. Hoffner and Isaac Farrell, the latter being tenant of the premises, to recover one undivided fifth part of a certain farm in that part of the city of Philadelphia, known as "The Neck." Plea, not guilty.

On the trial, plaintiffs proved title as follows: Abraham Wynkoop and Ann Wynkoop, his sister, became in 1814 seised as tenants in common of the farm in question. About 1850 Ann Wynkoop died, leaving her brother Abraham her sole heir, whereby he became seised of the whole of the said farm. On January 30, 1852, said Abraham Wynkoop died, providing by his will, *inter alia*, as follows:—

"To my wife Hannah Wynkoop, I leave and bequeath all my real estate and personal estate, to have and to hold during her natural life (if she remains my widow), she may sell the dwelling house No. 137 North Eleventh Street, if she think it for the best and the comfort of herself and her children. My proportion of the farm in the Neck may be sold, if all can and do agree. My wife, sister Ann, Benjamin my son and Alfred my son, my daughter Almira Ann, Francis A. my son. As I have not much to leave, I do in remembrance leave to my son, Benjamin Norman Wynkoop, 20 dollars, ditto to my son, Alfred Washington Wynkoop, 10 ditto. To my dear daughter Almira Ann Wynkoop, my silver watch, my desk and all that is in it, half of my silver spoons, etc. And I hope that her deare mother will be kind and affectionate to her, and give her such bed and bedding and clothing as will make our daughter comfortable and happy. To my son Francis A. Wynkoop ten dollars, and now may the blessing of our own Heavenly Father rest upon you all, amen."

Hannah, widow of said Abraham Wynkoop, survived him, and died in 1878. Plaintiffs claimed as sole lineal descendants of Joseph P. Wynkoop, one of five children of said Abraham Wynkoop, who had died in October, 1842, before the death of his father, the said Abraham, and before the date of his said father's will. Plaintiffs' claim was based upon the ground that said testator died intestate as to said farm, except as to the life estate given therein to his widow, and that therefore they, as lineal descendants of one of testator's five children, were entitled to recover an undivided fifth part thereof.

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Defendants showed title as follows: On March 1, 1849, said Abraham and Ann Wynkoop leased the farm in question to one William Horner for five years, granting to said Horner the right to purchase the same at any time within said term. On September 21, 1852, after Abraham Wynkoop became sole seised of said premises, and died as aforesaid, Horner assigned his rights under the lease to George Hoffner, who in 1853 presented a petition to the Orphans' Court praying a specific performance of Abraham Wynkoop's contract of sale for said premises. Citations were awarded to the executors of said Abraham Wynkoop and to Benjamin, Almira Ann, Alfred, and Francis A. Wynkoop, the children of said Abraham Wynkoop mentioned in his will, to show cause why the prayer of the petition should not be granted. No notice, however, of said proceedings was given to plaintiffs, Benjamin J. Wynkoop, nor to Hannah Matilda Wynkoop (now Garabedean), nor to George H. Wynkoop, father of complainants, Joseph P. and Kate S. Wynkoop, all of whom were then living and minors. On due proof of service of the citations above mentioned, the said Orphans' Court made a decree instructing the executors of said Abraham Wynkoop to execute to said Hoffner a deed for the premises. Said executors accordingly executed said deed on January 26, 1853. Said Hoffner, being thus seised of the premises, afterwards died, devising the same to his wife Sarah A. Hoffner, defendant in this suit.

The Court instructed the jury to find a verdict for plaintiffs, reserving the point of law, whether plaintiffs were concluded by the proceedings in the Orphans' Court, they not having been made parties to and having had no notice of said proceedings. Verdict accordingly.

Defendants thereupon moved for judgment *non obstante veredicto*. After argument, the Court entered judgment for the plaintiffs upon the point reserved. Defendants took this writ, assigning for error the entry of judgment for plaintiffs on the point reserved as aforesaid.

Charles Davis (with whom were *Lewis C. Cassidy* and *Charles S. Pancoast*), for the plaintiffs in error.

The proceedings in the Orphans' Court were had under the Act of Feb. 24, 1834, § 15. In so far as that Act required notice to the "devisees of the estate," it was complied with, for they were all notified, and the plaintiffs are not mentioned in the will.

The power of sale in the will implies who are the objects of the testator's bounty. The petitioners were not bound to go beyond the face of the will, and ascertain if there were heirs as well as devisees. But, in truth, there were no heirs; for where from the will it appears that the testator thought he had given, or intended to give, to certain parties, they will take as if by express gift.

Jarman on Wills, 5 Am. ed. ch. xvi. 486.
McKeehan *v.* Wilson, 3 Smith, 74.
Jordan *v.* Fortesque, 10 Bean. 259.
Farrer *v.* St. Cath. College, L. R., 16 Eq. 19.
Hall *v.* Lietch, 9 Id. 376.
Taylor *v.* Webb, Styles, 301–19.
Marret *v.* Sly, 2 Sid. 75.
Parker *v.* Nickson, 1 De G. J. & S. 177.
Parker *v.* Tootal, 11 H. L. C. 143.
Redfield on Wills, Ch. 9, § 23.
Shovelton *v.* Shovelton, 32 Beav. 143.
2 Jarman on Wills, 109.
Langston *v.* Pole, 1 Tam. 119; s. c. 2 Cl. & Fin. 194.

The contract of sale in the lease worked a conversion into personalty, over which the personal representatives had absolute control.

Where the application for specific performance is made by either the executors or the purchasers, notice to the heirs or devisees is unnecessary.

West Hickory Mining Assoc. *v.* Reed, 30 Sm. 38.

But if such notice be required, the effect of the want of it is simply to entitle them to show in the ejectment that the contract of sale should not have been performed.

Sutter *v.* Ling, 1 Casey, 466.

Benj. P. Wrigley (*William Hopple, Jr.*, with him), for the defendants in error.

The plaintiffs are interested; there was no devise of the fee; it passed to the children of Abraham under the intestate laws. An intention even to dispose of the fee cannot be gathered from the will. Proceedings on application of the purchaser, without notice to the heirs, are void.

McKee *v.* McKee, 2 Harris, 231.
Anshutz's Appeal, 10 Casey, 375.
West Hickory Mining Assoc. *v.* Reed, 30 Sm. 38.

The land had vested in the heirs, and could not be taken from them without notice. The very question on the contract was whether or not there was a conversion.

The irregular process, not having complied with the legislative enactment, was void.

Horner *v.* Hasbrouck, 5 Wr. 198.
Cadmus *v.* Jackson, 2 Sm. 295.

February 7, 1881. THE COURT. Title to the land was vested in Abraham Wynkoop. He leased to William Horner for the term of five years from March 1, 1849, and gave him the privilege of purchasing on certain terms, at any time before the expiration of the lease. Horner assigned to George Hoffner, upon whose petition the Orphans' Court decreed specific performance of the contract for sale. Verdict was rendered for plaintiffs, subject to the opinion of the Court on the point of law reserved, "Whether the plaintiffs are concluded by the proceedings in the Orphans' Court, they not being made parties, or having notice of the said proceedings."

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In strictness, the reservation assumes that the plaintiffs are entitled to recover, unless barred by said decree; yet the defendants now urge, what they did not in the Court below, namely, that the plaintiffs have no interest in the land because it was devised to other persons by Abraham Wynkoop. If this be so, their claim is groundless, and it is clear that they were not entitled to notice, nor can they question said decree. Abraham Wynkoop's will is plain. He gives the use of his real and personal estate to his wife, and small legacies to his children, who were living at its date. His grandchildren, the plaintiffs, whose father died before the making of the will, are not mentioned. He made no disposition of his property which would remain after the life use, and payment of the specific legacies. There is not a word to indicate a residuary legatee; nor does he name any persons who shall be his heirs or next of kin. The giving of specific legacies to designated persons neither makes them residuary legatees nor vests in them the right to take the whole estate as heirs. With less reason can such act be deemed evidence of an intendment to disinherit any one entitled to take as heir-at-law. The testator provided that part of his real estate might be converted, in the discretion of his widow, and another part upon agreement of his widow, sister, and children, whom he named; but was silent as to its disposition whether converted or not. It is impossible to hold that he intended to dispose of the remainder of his estate, for there is no expression from which such intent may be inferred. It therefore passes under the intestate law.

Section 15 of the Act of 1834 (P. L. 75) provides, that where a decedent had bound himself in his lifetime to sell and convey real estate, and had made no sufficient provision for the performance of his contract, his executors or administrators, or the purchaser, or other person interested in such contract, may apply, by bill or petition, to the Orphans' Court, "and after due notice of such bill or petition, to the purchaser, or to the executors or administrators and heirs of the decedent or devisee of such estate, as the case may require, to appear in such Court on a day certain, and answer such bill or petition;" and if the case be sufficient in equity, said Court may decree specific performance of the contract. In West Hickory Mining Association *v.* Reed (30 P. F. S. 38), it was decided that where the application is by the executors or administrators of a vendor, notice to his heirs or devisees is unnecessary. Prior to that ruling, it was often thought that notice in all cases was necessary to be given to the heirs or devisees, in order that the decree be conclusive against them. This was recognized in the opinion by remarking that, "while there are enough of dicta in the authorities to inspire some doubt, it is believed that the construction which the language of the statute contains is not inconsistent with any definitive judgment of this Court." After noting the plain and obvious sense of the words of the statute, it was said: "Three alternative directions are given, one of which is to be pursued as the facts of a particular case shall make it requisite and appropriate. In the first instance, purchasers; in the second, executors or administrators, and heirs of a decedent; and, in the third, executors or administrators of a decedent, and the devisees are entitled to notice."

It had not been doubted that when a purchaser applied, notice to the heirs or devisees of the real estate was requisite as well as notice to the executors or administrators. Such is the express direction of the statute. The dicta were, that heirs or devisees of the vendor should be notified, even when his personal representatives applied; and the dicta were inspired by more than a doubt as to necessity of notice to them for a final decree. Why the statute demands notice to heirs or devisees when the purchaser petitions, and dispenses with it when the personal representative petitions, would be useless to discuss. The distinction is probably for wise reasons.

The defence rested on the decree of the Orphans' Court. As respects the plaintiffs, that decree is a nullity, because of the facts stated in the reserved point.

Judgment affirmed.

Opinion by TRUNKEY, J.

Jan. '80, 308. January 24, 1881.

Schmidt and Erb v. Owens.

Pleading—Divers counts—Trespass, what constitutes—Objection of misjoinder of counts—When must be taken—Practice.

PER CURIAM. An objection to the inconsistency of two counts in a narr. must be taken advantage of by demurrer; it will not be inquired into, on error.

Both counts of the narr., printed below, are counts in trespass.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by W. A. Owens against J. G. Schmidt and J. Erb, to recover damages for the wrongful obtaining of certain goods and chattels of plaintiff. The narr. filed contained two counts, as follows:—

. . . And thereupon the said plaintiff complains, For that the said plaintiff before and at the time of the committing of the grievances by the said defendants hereinafter mentioned, was lawfully possessed of certain goods

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and chattels, to wit [specifying them] . . . of great value, to wit, of the value of five thousand dollars, at the county aforesaid, yet the said defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, oppress, aggrieve, and defraud the said plaintiff, and to deprive him of said goods and chattels, on the twenty-first day of February, A. D. 1878, at the county aforesaid, unlawfully, and with force and arms, combined and conspired together to obtain possession of said goods and chattels, the property of said plaintiff, and by means of such unlawful combination and conspiracy did obtain possession of said goods and chattels, and converted the same to their own use. And other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace and dignity of the Commonwealth of Pennsylvania.

And also, for that the said defendants, on the day and year aforesaid, with force and arms, etc., to wit, at the county aforesaid, seized, took, and carried away divers goods and chattels, of the said plaintiff of the like number, quantity, quality, description and value, as the said goods and chattels in the first count mentioned, of the said plaintiff of great value, to wit, of the value of five thousand dollars, there then found and being, and converted, and disposed of the same to their own use.

Plea, not guilty. On the trial, it appeared that, in 1878, J. G. Schmidt, a creditor of Owens, took out a warrant for his arrest, on the ground that he was secreting his goods for the purpose of defrauding his creditors, and had him arrested and put in jail. While Owens was under arrest, J. Erb, an employé of Schmidt, visited Owens to see about the payment of Schmidt's claim. Owens agreed to make a bill of sale of what he had left for $100 cash and Schmidt's claim, and accordingly delivered such bill of sale to Erb. The plaintiff's evidence was that the value of the goods covered by the bill of sale was about $2800. Owens subsequently brought this suit, claiming that the bill of sale was procured from him by duress. The Court submitted the question of duress to the jury, and the jury rendered a verdict for plaintiff for $2743.75, upon which judgment was entered; whereupon defendants took this writ, assigning for error the entry of judgment on two inconsistent counts and the overruling of his motion in arrest of judgment.

R. P. White (with him *L. R. Fletcher*), for plaintiffs in error.

The first count is clearly for a conspiracy, and the second in trespass. Such a misjoinder is matter of substance, and can be taken advantage of in error.

Brumbaugh *v.* Keith, 7 Casey, 328.
Seip *v.* Drach, 2 Harris, 355.
Malin *v.* Bull, 13 S. & R. 443.
Gruber *v.* Bank, 6 Norris, 467.

In this case, it did material injury to us, as evidence was admitted, which the Court said was inadmissible under the count in trespass but admissible under that for conspiracy. We objected to the evidence, and the plaintiff should then have withdrawn the count for conspiracy.

E. C. Shapley (with him *F. C. Brewster*), for defendant in error.

The counts are both in trespass; the second admittedly is, and the first avers that the act was done *with force and arms*, and contains all the other requisites for such action.

2 Chitty Pl. 850, note.
Maher *v.* Ashmead. 6 C. 346.
Smith *v.* Rutherford, 2 S. & R. 358.
Kerr *v.* Sharp, 14 S. & R. 399.

The misjoinder, if any exists, should have been taken advantage of on demurrer; it was cured by the verdict. The judgment could properly be entered on the good count.

February 7, 1881. THE COURT. We think both counts of the declaration are in trespass. The fact averred in the first count that the defendants did obtain possession, is not necessarily inconsistent with a taking possession by force and arms. At all events the exception was formal, and the objection of the inconsistency of the two counts on this score, could only be taken advantage of by a special demurrer. After verdict such an objection cannot avail. The judgment might have been entered on the good count, and where such is the case, this Court will not reverse.

PER CURIAM. Judgment affirmed.

Jan. '81, 94. February 18, 1881.

Smith v. Stokes.

Mechanic's lien—Amendment of—Act of June 11, 1879—Construction of—Evidence of custom of trade—When inadmissible—Materials furnished to a sub-contractor—Right to file lien for.

The right of a mechanic to file a lien being purely statutory, evidence to prove a custom of trade in relation thereto is incompetent.

The Act of June 11, 1879 (P. L. 122), entitled "An Act relating to mechanics' liens, and authorizing the amendment of the same," is not retroactive.

Fahnestock *v.* Wilson, 9 WEEKLY NOTES, 385, followed.

Materials furnished to a sub-contractor cannot be made the subject of a lien.

Error to the Common Pleas No. 2, of Philadelphia County.

Scire facias sur mechanic's lien filed Nov. 6, 1876, by J. W. Smith & Co., to the use of Maule Bro. & Co., against Williams & Stokes, owners, or reputed owners, Philip C. Garrett, registered owner, and Eli Loux, contractor, for materials furnished in the erection of nine dwelling-houses in the city of Philadelphia.

The defendants filed the following pleas: 1.

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Nil debent. 2. That said Williams & Stokes were not owners of the properties described in said lien claim, but that Philip C. Garrett was owner thereof. 3. That said Eli Loux never was contractor for the erection of the buildings described in said lien claim, nor for any of the same. Said Williams & Stokes above were contractors for the same.

Upon the trial (before FELL, J.) the following facts appeared: On the 12th of May, 1875, Philip C. Garrett, being the registered owner of a lot of ground, whereon a building was erected, contracted with Williams & Stokes, lumber merchants, to tear down the building and erect on the lot nine dwelling-houses. On the 31st of May, Williams & Stokes, by a written agreement, sub-contracted with Eli Loux, builder, for the erection of the nine dwelling-houses; Loux contracted with Smith & Co. for the materials for which the lien was filed. Evidence was offered on the part of the plaintiffs, and admitted under objection, that in all the transactions Williams & Stokes were regarded as reputed owners, and not as contractors.

Plaintiffs further offered to show that it is the custom of trade in the city of Philadelphia, for mechanics and material men in doing work and furnishing materials for new erections of buildings to rely on their lien on said buildings in the absence of information that at the commencement, the matter had been so arranged that no liens could be filed. Objected to, on the ground that it was irrelevant to the issue, the remedy being statutory. Objection sustained. Exception.

The evidence being closed, plaintiffs, under the Act of Assembly of 11th of June, 1879 (P. L. 122), moved the Court for leave to amend the record by striking out the name of Eli Loux as contractor, and substituting the defendants, Williams & Stokes, as contractors, in his stead. Objected to; motion overruled. Exception.

The Court, *inter alia*, charged the jury as follows: "If Williams & Stokes were the real owners in this case of the land, or if they were the agents of Mr. Garrett to procure the erection of the buildings—agents as distinguished from being contractors to do the work—or if Mr. Garrett misled the parties as to the relation between himself and Williams & Stokes by holding them out as owners, there can be a recovery in this case. [But if you find Garrett was the owner and entered into a contract with Williams & Stokes, who entered into a contract with Mr. Loux, to whom Smith & Co., the plaintiffs, furnished materials, and Garrett did nothing more, and the arrangement was upon this basis, and within this limit and in good faith, then there can be no recovery.] It does not follow because the plaintiffs acted in good faith, and thought Williams & Stokes were the owners that they have a right to recover. If the plaintiffs were misled by their own neglect or misled by Williams & Stokes, Mr. Garrett is not on this account responsible, and this proceeding is against his property."

Verdict and judgment thereon for the defendants. Plaintiffs took this writ, assigning for error the refusal of their offer above quoted, the overruling of their motion to amend, and that portion of the charge of the Court included in brackets.

N. H. Sharpless, for the plaintiffs in error.

Plaintiffs having proved that Williams & Stokes were the reputed owners, it was perfectly competent to prove the custom of the trade in relation thereto.

The Act of Assembly of 11th of June, 1879 (P. L. 122), fully authorizes the amendment proposed, and its provisions were entirely within the scope of the constitutional power of the Legislature.

Such a contract as this, where the true owner is concealed by an ingenious device, should not be tolerated, as in every case the lien of mechanics and material men may thus be successfully evaded.

Barclay *v.* Wainwright, 5 Norris, 191.
Duff *v.* Hoffman, 13 Sm. 191.

C. E. Morgan, Jr. (*F. D. Lewis*, with him), for the defendants in error.

This being a statutory remedy, the right of the mechanic to recover is conditional upon a strict compliance with the terms of the statute independent of any custom of trade. The Act of Assembly, *supra*, is not retroactive.

Fahnestock *v.* Wilson, 9 WEEKLY NOTES, 385.

One dealing with a sub-contractor is not entitled to a lien.

Harlan *v.* Rand, 3 Cas. 511.
Singerly *v.* Doerr, 12 Sm. 9.
Schenck *v.* Uber, 31 Sm. 31.

February 28, 1881. THE COURT. The evidence, the rejection of which is the ground of the first assignment, of the custom of trade was clearly incompetent. The second assignment is disposed of by the recent decision of this Court in Fahnestock *v.* Wilson (9 WEEKLY NOTES, 385), that the Act of June 11, 1879, is not retrospective. And it certainly cannot be maintained that there was any error in the charge as complained of in the third assignment. Materials furnished to a sub-contractor cannot be the subject of a lien. (Harlan *v.* Rand, 3 Casey, 511; Duff *v.* Hoffman, 13 P. F. Smith, 191; Schenck *v.* Uber, 31 Ibid. 31.)

PER CURIAM. Judgment affirmed.

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May, '79, 61. March 28, 1881.

Handley v. Delaware, Lack. & W. R. R. Company.

Practice—Errors and appeals—Writ of error to judgment of nonsuit—When premature—Motion to take off nonsuit, and its discharge, must appear of record.

Where a writ of error was taken to a judgment of nonsuit, and the record of the Court below failed to show that a rule had been obtained and discharged to take off such nonsuit, but an affidavit that such was the case was read to the Court, the Court ordered the case to be continued until a full and complete record should be brought up by certiorari.

Error to the Common Pleas of Lackawanna County.

Case, by the widow and minor children of Peter Handley, by their next friend, etc., against the above-named corporation, to recover damages for the death of the said Peter Handley, caused by the alleged negligence of the defendant.

The docket entries in the Court below were as follows:—

Feb. 10, 1879. Exit summons.
June 21, 1879. Plea filed. Not guilty.
Jan. 21, 1880. Issue joined.
Jan. 22, 1880. Verdict in favor of plaintiff for the sum of $2500.
Eo die. Motion for new trial and rule granted.
April 12, 1880. New trial granted.
Oct. 19, 1880. Issue joined.
Eo die. Defendant's attorney filed reasons, and moves for a nonsuit, and nonsuit is directed to be entered.
Nov. 13, 1880. It is ordered that the testimony and charge of the Court be filed of record.
Jan. 19, 1881. Writ of error filed.

When the case was called for argument—

Post, for defendant in error, moved to quash the writ of error, on the ground that the record does not show that a motion was made, and discharged, to take off the nonsuit, and, therefore, the record does not show any final judgment of the Court below.

C. Smith, for plaintiff in error, read an affidavit, that on the day after the entry of the nonsuit he appeared in Court, counsel for the other side being present, and moved for a rule to show cause why the nonsuit should not be taken off, and the said motion was subsequently discharged by the Court, but no entry of said proceeding was made of record.

[SHARSWOOD, C. J. You should have taken care to see that the record was in due form. Upon application to the Court below they would doubtless have ordered the proper entries to be made.]

PER CURIAM. This cause may be continued, in order to bring up the full and complete record by a certiorari.

Oct. & Nov. '80, 97. Oct. 19, 1880.

Wagner et al. v. Elliott.

Equity—Subrogation—Feigned issue—Subrogation of parties to—Practice.

The doctrine of subrogation is one of mere equity and benevolence, and will only be applied with a proper equitable discretion, so that it may work no injustice to either legal or equitable rights.

A. held a judgment against B., which was a lien upon B.'s real estate. A. issued execution on this judgment against certain personalty as the property of B. The personalty was claimed by C., D., and E., who gave bond to the sheriff, with surety, took the property, and became plaintiffs in a feigned issue in which A. was defendant. On the trial of the feigned issue, a verdict was found for the plaintiffs, but a new trial was subsequently obtained. Afterwards F., another judgment creditor of B., issued execution against B.'s real estate. The same was sold, and from the funds produced, A.'s judgment was fully paid. The amount of the fund proved, however, insufficient to pay G., another judgment creditor of B., the lien of whose judgment was postponed to that of A. A month later H., the surety of B. in the obligation upon which G.'s judgment was obtained, paid G. the amount of his judgment:

Held, that H. was not entitled to be subrogated to A.'s rights as defendant in the feigned issue wherein C., D., and E. were plaintiffs.

Appeal from the Common Pleas of Erie County.

Feigned issue between H. G. Wagner, T. S. Wagner, and J. H. Wagner, and G. T. Elliott, subrogated as defendant in place of H. J. Lowry, and Frank Gunnison, committee of M. B. Lowry, a lunatic.

The following are the facts of the case as set forth in the opinion of the Supreme Court.

"M. B. Lowry held a judgment in the Court of Common Pleas of Erie County, against Gideon H. Wagner, No. 191, Sept. T. 1874. This judgment was a lien upon G. H. Wagner's real estate, and M. B. Lowry having become a lunatic, his committee, H. J. Lowry and Frank Gunnison, caused a fi. fa. to be issued on the judgment to No. 178, May Term, 1878. Upon this writ a levy was made on certain barley, cloverseed, and rails, as the property of G. H. Wagner. This property was claimed by the appellants, H. G. Wagner, T. S. Wagner, and J. H. Wagner, as belonging to them. They gave a bond to the sheriff, dated March 28, 1877, and took the property.

"A feigned issue, under the Sheriff's Interpleader Act, was awarded to determine the title to this personal property, No. 202, May Term, 1877, in which the appellants were plaintiffs, and the committee of M. B. Lowry was defendant. The issue was tried before a jury, and resulted in a verdict for the appellants on October 25, 1877, thus determining that the title was in the appel-

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lants, and not in G. H. Wagner the defendant in the judgment. A rule for a new trial having been granted, on October 27, 1877, was made absolute on January 7, 1878. The new trial has not yet taken place. On the 25th of June, 1878, one G. T. Elliott presented a petition praying to be subrogated in the case to the rights of H. J. Lowry and Frank Gunnison, committee of M. B. Lowry. An answer to this petition was filed by the appellants on November 11, 1878, and on April 28, 1879, the Court made an order of subrogation. . . . . The facts urged in support of Elliott's claim to subrogation, were as follows: The Marine National Bank recovered a judgment, No. 492, September Term, 1875, against G. H. Wagner and George T. Elliott, for $1500, in which Wagner was the principal debtor, and Elliott was surety. As such surety, Elliott paid the judgment of the Marine National Bank, on June 25, 1878, and was subrogated to the rights of the bank in the final order of subrogation on April 28, 1879. To this order no objection is made. In the petition for subrogation, it was set forth that the judgment of the Marine National Bank was a lien on G. H. Wagner's land in Erie County, and that this land was sold by the sheriff under a judgment obtained by the Erie Dime Savings & Loan Co. at February Term, 1878; that by this sale, the liens of all the judgments against G. H. Wagner were divested, and the judgment of M. B. Lowry *v.* G. H. Wagner was paid in full. It further appeared that the proceeds of the sale of G. H. Wagner's real estate having been paid into Court, an auditor's report distributing the money was confirmed *nisi* on May 15, 1878, and that on May 29, 1878, the whole amount, $1427, due on the Lowry judgment was paid to the committee, thus paying off and satisfying the judgment in full. This payment being accomplished on May 29, 1878, occurred within four days of one month before Elliott paid off the judgment of the Marine National Bank, and presented his petition for subrogation, both of which facts transpired on June 25, 1878."

The following was the order of subrogation made April 28, 1879. "It is therefore ordered that G. T. Elliott be subrogated to the rights of the Marine National Bank of Erie *v.* G. H. Wagner and G. T. Elliott, and also to the rights of the plaintiffs, H. J. Lowry *et al.*, Committee, *v.* G. H. Wagner, No. 191, September Term, 1874, including the rights of said plaintiffs in the feigned issue arising under said judgment, and the execution issued thereon, being the case of H. G. Wagner *et al. v.* H. J. Lowry *et al.*, and that G. T. Elliott is subrogated in place of said H. J. Lowry *et al.*, as defendant in said case."

Plaintiffs in the feigned issue took this appeal, assigning for error, the making of the above order of subrogation.

Benson and *Brainerd*, for appellants.

Courts will not subrogate when it is unjust to other parties, or produces injustice in any respect whatever. The right of subrogation is founded in equity only, and will not be allowed except in a clear case.

Erb's Appeal, 2 P. & W. 296.
Kyner *v.* Kyner, 6 Watts, 221.
Coates's Appeal, 7 W & S. 99.
McGinnis's Appeal, 4 Harris, 445.
Lloyd *v.* Galbraith, 8 Casey, 103.
Fink *v.* Mahaffey, 8 Watts, 384.
Russell's Appeal, 9 Smith, 401.
Gring's Appeal, 8 Norris, 336.

In the present case injustice was done both to the plaintiffs in the feigned issue and the surety on their bond by the order of subrogation.

Davenport and *Griffith* (with them *Frank Gunnison*), for appellee.

The Marine National Bank was undoubtedly entitled to subrogation in the feigned issue, inasmuch as Lowry, creditor of their debtor, having a lieh on that debtor's personalty, chose to abandon it and claim from the proceeds of the debtor's realty so as to cut out the bank from said fund. Appellee, having as surety paid the bank's judgment in full, is entitled to subrogation to all its rights.

Kyner *v.* Kyner, 6 Watts, 221.
McCormick's Adm. *v.* Irwin, 11 Casey, 111.
Mosier's Appeal, 6 Smith, 76.
Fleming *v.* Beaver, 2 Rawle, 128.
Cottrell's Appeal, 11 Harris, 294.
1 Story Eq. Jur., § 653.
Brightly's Eq. Jur, § 183.

Nov. 8, 1880. THE COURT. In Fink *v.* Mahaffy (8 W. 384), it was held that the doctrine of substitution being one of mere equity and benevolence will not be enforced at the expense of a legal right. In McGinnis's Appeal (4 Har. p. 448), we said "the principle which governs in all cases of substitution is one of equity merely, and is to be carried out in the exercise of a proper equitable discretion, with a due regard to the legal and equitable rights of others." In Erb's Appeal (2 Pa. Rep. p. 298), ROGERS, J., in delivering the opinion of the Court said: "When, therefore, an application is made for substitution, the Court will take care that the subrogation of the surety shall work no injustice to the rights of others." In Ziegler *v.* Long (2 Watts, 206), SERGEANT, J., said: "But this principle must be employed like all other rules of equity, to the attainment of justice; it is not to be used to overthrow the equity of another person, and thus work injustice." In Lloyd *v.* Galbraith (8 Cas. p. 110), we said, STRONG, J., "Subrogation is not to be allowed except in a clear case, and where it works no injustice to the rights of others." The same doctrine was repeated in Wallace's Estate; Russel's Appeal, 9 P. F. S. 401; and Gring's Appeal, 8 Nor. 339.

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Tested by these principles, let us consider the relative positions and rights of the parties affected by the order for subrogation in the present case.

[Here follows the statement of the facts of the case' *ut supra.*]

Now it is claimed by the appellants that the effect of this payment of the Lowry judgment was to terminate the proceedings under the feigned issue, and, therefore, they were no longer bound to respond in that case. This position is undoubtedly true, as between them and the committee of M. B. Lowry. The question that now arises is, are the appellants bound to submit to have those proceedings re-opened, to have another trial as to the ownership of the personal property involved in that issue, incur the expense of such a trial, and the risk of an adverse verdict, in order that Elliot may get his money out of this personal property as the subrogated representative of M. B. Lowry? We think not. The bond given by the appellants to the sheriff was conditioned for the delivery of the goods at the termination of the issue pending between them and the committee of M. B. Lowry. A surety, S. B. Wagner, joined them in the execution of the bond, and was responsible for the performance of its condition. When the Lowry judgment was paid by the proceeds of G. H. Wagner's land, the proceedings under the feigned issue had reached their termination as to the original parties to the issue and to the bond. We see no reason why the surety could not then insist that he should be subject to no further responsibility on his obligation. Certainly the committee of M. B. Lowry could have no further resort to him. If now, the subrogation is permitted to take place, and another trial to be had, the surety is subjected to still further liability to other persons than those named in the bond or in the proceedings at the time the issue was framed and the bond given. But he never contracted for such additional liability, and he at least is one person whose position and plain legal rights will be changed in a most material respect if the subrogation is affirmed. Indeed, the very object of the subrogation is to produce such a change; to make him liable to pay the debt to persons entirely different from those with whom he contracted when he signed the bond. The same considerations apply to the appellants, the other parties to the bond. They must become subject to fresh expense and hazard, and to new and additional liabilities to those which held them under the bond and under the pleadings. From, and after the 29th of May, 1878, they were entirely discharged from all liability. Now it is sought to reimpose the full measure of their liability from the 25th day of June, 1878. This too, in a matter of purely equitable cognizance, and upon equitable principles solely, and in favor of persons to whom they never owed any duty whatever. We consider that this would be doing injustice to the appellants and their sureties, and therefore, it is not a proper case for enforcing subrogation.

The order of the Court below, subrogating G. T. Elliott to the rights of H. J. Lowry and Frank Gunnison, in the judgment No. 191, Sept. T., 1874, and in the feigned issues arising under the said judgment, and the executions issued thereon, being the cases No. 202, May Term, 1877, and No. 206, May Term, 1877, is reversed at the cost of the appellee.

Opinion by GREEN, J.

Common Pleas—Equity.

C. P. No. 1. April 2, 1881.

Commonwealth v. Harris et al.

Equity—Injunction—Power of Commonwealth over streets of a city—Purpresture—Public and private nuisance—Bow-window built over street line—Acts of Feb. 18, 1769 (1 Sm. L. 301), and April 16, 1838 (P. L. 626)—Ordinance of Philadelphia of Sept. 23, 1864 (Ord. 1864, 357)—Special ordinance of City Councils of Philadelphia authorizing erection of bow-window over street line—Want of authority to pass—Laches—"Contemporaneous construction."

This was an information in the nature of a Bill in Equity filed on January 25, 1881, by the Attorney-General on behalf the Commonwealth against J. Campbell Harris, and others, to restrain by injunction the building of a bow-window which extended over the street line at 1609 Walnut Street, in the city of Philadelphia, and to compel the restoration of the part of the street encroached upon.

The bill set forth that the defendant Harris had lately pulled down the houses 1607 and 1609 Walnut Street in order to build a dwelling for himself on their site. That the approved plans for building involved an encroachment upon the side-walk such as would cause a nuisance on the said street, and a deprivation to the Commonwealth of its exclusive right of user of the said street to the width of fifty feet; that this encroachment upon the pavement was about three feet in depth and ten feet in length. That defendants began the erection of said bow-window in April, 1880. That

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as soon as the nature of the contemplated encroachment was discovered, many of the citizens, comprising nearly all living in the neighborhood, remonstrated with the defendant Harris, informing him that their property would be greatly injured, and that they would be specially damaged by the obstruction of light, air, and view, and the general injury sustained by them in common with other citizens of the Commonwealth lawfully using the said street as a public highway. That the defendant Harris refused to stop building, and claimed that the erection complained of was in accordance with law, and expressly authorized by a special ordinance of the Select and Common Councils of the city of Philadelphia, approved April 6, 1880, whereby permission was accorded to one Edward Collins to erect the same.

The bill further set forth that Edward Collins was not the owner of the said premises, but the architect thereof, and charged that the encroachment was wholly without authority, and in violation of law, and was, and unless abated, would continue to be a public nuisance; that the said ordinance of April 6, 1880, conferred no authority on the defendant to erect or maintain the said encroachment, and was an express violation of the law of this Commonwealth, and wholly in excess of any authority granted to the City Councils.

The bill prayed, therefore, that the defendants might answer the premises, that the defendant Harris be restrained by preliminary injunction from continuing to erect and maintain the said encroachment, and that upon hearing a perpetual injunction might issue to compel the abatement of the encroachment and the restoration of the excavation in the street to its original condition.

The Court granted an *ex parte* injunction. Complainant moved to continue the injunction. The hearing took place upon bill and affidavits on both sides.

Josiah R. Adams, *A. Sydney Biddle*, and *George W. Biddle* (*Lyman D. Gilbert*, Deputy Attorney-General, and *Henry W. Palmer*, Attorney-General, with them), for the Commonwealth.

It is old law that unauthorized obstructions to a highway constitute a nuisance.

Hawkin's P. C., Bk. 1, Ch. 76, § 48, p. 112.

And it is no excuse that the public convenience is not impaired thereby; that the highway is big enough to afford scraps for favored individuals. The most temporary partial obstruction of a highway for an unauthorized use is equally a nuisance, and punishable as such.

Hawkin's P. C., §§ 49, 50.
Bacon's Abr., vol. iv., Highways D., p. 675.

Walnut Street is one of the old streets laid out by William Penn, of the width of fifty feet. It was Penn's private property till he dedicated it as a street for public use. The State would have no power to use the street except as a street, or, by the exercise of its power of eminent domain, *for a public use*. The right to regulate and direct the manner of its use is in the Commonwealth.

Faust *v.* Pass. R'y. Co., 3 Phila. 166.
Comm. *v.* McDonald, 16 S. & R. 920.

Any unauthorized infringement of a public highway is a nuisance.

Commonwealth *v.* Alburger, 1 Whart. 486.
Taggart *v.* Commonwealth, 9 Harris, 527.

The encroachment is unauthorized. The city was not authorized by common law to grant the privilege.

Commonwealth *v.* Alburger, 1 Whart. 485.
Commonwealth *v.* Rush, 2 Harris, 186.

The city was not authorized by statute to grant such a privilege. The Act of Feb. 18, 1769, §45 (1 Sm. Laws, 301) declared that the obstruction of passage in any street by means of jut-windows, etc., should be punished by fine, and the nuisance be removed.

By the Act of April 16, 1838 (P. L. 626), it was made lawful for the municipality to establish by ordinance such rules as they might deem expedient for the better regulation of jut-windows, etc., "*projecting over, under, into, or otherwise occupying the sidewalks*, or other portion of any of the streets, lanes, and alleys;" and so much of the prior Act as was altered thereby was repealed.

This was clearly a right to regulate existing obstructions. It neither deprived the Commonwealth of its right of action to remove the same, nor did it apply, by the broadest intendment, to future encroachments. Nor, above all, did it, or could it (for the Act would have been unconstitutional) permit a *personal* license to a private person to commit a nuisance.

The authority was not intended to be permissive, but restrictive. The right given was to "enforce by suitable penalties" obedience to the regulation to be adopted. It was to be *punitive*, and to operate upon existing nuisances. And this is conclusively shown by the general ordinance passed in 1864, which declared that the very thing complained of was a nuisance, and punishable by repeated fines.

In the present case the city has not even granted a license. The alleged authority is the special ordinance. But Collins never held the title, nor had any interest in the premises upon which the nuisance is erected.

Injunction is the proper remedy.

Commonwealth *v* Rush, 2 Harris, 193

R. C. Dale, *R. N. Willson*, *George W. Thorn*, and *R. C. McMurtrie*, for the defendants.

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The right of defendants to erect this bow-window with a projection of two feet ten and one-eighth inches from the front of the house, cannot be questioned, for the mere setting back of the house to that distance from the building-line does not operate as a dedication of so much ground to the public.

Biddle *v.* Ash, 2 Ashmead, 211.
Gowen *v.* Exchange Co., 5 W. & S. 141.
Neill *v.* Gallagher, 31 Leg. Int. 388.

The encroachment was not made without permission from the municipal authorities. The only question is, whether the permission given by Councils was within the scope of their authority. The Legislature may delegate to the municipal authorities the power to regulate and control the use of streets within the bounds of the municipality. This is a well recognized exception to the principle that legislative power cannot be delegated.

Sedgwick's Constitutional and Statutory Law, 395; Cooley's Const. Lim. 257.
Dillon's Mun. Corp., Sec. 538.

By the Act of April 16, 1838, the Legislature conferred the power to legislate upon these matters upon the City Councils.

City *v.* Presbyterian Board of Publication, 28 Smith, 33.

The Commonwealth is bound to prove beyond reasonable doubt that the defendants have encroached upon this highway without authority of law.

If this is a doubtful question, it is decisive against the injunction. Chancery can only interfere in a clear case of invasion of a private or public right.

Commonwealth *v.* Central P. R. Co., 2 Smith, 517.
Blanchard *v.* Reyburn, 1 WEEKLY NOTES, 529.
Horner *v.* Craig, 2 WEEKLY NOTES, 11.
Wilson *v.* Strawbridge, 4 WEEKLY NOTES, 35.
Philadelphia *v.* Lombard & South St. R. R. Co., 3 Grant, 403.
Mississippi R. R. *v.* Ward, 2 Black, 485.
Attorney-General *v.* Delaware & B. B. Railway Co., 12 C. E. Green, 1.

The building of the window began in April, 1880, and the bill was not filed till January 25, 1881. A mere objection or protest, or threat to take proceedings, is not sufficient to exclude the consequence of laches or acquiescence in such a case. Delay will bar those asserting even a public right.

Attorney-General *v.* Sheffield Gas Co., 3 De G. M. & G. 304.

Where money has been expended in good faith in the erection of a work under the belief that authority had been conferred by competent legislative authority, equity will refuse its aid even to the State seeking an injunction.

Attorney-General *v.* D. & B. R. R. Co., 12 C. E. Green, 1.
Hackensack Imp. Co. *v.* N. J. M. R. R., 7 C. E. Green, 94.
Scudder *v.* Trenton Falls Co., Saxt. 694.
Attorney-General *v.* Johnson, Wilson C. R. 87.
M. & E. R. R. Co. *v.* Prudden, 5 C E. Green, 530.
Attorney-General *v.* Heishon, 3 C. E. Green, 410.

April 2, 1881. THE COURT. This is an information in the nature of a bill in equity, filed by the Attorney-General on behalf of the Commonwealth of Pennsylvania. It appears by the bill and affidavits that the respondents are erecting a bay window, in the city of Philadelphia, partly on the premises numbered 1609 Walnut Street, and partly on the adjacent highway; that it is 15 feet high, and extends beyond the building line 2 feet and 3/8 inches into the public street; that its width at the building line is 13 feet 7¾ inches, and at its extreme limit 8 feet, thus leaving a footway of 9 feet 11⅝ inches, instead of one of 12 feet, as required by law.

These facts are not disputed, and the encroachment on the highway of the Commonwealth not denied. That these highways belong to the Commonwealth, in trust for the great body of the people, and that any one who claims a peculiar privilege to invade them must establish beyond peradventure his title under some Act of legislative power to do so, is not controverted, The real and only question, therefore, in this case is, have the respondents shown a sufficient warrant from competent authority to make this encroachment.

Walnut Street was laid out by William Penn of the width of 50 feet between the building lines of the houses on each side of it, and in no instance, from that day to this, has this original width been departed from by lawful authority. The width of the roadway of all 50 feet streets has invariably been 26 feet, thus leaving a sidewalk of 12 feet in breadth upon each side of such streets. In this particular square of Walnut Street, the dwellers on the north side have, except in the present instance, in building their houses, receded from the true north line 2 feet 10⅜ inches, so that the width of the highway might to that extent be increased.

The earliest Act of Assembly pertinent to the present subject, is the Act of the 18th of February, 1769, sec. 45 (1 Smith's Laws, 301). It enacts as follows: "That if any person or persons shall hereafter make and set up, or shall cause to be made and set up any bulk, jut-window or incumbrance whatsoever, whereby the passage of any street shall be obstructed, . . every person offending and being legally convicted thereof before any justice of the peace of the said city, shall for every such offence forfeit and pay the sum of thirty shillings, and shall forthwith remove, or cause the said nuisance to be removed."

This appears to have been the only legislation on the subject until the 16th of April, 1838 (P.

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L. 1837–8, pp. 626–7), when the following Act was passed :—

"Sect. 3. It shall and may be lawful for the Select and Common Councils of the city of Philadelphia, from time to time by ordinance, to make and establish such and so many rules and regulations as to them may seem expedient for the better regulation of porches, porticoes, benches, doorsteps, railings, bulks, or jut-windows, areas, cellar-doors, and cellar windows, signs, signposts, boards, poles or frames, awnings, awning posts, or other device or thing projecting over, under, into, or otherwise occupying the sidewalks or other portion of any of the streets, lanes, and alleys; . . . . and the said ordinances, rules, and regulations to execute under the direction or superintendence of such person or persons as they may authorize or appoint, and the same to enforce by suitable penalties, which penalties . . . . shall be recoverable before any alderman of the said city, or before any Court having jurisdiction, in the same manner that debts of like amount are by law recoverable.

"Sect. 4. That so much of an Act passed on the 18th day of February, 1769, and so much of any other Act or Acts as are altered or supplied by the preceding section, be and the same are hereby repealed."

Under and by the authority of the last named Act of Assembly, the Select and Common Councils of the city of Philadelphia enacted an ordinance, approved the 23d day of September, 1864 (Ordinances of the city of Philadelphia, 1864, pp. 357–362), whereby it was ordained, *inter alia*, as follows :—

"An Ordinance relating to Nuisances:

"Sect. 1. The Select and Common Councils of the city of Philadelphia do ordain, that the following are hereby declared to be nuisances: . . . .

"Sect. 12. . . . . To project any bulk-window more than one foot into the footway beyond the building line. . . . .

"Sect. 13. To excavate or construct, hereafter, any area or other encroachment on any footway of the city, except as herein allowed; provided, that this section shall not apply to the planting of trees, or inclosing trees in boxes, or stepping stones, or hitching posts. . . . .

Sect. 41. Any person violating any provision of this ordinance shall forfeit the sum of two dollars, to be recovered before the alderman whose office is located nearest the place where such violations occurred, at the suit of the city of Philadelphia, for the use of the city; and every alderman of the city shall keep a separate docket for such cases, which shall always be open for the inspection of the Mayor, City Controller, City Solicitor, and his assistants, and committees of Councils."

It will be perceived that there is no permission in this ordinance to extend any jut or bay-windows beyond the building line; on the contrary (see sect. 13), they are expressly prohibited, unless the phrase "bulk-window" includes them. But we think in all the Acts referred to the word "jut-window" was considered the equivalent of "bay" or "bow-window," and that "bulks" or "bulk-windows" were shop windows, erections for purposes of business, and not for mere convenience or adornment.

A bay or bow-window, both in the ordinary and technical acceptation of the word, indicates the formation of a bow or bay in the room to which it is attached, and which to that extent enlarges the capacity of the room. Bulks are often movable structures, and are invariably an attachment to shops, and not to dwellings. They will be found thus defined in Wedgewood's Dictionary of English Etymology, edition of 1872. We should, therefore, infer from this ordinance, that it was the intention of Councils to protect our highways from encroachments of mere pleasure or fancy, and to strictly limit the bulk-window or show-window of the storekeeper from trespassing more than one foot beyond the building line. Be this, however, as it may, if the respondents claim under this ordinance, they have far exceeded the limits allowed by it.

They, however, base their claim exclusively, as we understand it, upon the following special license, contained in an ordinance of the Select and Common Councils of the city of Philadelphia, approved the 6th day of April, 1880. It is in these words:—

"An ordinance to grant permission to Edward Collins to erect a bay-window on his premises at No. 1609 Walnut Street, in the Eighth Ward.

"Sect. 1. The Select and Common Councils of the city of Philadelphia do ordain, that permission be and is hereby granted to Edward Collins to erect a bay-window on his premises, situate No. 1609 Walnut Street, in the Eighth Ward. Provided, the same shall be removed at any time on the passage of a resolution or ordinance to that effect. And further provided, that the said Edward Collins first pay the sum of fifty dollars to the clerks of Councils, for the publication of this ordinance."

It will be observed that there is no limit whatever to which the dimensions of this structure to be erected are restricted, and had the respondents satisfied us that the words "bulk-window," in the ordinance of 1864, applied to erections of this character, we should have no difficulty in holding, that the special license was intended to be subordinated to the general law, and that the bay-window must not extend more than one foot beyond the building line. We should not have assumed that Councils intended to give permis-

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sion to occupy the entire sidewalk, or to license what they themselves had previously denominated a nuisance. As we do not, however, entertain the opinion that the case is ruled by the section regarding bulk-windows, in the ordinance of 1864, we think that the respondents' rights must be determined exclusively by this special ordinance. If the Councils of Philadelphia, in pursuance of any authority from the Legislature, are authorized to issue licenses or grant indulgences to special individuals by name, to appropriate permanently a portion of the public highways of the State, there can be no doubt of the authority of the respondents to do what they have done, and this injunction must be dissolved. This is assuming, of course, that the Legislature themselves have power to divert the highways to any purpose inconsistent with a free passage over them, which we do not think the exigencies of this case require us to decide.

The 30th section of the Act of the 16th of April, 1838, from which alone Councils derive all the power they possess over this subject, authorizes them "from time to time by ordinances, to make and establish such, and so many rules and regulations, as to them may seem expedient, for the better regulation of porches, porticoes, . . . jut or bay-windows, . . . and the said ordinances, rules, and regulations, to execute under the direction of such person or persons as they may authorize and appoint, and the same to enforce by suitable penalties," etc. And the question here is whether licensing an architect, who is not the owner of the premises which he claims, to appropriate as much or as little of the public highway as he pleases to his own use, for the purpose of erecting a bay-window of no specified dimensions, is making and establishing "a rule for the better regulation of bay-windows in the city of Philadelphia;" or, in other words, is it competent for the Councils under this law to say to the owners of two adjacent properties that the one may and the other may not erect a bay-window, or that one may occupy the highway without limit, while others are restricted to a limit of one foot? Because, if each case is to be individually passed upon, and does not depend upon its conformity to a general rule, this would be the result, not only in regard to bay-windows, but to every other purpose for which it would be desirable to occupy the highway. The ordinance of 1864 was clearly within the exercise of the powers delegated to Councils, nor can it be denied that they could regulate under it, by a general law, the size of obstructions, according to the width of the several streets, or upon any other intelligible and general design. But if they can authorize one man to commit a nuisance, they can, under the same power, select one individual upon whom to inflict a penalty. It may sometimes happen that there are but one or two people interested in the subject to be legislated upon, which may excuse a special license, as they may be said practically to include the whole class, but it is special legislation on subjects of general interest and concern, forming no "rule or regulation" for all alike, but giving invidious privileges to the favored few at the expense of the many, which is contrary to the whole spirit and intent of the authority intrusted to Councils by this law.

The Constitution of 1874 was the revolt of the people against just such special and arbitrary legislation on the part of the Legislature themselves. "Granting to any corporation, association, or individual, any special or exclusive privilege or immunity" is (Art. 3, sec. 7) now positively forbidden. So, that if this power does exist in our Councils, they are permitted to do what the body which created them dare not do. And the functions delegated are more extensive than the body which delegated them possesses. It is just the exercise of such power, which is the distinguishing characteristic of arbitrary government. Perfect equality before the law is the attribute of free government; it proceeds by general laws affecting all the citizens alike, while, in arbitrary governments, the enjoyment of liberty and property is dependent on the favor of the sovereign.

The force of this reasoning obliges the able counsel, who contend for the existence of such power as is here claimed, to derive it, not from any fair construction of the Act of 1838, but from the abuse of it. "Contemporaneous construction" is urged on behalf of the present practice, and if persistent violations of the letter and spirit of the law can fairly be called contemporaneous construction of it, the case is undoubtedly a strong one. While it might, perhaps, be urged with some force as against Councils, and as to existing buildings, it certainly cannot be held to invalidate the rights of the sovereign who was no party to it, especially in regard to buildings which it is only proposed to erect.

The very earliest Act on this subject—the Act of 1769—to which we have already referred, commences in the old style, with a preamble informing the public what had aroused the Legislature to action. It begins: "And whereas, by late extraordinary encroachments of cellar doors, steps, and porches, made in the streets of the said city, of jut-windows, bulks, and other incumbrances, the said streets are greatly obstructed; and by a number of spouts or gutters set at the eaves of pent houses and other places in the said streets, large collections of water are discharged in rainy seasons on persons passing along the same, be it enacted, etc.;" showing that over a hundred years ago this tendency to

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encroach upon the rights of the public was as strong as it is now; and as vainly protested against. The judiciary are, of course, powerless to initiate any redress in this matter, or in any other, as they can only act upon cases properly brought before them. The attempts of private citizens to check this tendency has generally proved abortive, for it is a well-established rule that the private citizen who attempts to redress a public grievance must show a special damage to himself over his fellow citizens, which is generally impracticable. His rights on the highway are those of a traveller, and he cannot complain of erections by owners of the soil, however unlawful, except such as obstruct his right of passage. It was upon this principle that it was said in Blanchard *v.* Reyburn (32 Leg. Int. 239), and in Horner *v.* Craig (2 WEEKLY NOTES, 11), that even admitting that the Act of 1769 had not been abrogated by subsequent legislation, it would afford no remedy, as the width of the "passage-way" required by ordinance was not encroached upon, and they could as private citizens require no more. It is only when the Commonwealth intervenes that all questions of right to bring suits disappear, and that length of occupation becomes an aggravation rather than an excuse.

Excessive laches on the part of a State may, in cases that can be imagined, induce a chancellor to refuse to exercise his equitable powers, which are of grace and not of right; but it would certainly be a hard rule to hold that the authorities of a vast Commonwealth had forfeited any right to ask for equitable redress in her own courts for encroachments upon any of her highways, which exceed, in this city alone, a thousand miles in length, because they had taken six months to decide whether it was necessary and proper for them to do so. An ordinance reducing the width of all our highways would instantly provoke remonstrance and resistance, but where it is effected by licensing isolated obstructions over an area of one hundred and twenty-nine square miles, it takes a long time before the citizens realize what is being done, and the Commonwealth may well be lulled to inaction by the apparent insignificance of the violations. Thus another of the great safeguards which general legislation affords is taken away.

The wheels of justice proverbially move slowly, and must do so in all countries regulated by general law. It is the price we pay for our personal security. It is only under despotic governments that the punishment is as prompt as the offence. Nothing can, for instance, be more vigorous in its methods than what is popularly called "Lynch law;" but it is open to this objection that, although some one meets with prompt punishment, it is often not the person who has committed the offence.

We have seen that in 1769, when there were less than five thousand houses in this city, occupied by less than thirty thousand people, these encroachments were felt to be intolerable, yet we now, with over 150,000 houses, and a population approaching a million of people, are actually fostering the old and encouraging new nuisances by protective and capricious legislation. After having granted in this case a special license to obstruct Walnut Street, between Sixteenth and Seventeenth Streets, on the 21st day of March, 1881, an ordinance has been passed by Councils for "widening Chestnut Street, between Fifteenth and Sixteenth Streets," to the width of six feet. It is certainly difficult for any citizen to comprehend why, if it be wise to widen the square in Chestnut Street, it is judicious to narrow the almost corresponding one in Walnut Street.

To enforce a law which has long and persistently been evaded, is always disagreeable, but it is the reluctance to do so, which is bringing upon us all the inconveniences suffered by older communities, and which they are now spending millions to remedy.

We have failed to discover in this case anything which justifies us in refusing to the law officer of the Commonwealth, the assistance he asks at our hands. That the consent of Councils was asked in good faith, and given in good faith, cannot alter what we conceive to be the law, which in our opinion, does not permit any such partial and special legislation as has here been attempted by Councils. In our opinion, it does not establish "by ordinance, rules and regulations" for the guidance and government of our people in this regard, nor does it enforce them by "suitable penalties" but under cover of a title indicating a general law, gives a special license to erect a nuisance "regulated" in no respect whatever.

Entertaining these views, the injunction must be continued.

Opinion by BIDDLE, J.

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Orphans' Court.

Feb. 24, 1881.

Bentz's Estate.

Contract of suretyship entered into by decedent—Liability—Intention of parties.

Upon the audit of the account of the administratrix of Jacob Bentz, deceased (before PENROSE, J.), the following facts appeared:—

In the winter of 1877–78, William Weikel, who was doing business as a merchant tailor, failed, and made a settlement with his creditors, among whom were J. B. Ellison & Sons. Wishing to resume business, he applied to them for credit, and at their request the decedent, who was the father-in-law of Weikel, gave the following bond:—

"Philadelphia, March 16, 1878.

For a valuable consideration, the receipt of which is hereby acknowledged, I do hereby become surety as bail absolute for the payment to John B. Ellison & Sons, at maturity of all future bills or indebtedness by William Weikel to said John B. Ellison & Sons. I hereby waiving notice of the time and amount of any future sales, and waiving also notice of non-payment or proof of demand being made. The amount recoverable on this obligation not to exceed the sum of five hundred dollars.

Witness
C. W. KIRK,
LOUIS TISSOT, Jr.

JACOB BENTZ,
3013 Girard Avenue."

On the same day Messrs. J. B. Ellison & Sons sold Weikel goods to the amount of $262.05, and in compliance with Bentz's request, notified him of the sale.

Weikel made subsequent purchases of goods to an amount more than double the amount of the bond, and paid on account of his purchases at different times sums aggregating more than $500, but failed to pay a balance of more than $975, for which the Messrs. Ellison obtained a judgment against him in the Court of Common Pleas No. 1.

At the adjudication, a claim was presented to recover the sum of $500 upon the contract of suretyship entered into by the decedent, which claim was allowed by the Auditing Judge. To this ruling exceptions were filed by the accountant.

William M. Mervine, for the exceptant.
Michael Arnold, contra.

March 5, 1881. THE COURT. It appeared from the evidence that decedent, on March 16, 1878, by writing under seal, became surety for the payment at maturity *of all future* bills or indebtedness by William Weikel to the claimants, "hereby waiving notice of the time and amount of any future sales, and waiving also notice of non-payment or proof of demand being made. The amount recoverable on this obligation not to exceed the sum of $500." On the day of the execution of this instrument claimants sold Weikel goods to the value of $262.05, and in compliance with the request of decedent immediately notified him of the sale. Subsequent sales were also made to Weikel, and, at the date of the death of decedent, on September 20, 1879, he was largely indebted to claimants. Upon the audit of the account of the administratrix of decedent's estate, the indebtedness of Weikel still being unpaid, a claim was presented to recover the sum of $500 upon the contract of suretyship entered into by decedent. It was allowed by the Auditing Judge, and is the subject of the exceptions. We think the construction placed upon the contract is correct. It was not a guaranty of the sales to Weikel, whereby the claimants would be obliged first to look to him for payment, but clearly an original undertaking of decedent to pay the same not exceeding the sum prescribed. (Sitgreaves *v.* Griffith, 2 WEEKLY NOTES, 705). And it was admitted by exceptant at the argument that the sales to an amount exceeding $500 did not constitute such a variation of the contract as would release the surety: as was the case in Brez *v.* Warner (9 WEEKLY NOTES, 47). But it was contended that as the evidence presented at the argument in support of the petition for a re-hearing showed that Weikel had paid claimants exceeding $500 for goods purchased, the decedent was not liable for future sales; or in other words, his liability was to be confined to but the first purchases aggregating $500, and as these had been paid by Weikel, the subsequent sales were made upon his individual credit, and not upon the faith of the suretyship of decedent. But we cannot think this was the intention of the parties. The contract itself is a sufficient answer to the argument, and demonstrates that decedent loaned his credit to the amount of $500 for the benefit of Weikel, to enable him to purchase goods not to that amount alone, but to whatever extent the claimants would assume the risk of selling him, he, however, agreeing to pay only $500 of any such indebtedness. It was, therefore, a continuing contract, upon which decedent would be liable so long as claimants sold goods to Weikel. Having considered the matters alleged as reasons for a re-audit, but deeming the same insufficient, and the award to claimants fully sustained by the evidence, the petition for a re-hearing, and the exceptions are dismissed, and the adjudication confirmed.

Opinion by HANNA, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, APRIL 28, 1881.* [No. 2.

Supreme Court.

Jan. '81, 49. Feb. 17 & 18, 1881.

Shakespeare, Adm'r, etc., v. Fidelity Insurance, Trust, and Safe Deposit Company.

Safe deposit company—Deposit for safe keeping—Constructive possession by depositor—Decedents' estates—Assets within this State—Securities deposited here for safe keeping, when not such assets—Right of foreign executor to receive securities on production of certificate of deposit—Act of March 15, 1832.

A., whose domicile was in New Jersey, owned at the time of his death certain United States bonds, which he had deposited for safe keeping with the Fidelity Safe Deposit Company in Pennsylvania, for which service he had paid the usual charge. The certificate of deposit was assignable by indorsement, with the approval of the company, and it stipulated that the bonds should be returned to the depositor on surrender of the certificate. A.'s executor, who had qualified under the laws of New Jersey without giving security, demanded the bonds from the company, who, on production of the letters testamentary granted in New Jersey, and on surrender of the certificate, delivered them to him. No ancillary administration had been granted, and there were no creditors in Pennsylvania. The executor having subsequently misappropriated the bonds, an administrator *d. b. n. c. t. a.* was appointed in Pennsylvania, who sued the Deposit Company in trover:

Held, that the bonds were not part of the decedent's estate within this Commonwealth, and that the defendant company was not liable.

The bonds being deposited merely for safe keeping were constructively in the possession of the depositor, and as the certificate was assignable, whoever showed a legal title to the certificate was entitled to receive the bonds.

Whether, if the bonds had been assets of the decedent in this State, the foreign executor could have given a valid discharge upon a voluntary payment to him—not decided.

Error to the Common Pleas No. 1, of Philadelphia County.

Trover, by Shakespeare, administrator *d. b. n. c. t. a.* of John B. Ackley, deceased, against the Fidelity Insurance Trust and Safe Deposit Company for the value of certain United States coupon bonds alleged to have been lost by the negligence of the defendants, bailees.

A special verdict, by agreement of the parties, found the following facts: Ackley, the testator, died domiciled, as were his wife and children, in New Jersey, having by will appointed as his executor one Rogers, a resident of Philadelphia. By the laws of New Jersey security is not required from a non-resident executor, and Rogers duly qualified, and received letters testamentary without giving any. The testator had deposited with the defendants, for safe keeping, certain United States coupon-bonds, for which a charge was paid, and a certificate of deposit was given, in the following form:—

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

No. 11,702. PHILADELPHIA, Aug. 6, 1873.

This is to certify, That J. B. Ackley, M.D., has deposited with "The Fidelity Insurance, Trust and Safe Deposit Company," of the city of Philadelphia, for safe keeping:—

U. S. 5-20 consols, 1865's, 1867's, 1868's .	$15,400
U. S. 10-40's, Nos. 42,219, 42,220, 42,221 ($100 each)	300
	$15,700

[Here follow the numbers, description, and amount of the bonds.]

March, 1874, and after-due coupons attached, valued at fifteen thousand seven hundred dollars, for which the sum of fifteen $\frac{70}{100}$ dollars has been paid to this company.

In consideration whereof, the said deposit is to be safely kept by this company for the period of one year, and on the expiration thereof, or sooner if demanded by the said depositor, it shall be returned to him in good order, upon the surrender of this certificate and the identification of depositor, if required. In case of loss of deposit, the option is reserved to the company of either paying for it at the above valuation, or replacing it in kind and amount.

This certificate is not transferable, except by assignment endorsed hereon, and approved by the company. If the whole or any part of this deposit shall be withdrawn before the expiration of said period, no portion of the charge shall be returned, and if continued longer, it shall be deemed a renewal of the deposit on same terms, for which a like rate shall be chargeable.

JAS. W. HAZLEHURST,
For Treasurer.

Registered H.

This certificate must be surrendered on the withdrawal of the deposit.

ENDORSED.

Received, Philadelphia, December 28, 1874, of the Fidelity Insurance, Trust and Safe Deposit Company, the within deposit.

RANSOM ROGERS,
Executor of J. B. Ackley, deceased.

The widow handed the certificates to Rogers, who thereupon demanded of the defendants the surrender of the bonds, exhibiting the letters testamentary, and producing the receipt, and a certificate by the surrogate of his authority. The bonds were accordingly delivered, and the certificate surrendered. By his will Ackley declared that his wife might either receive one-third

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of his property or the interest on all his bonds during widowhood, with a provision for his minor children. At his death there were no claimants in Pennsylvania, and no debts due there. Rogers sold the bonds, and misappropriated the proceeds. The widow and children having subsequently changed their domicile to Philadelphia, letters of administration *d. b. n. c. t. a.* were issued by the Register of Philadelphia County to the plaintiff, who brought this action.

The verdict was for the plaintiff for $19,000, subject to the point of law reserved: whether upon the foregoing facts, the plaintiff was entitled to recover. Judgment was subsequently entered on the point reserved for the defendant, whereupon the plaintiff took this writ, assigning for error the entry of judgment for the defendant.

The case in the Court below was fully reported, including arguments and oral opinion of ALLISON, P. J., in 8 WEEKLY NOTES, 92.

Pierce Arther, for the plaintiff in error.

It is admitted that the foreign executor could not maintain a suit for the bonds in our Courts, yet it is contended that he can commit a fraud by indirection by *receiving* that which he could not sue for, and that we have no remedy against our "safe" depository who enabled him to commit the fraud.

By the common law and by the general law everywhere, letters testamentary have no extra-territorial power. No case can be found in which it has been held that a voluntary payment or delivery of property to a foreign executor is good at common law, where a loss ensues from a *devastavit* by such foreign executor. The position of Rogers was that of an executor *de son tort*, whose every act was void in this State.

Roumfort *v.* MacAlarney, 1 Norris, 197.
Sellers *v.* Licht, 9 Har. 98.
Lea *v.* Wright, 1 Rawle, 152.
1 Lomax on Ex'rs, 119, § 14.
Williams on Ex'rs, 432, 434.
Wharton, Conflict of Laws, §§ 604, 605, 626.
Magraw *v.* Irwin, 6 Norris, 139.
Smith *v.* Bank, 5 Peters, 519.

In this country as in England a foreign executor cannot discharge a debt so as to bar a suit by an administrator here.

Willard *v.* Hammond, 21 N. H. 382.
Vaughn *v.* Barret, 5 Verm. 333.
Fay *v.* Haven, 3 Metc. 115.
Young *v.* O'Neal, 3 Sneed, Tenn. 55.
Normand's Adm'r *v.* Grognyard, 2 C. E. Green, 425.
Freeman's Appeal, 18 Smith, 151.
Ellen Barry's Appeal, 7 Norris, 131.

The case of Wilkins *v.* Ellett (9 Wallace, 740), relied on by the other side, is not analogous to the present one. The effort there was, to take assets already distributed *out of the domicile* and re-administer them by a foreign administrator.

With the exception of certain enabling Acts, authorizing foreign executors to transfer State stock, etc., which do not apply to this case, the statute law of Pennsylvania enforces the rule, even more strongly than at common law, that a foreign executor cannot "intermeddle" with the assets of his testator within this Commonwealth. The Act of 1705 (Smith's Laws, 33; Purd. Dig. 419, pl. 78), which gave such power, was repealed by the Act of March 15, 1832 (Purd. Dig. 407, pl. 13), which provided that no foreign letters should confer any authority possessed by an executor within the State, and provided for the grant of ancillary letters. Under the positive prohibition of the Act of 1832, a foreign executor cannot give a valid discharge for a voluntary payment.

Moore *v.* Fields, 6 Wright, 473.
Sayre *v.* Helme, 11 P. F. Smith, 301.
Reeside *v.* Reeside, 6 Phila. Rep. 507.

This is not a case of debtor and creditor, but of bailment for reward, demanding the highest caution, and within the special duty of this "Fidelity Trust and Safe Deposit Company." This was a special deposit for hire of bonds "to be returned only to the depositor or his indorsed legal assignee" in this State. This is a question of *title*, and the administrator *c. t. a.* appointed here, has alone showed title. The defendants, on failure to deliver to him, are liable to him in trover for negligence as bailees.

Safe Deposit Co. *v.* Pollock, 4 Norris, 391.
Neiler *v.* Kelly, 19 P. F. Smith, 406.
Work *v.* Bennett, 20 Smith, 484.

It has been expressly decided that United States government bonds are domestic assets in this State for purposes of administration, and subject to the collateral inheritance tax here, because of their *situs* here; although for purposes of succession, the domicile of the deceased owner governs.

Strode *v.* Commonwealth, 2 Smith, 181.

The decedent's will created a *trust* of these bonds in favor of the widow and children, of which the defendants were bound to take notice.

A. Sydney Biddle and *George W. Biddle*, contra, in addition to their former arguments, submitted: (1) That no enabling Act, similar to those passed subsequently to the Act of 1832, was necessary in respect to United States bonds, as such Act of a State, purporting to regulate the transfer of national securities, would have been unconstitutional. (2) That the securities in question were not legally assets of the testator, situated in Pennsylvania. The possession of the *receipt* was sufficient, and was alone necessary to enable Rogers to demand the bonds by virtue of the contract. The contract passed to him as legal custodian of the receipt. No cause of action accrued to the testator; and none could arise till Rogers, the legal holder of the certifi-

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cate, made a demand for the bonds, and delivery was refused. Suit could have been maintained by Rogers as an individual, and not as foreign executor. The plaintiff should have been nonsuited, as he did not produce, or legally account for the absence of the receipt. This is like the case of a promissory note indorsed in blank, and held by the testator, in which case the foreign executor can sue in his own name.

Moore *v.* Fields, 6 Wr. 471.
Wharton's Conflict of Laws, 2d edit. §§ 614, 615, *a.*
Klein *v.* French, 57 Miss. (1880) 662.
Comm'th *v.* Ware, 6 Phila. 259.

March 7, 1881. THE COURT. This case has been very ably and elaborately argued, and all the authorities examined and commented on. We do not, however, deem it necessary to discuss the several questions presented. The main contention of the plaintiff in error is grounded upon the provision of the sixth section of the Act of March 15, 1832 (Pamph. L. 136), that "no letters testamentary, or of administration or otherwise, purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this Commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this State." In speaking of this Act, Mr. Justice WOODWARD remarked in Moore *v.* Fields (6 Wright, 471): "This section of the Act of 1832, suggested to the minds of the codifiers by what was said in McCullough *v.* Young (1 Binney, 63), was merely declaratory of the common law, according to which the title of executors and administrators cannot *de jure* extend beyond the territory of the government which grants it, and the movable property therein." It has been earnestly maintained that upon the proper construction of the statute the foreign executor or administrator not only cannot sue in the courts of this State, for any of the debts or assets of the decedent, which certainly must be conceded to be settled; but that he cannot receive or give a valid acquittance upon a voluntary payment or delivery, even where it does not appear that there are any domestic claimants upon the estate. The current of authorities, where the rule of our statute is recognized as the common law, does not sustain this position. (Williams *v.* Storrs, 6 Johns. Ch. Rep. 357; Parsons *v.* Lyman, 20 New York, 112; Klein *v.* French, 57 Miss. 667; Wilkins *v.* Ellett, 9 Wall. S. C. 740.) The point has never been decided in this State. We do not think it necessary to decide it in this case.

There is another point which, we think, disposes of the question upon this record. We do not consider that the United States coupon bonds, which are the subjects of this controversy, were, at the time of the death of the decedent, any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe keeping. They were, therefore, in the possession of the decedent. He held the certificate of their deposit. The defendants were bound to restore the bonds at any time to the lawful holder of the certificate. It was as if the bonds had been placed in a fireproof of the defendants, of which the decedent possessed the key. In point of fact, the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it, as she was bound to do, to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her, and compelled its delivery to him. The Pennsylvania administrator certainly could not. By the terms of the certificate it might be transferred by assignment indorsed thereon, and approved by the company. The foreign executor could have so assigned it, and his assignee could have sued for the delivery of the bonds in his own name. The assignment would have been a sale of the bonds, which were payable to bearer, and passed by delivery. Whoever showed a legal title to the certificate had a right to the possession of the bonds. The case, then, is within the principle of Moore *v.* Fields (*supra*), where it was held, that, where a debt fixed by a decree or judgment of the Court of another State in favor of a foreign administrator, is due by citizens of Pennsylvania to the estate of the decedent, the administrator of the foreign domicile may sue for and recover it in his own name.

Judgment affirmed.

Opinion by SHARSWOOD, C. J.

Jan. '81, 58. February 18, 1881.

Woods v. White.

Legacy charged upon land—When discharged by sheriff's sale—Plea puis darrein continuance—Effect of—Under what circumstances parties who appear before an auditor may not be concluded by his report—Practice.

A. devised lands to B., charged with the payment of a legacy. He also made B. his executor. B. subsequently sold the lands to C., charged with the payment of the legacy, taking in part payment therefor a purchase-money mortgage on the premises, executed by C. Default being made in the payment of interest, the mortgage was sued out, the property duly sold at sheriff's sale, and bought in by B.:

Held, that no fraud was committed by B. against the legatee, and that the legacy was discharged by the sale.

A plea *puis darrein continuance* is a waiver of all former pleas of the party pleading it.

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One who appears before an auditor appointed to distribute the proceeds of a sheriff's sale of real estate, and states that the question as to whether a mortgage held by him against the property sold was discharged by said sale or not is being litigated in another court in a suit brought by him upon said mortgage, and who further gives notice that in case such other court shall decide that the mortgage has been discharged by said sale, he shall claim the whole amount thereof from the funds in the auditor's hands, and who asks for a continuance of the proceedings before the auditor until said question is determined by said other court, which continuance is refused, does not bring himself within the jurisdiction of the auditor, and is not concluded in his suit upon the mortgage in said other court by a finding of the auditor that the mortgage has been discharged by said sale.

Error to the Common Pleas No. 1, of Philadelphia County.

Scire facias sur mortgage by Lydia Ann Woods against Edward White.

Judgment was obtained for want of an appearance which was subsequently opened, and Jamison Lott, terre-tenant, let into a defence, who pleaded: 1. Payment with leave, etc., and 2. Specially, that the lands covered by the mortgage were formerly the property of one Isaac White who devised them to Edward White, the mortgagor, subject to the payment of a legacy to one William Powell, that said legacy has never been paid, that after the death of Isaac White, Edward White executed the mortgage in question, and that subsequently one Shallcross, having obtained judgment against Edward White, issued execution thereon, and the lands were sold at sheriff's sale, at which sale the terre-tenant became the purchaser and took the property discharged of the said mortgage, by reason of the legacy being a prior lien thereto. Issue was joined on both pleas. Before trial the terre-tenant filed a plea *puis darrein continuance*, to the effect that the proceeds of the sale under the Shallcross execution (which issued out of Common Pleas No. 4) had been referred to an auditor to make distribution, that the plaintiff in this suit had duly appeared before said auditor, and that the same questions involved in this suit between the same parties had been there decided, the auditor holding that the mortgage was discharged, and that his report had been duly confirmed by the Court. The plaintiff replied *nul tiel record*. In support of his plea the terre-tenant produced a record of the proceedings in the Court of Common Pleas No. 4, from which it appeared that the proceeds of the sale in the case of Shallcross *v.* White had been referred to Edward L. Bodin, Esq., as auditor, who reported the following as the facts in the case:—

Isaac White, former owner of the property, died in the year 1865, devising the land to his son Edward White, subject to the payment of a legacy of $1000 to his grandson. He also appointed Edward White his executor, who duly qualified as such. In March, 1873, White and wife conveyed the premises in fee to Rosa Ann Coyne, under and subject to the payment of the legacy to testator's grandson. Rosa Ann Coyne with her husband then gave a mortgage on the premises to White, to secure part of the purchase-money. Default was made in the payment of interest, a sci. fa. issued, and the premises were bought in by White for $150. White, on April 1, 1876, gave the mortgage in suit to Lydia Ann Woods. The Shallcross judgment was of date January 25, 1877. The auditor further reported, *inter alia*, that he was attended at the audit by Francis E. Brewster, Esq., representing Lydia Ann Woods, owner of the last-mentioned mortgage. That "Mr. Brewster stated that he appeared before your auditor for the purpose of calling attention to said mortgage (claiming it to be a first lien against said premises) and to proceedings pending in Court of Common Pleas No. 1, for the county of Philadelphia, of December Term, 1878, No. 1470, wherein it was claimed that said mortgage had been discharged by the sheriff's sale in question. He also claimed in case it should be decided that said mortgage had been discharged that the fund before your auditor for distribution should be awarded to his client, and desired your auditor to suspend the distribution of said fund until the said proceedings in Common Pleas No. 1 should be determined."

The auditor reported as his conclusions of law: 1. That the legacy to the testator's grandson was a charge upon the premises. 2. That the sale by the executor on his own mortgage against Rosa Ann Coyne was a fraud against the legatee, and that therefore the legacy was not discharged thereby. 3. That the legacy was discharged by the sale in question, and therefore being the first lien upon the real estate he awarded the whole amount of the fund to the legatee on account of his legacy. The Court of Common Pleas No. 4 confirmed this report.

After argument the Court of Common Pleas No. 1 entered the following judgment:—

And now, October 12, 1880, this cause coming on for trial, it is considered by the Court that the plea *puis darrein continuance*, filed April 13, 1879, by Jamison Lott, terre-tenant in the above case, is a waiver of all the former pleas on the record filed by said terre-tenant, and the Court enters judgment in favor of the said terre-tenant on the whole record upon the plaintiff's replication of *nul tiel record* to said plea *puis darrein continuance*.

The plaintiff took this writ, assigning for error the entry of the judgment as above set forth.

Francis E. Brewster (*F. Carroll Brewster* with him), for the plaintiff in error.

Lewis Stover, for the defendant in error.

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February 28, 1881. THE COURT. The sale of the land in controversy, under the mortgage of Rosa Ann Coyne to Edward White, discharged the lien of the legacy charged upon it by the will of Isaac White. Of this Strauss's Appeal (13 Wr. 353) is conclusive. The auditor, who was appointed to distribute the money made by the sale of the same property under the judgment of Shallcross against Edward White, came to a different conclusion. He seemed to think, that the sale by the devisee on his own mortgage, was a fraud *per se* upon the legatee, and as a consequence did not discharge the lien of his legacy. But this is a conclusion that cannot be sustained. It is true that Edward White was the executor of his father's will, and as such required to act in good faith toward his father's creditors and legatees, but he was also devisee, and since, as such, he had the undoubted right to sell the land devised to him, so he had the right to secure himself, as to the purchase-money, by judgment or mortgage.

It then follows necessarily, that he could compel the payment of such security by execution and sale of the land. All this having been done in good faith, as in the absence of evidence to the contrary we are bound to presume, and the land having been sold on lawful process by act of law, the lien of the legacy was discharged from the land and attached to the money arising from its sale.

Prima facie then, the mortgage in suit was the first lien upon the premises and was not discharged by the sale on the Shallcross judgment. But it is urged that the submission of this mortgage to the consideration of the auditor, gave that officer jurisdiction over it, and that by reason thereof his decision was final and conclusive.

This question was raised in the Court below, by the defendant's plea of *puis darrein continuance;* a plea which is always pleaded by way of substitution, no proceedings being afterwards had on the previous pleadings. It may be either in bar or abatement, and like other pleas, is followed by replication, etc., until an issue is regularly formed. (Steph. Plead. 98; 2 Chitty Pleadings, 453). In the case in hand, the issue was formed, under the replication of *nul tiel record.* What we have to do therefore, is to examine the auditor's report, in the case of Shallcross *v.* White, for the purpose of ascertaining whether or not the question now presented was settled in that proceeding.

Whether this was so determined, must we think depend upon the fact of the voluntary submission of the mortgage now in controversy, to the judgment of the auditor, for we cannot, for a moment, entertain the idea that the lien of a first mortgage could be discharged by the unauthorized act of an auditor. *Prima facie* the auditor had nothing to do with it. He was making distribution of moneys raised under a subsequent judgment, and as to this fund the Woods mortgage had no standing and ought not to have been considered. It may be, indeed, if it were presented by the mortgagee as a lien on the fund, and was passed upon by the auditor, and by him postponed to what he considered a prior lien, his judgment unappealed from would be conclusive. It is indeed a fact that he did so pass upon this mortgage, and that, in his judgment, its lien was preceded by the Powell legacy, and was therefore divested by the sheriff's sale. Under these circumstances, it becomes important to know by what authority the auditor acted, whether or not the mortgagee submitted her mortgage for his judgment. The following is all that is exhibited by the auditor's report on this subject.

"Francis E. Brewster, Esq., represented Mrs. Lydia Ann Woods, who held a mortgage upon the premises in question, given by the said defendant, dated April 1, 1876, for $5000 and recorded April 6, 1876, in mortgage book D. H. L. No. 2, p. 542. Mr. Brewster stated that he appeared before your auditor for the purpose of calling attention to said mortgage; claiming it to be a first lien against said premises; and to proceedings pending in the Court of Common Pleas No. 1, for the county of Philadelphia, of December Term, 1878, No. 1470, wherein it was claimed that said mortgage had been discharged by the sheriff's sale in question. He also claimed in case it shall be decided that said mortgage had been discharged, that the fund before your auditor for distribution should be awarded to his client, and desired your auditor to suspend the distribution of said fund, until the said proceedings in Common Pleas No. 1, should be decided."

This was not a submission of the question in controversy to the auditor, the very converse. The counsel for the mortgagee claimed that the mortgage was a first lien, but gave notice, that should the Court of Common Pleas decide otherwise, he would claim the fund, and asked that the auditor's judgment be suspended, until the pending suit should be determined. In short, he informed the auditor, that, at that time, he had no standing before him, but might have, should the decision of the Court, in the case then pending, be averse to his position, and asked *ex gratia* for a continuance.

It is thus obvious, that nothing was submitted to the auditor which gave him jurisdiction over the subject matter now in controversy: he was appealed to for nothing but a continuance, and that he refused to grant. It follows that upon the record exhibited, there was nothing which curtailed the power of the Court or altered the

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original status of the parties which were before it, hence it ought to have sustained the plaintiff's replication, and ordered judgment against the defendant for the whole amount of the mortgage.

Judgment is reversed, and judgment for the plaintiff for the full amount of her mortgage with interest and costs. Judgment to be liquidated by the Prothonotary of the Court of Common Pleas.

Opinion by GORDON, J.

Jan. '80, 135. Jan. 4, 1881.

Wilkinson v. Conrad.

Judgment—Warrant of attorney to confess—Restriction—Transcript of judgments under Act of April 16, 1840—Effect of—Court in which original judgment was entered retains jurisdiction—Practice.

A warrant of attorney accompanying a bond was directed to "A. B., attorney of the Court of Common Pleas of Bucks County, or to any other attorney of said Court, or of any other Court, there or elsewhere, except the Courts in and for the city and county of Philadelphia:"

Held, that the only effect of the exception or limitation in the warrant was to prevent a confession of judgment in the Courts of Philadelphia County by any attorney of said Courts, and that if said judgment was entered by confession in Bucks County, and transferred to Philadelphia County by filing a transcript thereof in the Common Pleas, under the provisions of the Act of April 16, 1840, the same would take full effect as a judgment in Phila delphia County, and warrant the issuing of an execution thereon.

The transfer of a judgment from one county to another by virtue of the Act of 1840, does not make it a judgment of the Court to which it is transferred. The original is still the principal judgment, and the Court in which it was obtained can alone take action operating on the judgment itself in any other way than by satisfaction. The Court to which the judgment is transferred may determine from inspection of the certified record whether the provisions of the Act authorizing its transfer have been fully complied with, but it has no authority to review the judgment or inquire into its merits.

If the defendant, in a judgment so transferred, has any claim to equitable relief, by which the operation of the judgment might be restricted or limited, he should apply to the Court in which it originated, and not to the Court to which it has been transferred.

SHARSWOOD, C. J., and PAXSON, J., dissent.

Error to the Common Pleas No. 2, of Philadelphia County, from an order making absolute a rule entered on behalf of Osborn Conrad, to set aside an execution issued upon a transcript of the record of a judgment from Bucks County, there obtained against him by one Mahlon Dickinson.

The facts of the case, as they appeared from defendant's testimony in a deposition taken under the rule, were as follows: Defendant agreed to buy of plaintiff a certain farm in Bucks County, and by an agreement in writing, dated March 11, 1874, undertook to pay for the same in part by giving a mortgage thereon, accompanied by a bond and warrant of attorney. In pursuance of this agreement the farm was afterwards conveyed to defendant, who thereupon executed the mortgage, and bond and warrant. At the time, however, of the execution of these papers, it was verbally agreed that the bond and warrant should be restricted to Bucks County, and in no case should apply to, or be used, or filed in Philadelphia County. The warrant was directed thus:—

"To George Lear, Esq., Attorney of the Court of Common Pleas, at Doylestown, in the county of Bucks, in the State of Pennsylvania, or to any other attorney of the said Court, or of any other Courts, there or elsewhere, except the Courts in and for the city and county of Philadelphia."

The above was the only writing as to the restriction agreed on, but defendant testified that he supposed that that covered the understanding he had had. Judgment was duly entered upon this warrant in Bucks County, and a transcript filed in the Common Pleas No. 2, of Philadelphia County, in pursuance of the Act of April 16, 1840, upon which transcript an attachment execution and a fi. fa. were issued.

Defendant thereupon obtained a rule to set aside the fi. fa. and attachment, and strike off the judgment, which rule the Court afterwards made absolute (see Atkinson *v.* Conrad, 8 WEEKLY NOTES, 45). The plaintiff having afterwards died, his executors were duly substituted, who took this writ, assigning for error the action of the Court in making the above rule absolute.

Joseph J. Broadhurst (*Louis H. James* with him), for plaintiff in error.

The transcript to Philadelphia County did not give the Court below jurisdiction; the judgment remained a judgment in Bucks County.

Act of April 16, 1840, P. L. 410.

Any question concerning the judgment, therefore, could only be inquired into by the Court where it was originally entered.

Brandt's Appeal, 4 Harris, 346.
King *v.* Nimick, 10 Casey, 297.
Banning *v.* Taylor, 12 Harris, 297.

In any case, the most that can be claimed for the testimony of defendant below is, that it shows that the *lien* of the judgment was to be restricted to Bucks County; there is not a word to show that the obligee gave up any means of collecting his *debt*.

Stanton *v.* White, 8 Casey, 358.

David W. Sellers (*Lucas Hirst* and *J. Guild Millette* with him), for defendant in error.

The undisputed fact is, that by virtue of the warrant, which is the source of the judgment in

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this case, no judgment was to be entered in any Court for the city and county of Philadelphia.

Such stipulations have effect given to them.

Hageman *v.* Salisberry, 24 Smith, 285.
Baillie *v.* Kessler, 36 Leg. Int. 72.

February 14, 1881. THE COURT. The original judgment was regularly entered in the Common Pleas of Bucks County by virtue of a warrant of attorney, addressed "to George Lear, Esq., Attorney of the Court of Common Pleas at Doylestown, in the county of Bucks . . . or to any other attorney of the said Court, or of any other Court, there or elsewhere, except the Courts in and for the city and county of Philadelphia," reciting defendant's bond of April 1, 1874, conditioned for the payment of $2400 in three equal annual instalments with interest, and authorizing confession of judgment thereon in favor of the plaintiff.

The only effect of the exception or limitation in the warrant, was to prevent a confession of judgment in either of the Courts of Philadelphia County, by any attorney of said Courts. It did not in any way restrict the lien of the judgment in Bucks County, or interfere with its transfer to any other county under the Act of April 16, 1840. There is nothing in the bond, warrant of attorney, or any other paper connected with the transaction, indicative of any agreement to limit the lien of any judgment, to the land for which the bond was given as part consideration, or in any manner to restrict the operation of the judgment Like any other judgment of the Common Pleas of Bucks County, it might be transferred to the county of Philadelphia, or to any other county in the State by filing a certified copy of the whole record, as required by the Act. The judgment was thus transferred to the Court below, and an attachment execution thereon was duly issued and served on the garnishee and subsequently a fieri facias was issued. It is not claimed that there was any irregularity apparent on the face of either the original or the transferred judgment, and yet the latter was summarily stricken from the record, and with it the execution fell. The plaintiff's contention is, that there was nothing to justify this action of the Court.

The transfer of a judgment from one county to another, by virtue of the Act of 1840, does not make it a judgment of the Court to which it is transferred. "It remains a judgment of the Court, in which it was first entered, and an exemplification filed in another Court accomplishes no more, than to enable the case to be proceeded in, with like effect, as to lien, revival, execution, and so forth, and no other, as if the judgment had been originally entered in the Court to which the transfer has been made." (Mellon *v.* Guthrie, 1 P. F. Smith, 116.) The original is still the principal judgment, and the Court in which it was obtained can alone take action, operating on the judgment itself, in any other way than by satisfaction in the proper sense of the term. The Court to which the judgment is transferred may determine from inspection of the certified record, whether the provisions of the Act authorizing the transfer have been fully complied with; but it has no authority to review the judgment, or to inquire into its merits. (King *v.* Nimick, 10 Casey, 297; Brandt's Appeal, 4 Harris, 343.) In the latter case a judgment obtained in the Common Pleas of York County was transferred to Cumberland County, and subsequently, on application of the defendant, the original judgment was set aside for irregularity. In holding that the judgment on the transcript was a dependent emanation of the original and fell with it, the Court say, "It was a judgment, exclusively of the Common Pleas of York County, and the regularity or merits of it could not be overhauled elsewhere, further than to stay execution on it, which was done. Had the defendant moved the Common Pleas of Cumberland to set it aside, he would have been told that the power of the Court was restricted to the enforcement of it. He properly went to the fountain head; had the irregular judgment set aside in York County, and execution stayed in Cumberland. . . . The object of the Legislature was not to create a new lien, but to enlarge the field of an old one, and enforce it by local authority; to which end the transcript was endued as a graft with no greater measure of life than that of the parent stock."

In King *v.* Nimick, *supra*, it was held that when the Court, in which the judgment was originally obtained, directed satisfaction to be entered on payment of the money into Court, all further proceedings on the transferred judgment, except for its own costs in a proper case, must necessarily be arrested.

From the provisions of the Act itself and the construction it has heretofore received, we are of opinion that if the defendant had any defence to the judgment, on original grounds, or on any well grounded claim to equitable relief by which the operation of the judgment might be restricted, or its lien in any way limited, he should have applied to the Court in which it originated, and not to the Court to which it was transferred for the special purposes contemplated by the Act. If an improper use was being made of the judgment, the authority of the Court in which it was confessed, to grant such relief as the defendant was entitled to, cannot be questioned; and the action of that Court duly certified to the county in which the exemplification was filed, would afford the defendant ample protection. A judg-

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ment may be transferred to every county in the State, and if one of the Courts to which it has been removed, may entertain applications for equitable relief, grounded on facts existing at the time judgment was obtained, there is nothing to prevent every Court to which it has been transferred from doing so. Such a condition of things was certainly never contemplated by the framers of the Act.

But aside from the question of jurisdiction, we think the testimony was insufficient to justify the Court in striking off the judgment. The defendant's application was grounded on an alleged understanding between the plaintiff and himself, at the time the bond and warrant of attorney were executed; the substance of which as testified to by the defendant, was that the lien of the judgment, to be entered by virtue of the warrant, should be restricted to the property in Bucks County, conveyed to him by the plaintiff, and that he and his property, real and personal in the county of Philadelphia, should be exempt from judgment and execution process of every kind for the security or collection of the debt evidenced by the bond. The terms of the alleged agreement are so inconsistent with the written contract of March 11, 1874, as well as with the bond and warrant of attorney, given in pursuance thereof, that no controlling effect should have been given to it, until it was established by clear and convincing proof. The defendant's testimony, which was the only evidence on the subject, fell far short of this standard. Indeed, it may be fitly characterized as vague and uncertain. After testifying to his understanding of what was agreed upon, he says, in the concluding paragraph of his deposition: "The only agreement that was made was put in the warrant of attorney, and I believe in the bond, and that I understood was sufficient." The bond is in the usual form, and contains not a word in regard to restricted lien or limited liability, and the only limitation contained in the warrant of attorney, has been already quoted. It is very evident that the defendant's testimony amounts to nothing more than his own construction of the exception or limitation in the warrant, the only effect of which, as we have seen, was to prevent a confession of judgment in the Courts of Philadelphia County by an attorney thereof. This was neither done nor attempted. By the confession of judgment in Bucks County, the warrant was exhausted and could not be used elsewhere.

The order of Court striking off the judgment and setting aside the execution attachment and writ of fieri facias is reversed and set aside, and a procedendo awarded.

Opinion by STERRETT, J.

SHARSWOOD, C. J., and PAXSON, J., dissent.

Oct. & Nov. '80, 276. October 19, 1880.

McNish to use v. Reynolds, Lamberton & Co.

Contract—Breach of—Performance—Consideration—Postponement of time for performance of contract by agreement of parties.

When at the moment for performance of a contract by one party, both parties agree to postpone the time for its performance, such agreement is substantially a new contract which is valid and binding, and for which the mutual promises of the parties form sufficient consideration.

A. contracted to buy oil of B. at a certain price, on or before a certain date at seller's option. B. tendered the oil, but A. declared himself unable at the moment to take and pay for it, and asked for time. B. thereupon, without withdrawing his tender, agreed that A. might have the oil at any time before the expiration of the then ensuing month:

Held, that the new agreement of the parties was a binding contract for which the mutual promises of postponement formed sufficient consideration, and that A. having within the stipulated time, and at the proper place, offered to take the oil, but having failed to find B. or any one authorized to act for him, B. had broken his contract and A. was entitled to recover from a stakeholder margins deposited by him to secure his compliance with the terms of the original contract.

Error to the Common Pleas of Venango County.

Assumpsit, by W. C. McNish to the use of F. R. Martin against J. B. Reynolds, S. H. Lamberton, and R. Colbert, trading as Reynolds, Lamberton & Co.

The following facts appeared on the trial before TAYLOR, P. J.: In April, 1877, W. C. McNish agreed to buy of George Van Vleck five thousand barrels of oil on or before December 31, 1877, at seller's option at the rate of $2.51¼ per barrel. To secure the faithful performance of said contract McNish deposited with Reynolds, Lamberton & Co., defendants, $2500 as a margin.

According to the testimony of McNish, the plaintiff, Van Vleck, acting by his broker, on June 21, 1877, tendered the oil at Titusville to the buyer, McNish, who answered that he was not in condition to take the oil and pay for it, but could, if he had a little time. Thereupon Van Vleck's broker referred him to his principal. On the same day McNish went to Oil City and there saw Van Vleck: what passed McNish stated as follows: "I told him that owing to the failure of the bank, my funds were all locked up in the bank, that I needed a little time to make different arrangements, which, if he would grant, I would take the oil. He asked me how long I wanted. I told him I could arrange for thirty days. He replied, if I would take the oil up he would give me the month of July to take it in. I told him I would arrange to take the oil in the month of July, and that was agreed upon and we separated."

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McNish also testified that the tender by Van Vleck was not withdrawn. Van Vleck's account of this interview was wholly different. He testified that on McNish's declaring himself unable to take the oil then, and asking for further time, he (Van Vleck) had simply withdrawn the tender.

On July 18, McNish assigned his contract to Martin, the use plaintiff, who, on July 31, 1877, duly sent his broker to Oil City to take and pay for the oil. The broker was, however, unable to find Van Vleck, or any one authorized to act for him; whereupon Martin, holding that he had performed his contract, claimed from defendants the amount deposited by McNish with them as security for performance of the contract on his part.

Van Vleck, on November 8, tendered the oil to plaintiff, who refused to take it and pay for it. Van Vleck thereupon claimed that the contract was broken by plaintiff, and that the margin deposited with defendants, the price of the oil having fallen, was forfeited. He, therefore, indemnified the defendants against any loss they might sustain by not paying plaintiff the amount deposited as margin with them, and instructed them to retain the same. Whereupon plaintiff brought this suit against them to recover said amount of $2500, with interest.

The defendants asked the Court to charge: 3. "If the tender of June, 1877, was not withdrawn, the rights and liabilities of the parties were fixed by the tender and failure to accept the oil and pay for it, and could not be changed except by a new contract founded upon a new consideration." *Affirmed.*

The Court, in its general charge, instructed the jury as follows: "If we remember aright, the plaintiff swore that the tender of June 21st was not withdrawn; you will remember the evidence for yourselves, and not as we recollect it, and we instruct you as matter of law, if that be true, he cannot recover in this case, without a a new and sufficient consideration of which there is no evidence here. But if you believe the defendant, that the tender was withdrawn, and if you believe the balance of what the plaintiff says about the contract, that he should have the right to tender the money during the month of July; if you are satisfied from the weight of the evidence that this was true, then he might recover upon the evidence of the defendant."

Verdict and judgment for defendants. Plaintiff took this writ, assigning for error, *inter alia*, the action of the Court in affirming defendants' third point, and the portion of the charge above cited.

F. B. Guthrie (with him *Julius Byles*), for plaintiff in error.

In case of a parol contract, any subsequent parol agreement between the parties extending the time of performance is valid and binding. The mutual promises of the parties to deliver and accept and pay are ample consideration for the new contract.

Watkins *v.* Hodges, 6 Har. & Johns, 38.
Wilgus *v.* Whitehead, 8 Norris, 131.
Robinson *v.* Batchelder, 4 N. H. 40.
Keating *v.* Price, 1 Johns's Cas. 22.
McComb *v.* McKennan, 2 W. & S. 216.
Carrier *v.* Dilworth, 9 Smith, 406.
Chitty on Contracts (10 Am. Ed.), 115.
1 Greenleaf on Evidence, § 304.

The Court will stretch every intendment before enforcing a forfeiture.

Helme *v.* Philadelphia L. I. Co., 11 Smith, 107.

C. Heydrick, for defendants in error.

It was clear in this case that there had been an actual breach of the original contract before the new contract was formed. Such new contract must, therefore, in order to stand, be based on some new and valuable consideration.

Wilgus *v.* Whitehead, 8 Norris, 131.
Goss *v.* Lord Nugent, 5 B. & A. 58.
Chitty on Contracts, 154.

THE COURT. Nov. 8, 1880. Van Vleck contracted to sell to McNish five thousand barrels of oil at $2.51¼ per barrel, to be delivered at seller's option, at any time from April 20 to December 31, 1877, to be paid for as delivered. McNish testifies that on the last day of June, at Titusville, Bitter, acting for the seller, tendered the oil to the buyer, who answered that he was not in condition to take the oil and pay for it, but could if he had a little time; whereupon the agent referred him to his principal. On the same day he went to Oil City and there met the principal, Van Vleck, and what passed he states thus: "I told him that, owing to the failure of the bank, my funds were all locked up in the bank; that I needed a little time to make different arrangements, which, if he would grant, I would take the oil. He asked me how long I wanted. I told him I could arrange for thirty days. He replied, if I would take the oil up, he would give me the month of July to take it in. I told him I would arrange to take the oil in the month of July, and that was agreed upon, and we separated." He also said the tender was not withdrawn. For the purpose of the present inquiry, this statement must be taken as true. It may have been exceedingly generous, or very foolish in Van Vleck to change the contract into a buyer's option for one month, and the jury might not have believed a word of it; but if they did believe it, they were instructed that, unless the tender was withdrawn, the plaintiff could not recover, "without a new and sufficient consideration, of which there is no evidence." Whether this instruction was correct is the sole question here.

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An accepted rule, applicable to such contracts as these parties originally made, was stated in Goss *v.* Lord Nugent (5 B. & Ad. 58), as follows: "After the agreement has been reduced into writing, it is competent to the parties, at any time before the breach of it, by a new contract not in writing, either to waive, dissolve, or amend the former agreement, or in any manner to add to, or substract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent terms engrafted upon what will be thus left of the written agreement." It is manifest from the charge, that the learned Judge, recognizing the rule, held, that if the new contract was made at the time the oil was tendered, it was after the breach of the former.

If, at the moment for performance of a contract by one party, both agree to a postponement, is the contract broken? A. sells B. a horse for a stipulated price; the horse to be delivered and money paid on a certain day. At the appointed time A. tenders the horse, B. says I am not ready, but if you will wait till to-morrow I will take the horse and pay you; to which A. agrees. The new contract is as valid as the old. The mutual promises, the one to deliver, and the other to accept and pay, were ample consideration to sustain the new contract. (Carrier *v.* Dilworth, 9 P. F. S. 406.) Can it be that in such case the old was broken, and A. could recover damages for the breach? If his right of action accrued at all, it was at the instant he agreed to a change of time for delivery and payment, instead of demanding strict performance. The parties carried the yet unbroken contract into a new one, and neither has a just claim for damages.

On the day the oil was tendered, the parties mutually agreed that the buyer might take it at any time in the month of July. Had Van Vleck refused to extend the time, it was not then too late for McNish to perform his agreement. True, he said, he was not in condition to do so and asked time; but had his request been denied, possibly he would have succeeded in performance. The oil was due, not past due. Negotiations began immediately on its becoming due, and ended in an agreement for extension of time before it had become overdue. Nothing in this agreement involved a withdrawal of the tender, the seller was to keep the oil ready for the time named, at the buyer's option, not his own. Every reason which would enforce this contract, had it been made before the day of the tender, applies now; for, made at the time the oil could have been taken, the party would be liable to be thrown off his guard, or to be defrauded, if the other could treat it as invalid, the same as if made before the day. But after breach of a contract, and right of action accrued therefor, the case may be governed by other principles.

Having reference to the facts as alleged by plaintiff, and which the jury would have found had they believed him, we are of opinion that it was error to affirm the defendant's third point; and in so far as this error pervades the matter of the other assignments, there was error.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

May, '80, 200. May 28, 1880.

Parker v. Sulouff.

Usury—Interest—Mortgage—Right of mortgagor who conveys property subject to mortgage, to set off usurious interest paid by him to mortgagee on other mortgages, given to secure the same debt, on a sci. fa. against the land held by assignee.

W. conveyed seven distinct tracts of land to D. S., and received from him four mortgages, accompanied by bonds to secure the payment of part of the purchase-money. The interest reserved on the mortgage was at the rate of eight per cent. D. S. conveyed one of the tracts to K. S., "subject to the payment of the lien" of one of the mortgages, and in consideration, *inter alia*, of the payment of said mortgage by K. S. to W. In a scire facias issued on this mortgage against D. S. and K. S., as terre-tenant, all the other mortgages having been paid, defendants offered to set-off the usurious interest paid on the other mortgages:

Held, that such set-off was competent and proper. As D. S. was an interested party, being liable on the bond accompanying the mortgage for the difference between the amount realized from the property and the face of the bond, he was entitled to set off the usurious interest paid by him on the other mortgages, so as to reduce his liability on the bond.

Error to the Common Pleas of Juniata County.

Scire facias sur mortgage, by Ezra D. Parker, executor of John Wright, deceased, against David P. Sulouff, with notice to Jacob Sulouff, Keziah Sulouff, and Turner Sulouff, terre-tenants. Plea, payment.

The following facts appeared on the trial before JUNKIN, P. J.: On August 26, 1869, John Wright, the plaintiff's testator, conveyed to David P. Sulouff seven tracts of land, and to secure the payment of part of the purchase-money, received from said D. P. Sulouff four mortgages, accompanied by bonds, upon four distinct tracts of the land conveyed. One of these was the mortgage in suit; it was payable on April 1, 1873, and was for $3175.30, covering some 332 acres of land. The interest upon all the mortgages was at the rate of eight per cent. per annum.

On the 25th of January, 1872, David P. Sulouff and wife conveyed by deed the land upon

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which the mortgage in question was a lien, to Keziah Sulouff, the deed reciting that it was granted "in consideration of the sum of $1000, and the payment of the mortgage to John Wright by David P. Sulouff," and further stating in the habendum that the purchaser was to hold the same "subject to the payment of the lien of mortgage of John Wright to David P. Sulouff."

The defendant made the following offer of evidence: "That in 1869, D. P. Sulouff, the defendant, was indebted to John Wright, the plaintiff's testator, in the sum of $12,441.41, or thereabouts, and that to secure the payment thereof he took from the defendant four several mortgages on as many separate tracts of land, payable in different sums and at different times, to wit, on the 1st day of April, 1870, and annually thereafter till 1st April, 1875, inclusive; that interest on the several payments, as aforesaid, was computed from the date of the mortgage till the maturity of each payment, at the rate of eight per cent. per annum; that three of the mortgages had been paid and satisfied, including more than $1000 of usurious interest. This defendant will offer to prove by agreements in writing between the parties, and other proper writings, and for the purpose of claiming such excessive interest as a credit on mortgage in suit; and further, to show that the said four mortgages were given for parts of one and the same debt, and that they constituted one transaction."

Objected to; objections overruled, and evidence admitted.

The Court, *inter alia*, charged the jury: "The next question is, can David P. Sulouff resist the payment of the mortgage on the grounds of usury, after having conveyed the property bound by it to Keziah Sulouff, the terre-tenant? The case of the Miners' Trust Co. *v.* Roseberry) 31 Sm. 309) is relied on as teaching that a purchaser who has assumed the payment of the lien as part of his purchase-money, into which usurious interest has entered, cannot set up that as a defence to its payment. This is clear enough when the original debtor, as in the case cited, openly appears and expresses his wish that the defendant be paid, notwithstanding the usury. But it is too clear for argument, that when the original debtor is made a party defendant, though doing so was unavoidable, and even though the proceeding is *in rem*, as in this case, and although no personal liability may spring out of a judgment against him, he is entitled to set up all the defences (not having estopped himself) which would have been available had he continued the owner of the land bound by the original obligation. This proposition is so manifest that the mere statement of the principle becomes the axiom of sufficient proof. ..... Can David P. Sulouff recoup the interest paid by him on the satisfied mortgages? . . . We think there was but one original debt, . . . and that the separation of the whole into fragments, to adapt the charge to the ability of the four parcels of land to pay the whole, had not the effect of rendering each payment an independent, individual liability, so as to prevent the recoupment of excessive interest paid upon them, available in a sci. fa. issued on the fourth. This view of the case allows David P. Sulouff a credit on the mortgage sued upon, for all excessive interest paid by him on the other three satisfied mortgages."

Verdict for plaintiff for the amount of the principal of the mortgage, and legal interest thereon, less the whole amount proved by the defendant to have been paid as usurious interest, with interest thereon, viz., $800. Judgment accordingly. Plaintiff took this writ, assigning for error the action of the Court in admitting the above evidence, and the portion of the charge above cited.

Louis E. Atkinson, for plaintiff in error.

This was a proceeding *in rem*, and David P. Sulouff had no interest in the thing proceeded against; payments made by him on other mortgages on other lands should not have been admitted in evidence against the claims of the plaintiff. Nor was he in any condition to resist this claim. It is true he was a party to the record, but this was unavoidable, and he was merely a nominal party. He could not be affected personally by the judgment, nor was his liability on his mortgage bond influenced by the result.

Wilson *v.* McCullough, 7 Harris, 83.
Stevens *v.* N. P. Coal Co., 11 Casey, 265.
Perkins *v.* Johnson, 7 Harris, 512.
Hoffman *v.* Lee, 3 Watts, 354.

The consideration of the deed from David P. to Keziah Sulouff having been in part the payment of the mortgage in favor of John Wright, and the conveyance having been made "under and subject to the *payment* of the mortgage," the fact that the mortgage was a part of the consideration, and the land made subject to the *payment*, is in law an undertaking on the part of the grantee to pay this mortgage. From the time she accepted the land under the conveyance she was the debtor of John Wright; this mortgage which she assumed to pay was "segregated" from its fellows, and as between her and David P. Sulouff, and John Wright as mortgagee, the liability to pay the mortgage rested upon her exclusively, and David P. Sulouff was discharged therefrom.

Hoff's Appeal, 12 Harris, 203.
Lennig's Estate, 2 Sm. 139.
Merriman *v.* Moore, 7 WEEKLY NOTES, 426.
Townsend *v.* Long, 27 Sm. 143.
Justice *v.* Tallman, 5 WEEKLY NOTES, 90.

If these mortgages were not segregated debts

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when executed, the mortgage sued on, as between all the parties interested thereon, became separated and distinct from the rest when Keziah Sulouff became the owner of the encumbered land upon all the terms named in the deed.

"The rule that the vicious element in a usurious contract survives in all its transmutations, is confined to cases in which the obligor or promisor remains the same."

Bank *v.* Hottenstein, 7 WEEKLY NOTES, 320.

Mrs. Sulouff is not the original promisor, and it does not lie in her mouth to allege previous usurious transactions between the original debtor and his creditor.

Bank *v.* Roseberry, 31 Sm. 309.

E. S. Doty, Jr. (*E. S. Doty* with him), for defendant in error.

We submit that none of the cases cited by the plaintiff in error are inconsistent with the doctrine that where there is a mortgage bond, or a personal covenant in the mortgage for the payment of the amount thereof, the mortgagor, after he has parted with the mortgaged premises, is something more than a nominal party in a suit upon the mortgage, and that, as a defendant therein, he may make any defence that is available in law or equity.

It was not essential that Keziah Sulouff, grantee of the mortgagor, should have been a party to the suit upon the mortgage. The Act of 1705 does not require that the terre-tenant or purchasers under the mortgage, should be made parties to the sci. fa. on the mortgage.

Mather *v.* Clark, 1 Watts, 491.
Mevey's Appeal, 4 Barr, 80.

But it was essential that David P. Sulouff, the mortgagor, should be a party. He was more than a nominal party. In a suit on a bond which accompanies the mortgage, the verdict in the sci. fa. would be conclusive of the amount due.

Roberts *v.* Williams, 5 Wharton, 186.

Keziah Sulouff, by the acceptance of the deed, did not become the debtor of John Wright. The words in a conveyance "under and subject to a mortgage," do not import an assumption by the purchaser of the debt, unless there exist special circumstances to raise a covenant to that effect.

Moore's Appeal, 6 WEEKLY NOTES, 474, S. C.; 7 Norris, 450.
Thomas *v.* Wiltbank, 6 WEEKLY NOTES, 477.
Merriman *v.* Moore, 7 WEEKLY NOTES, 426.

It was not claimed on the trial, that Keziah Sulouff had assumed any personal obligation to pay the mortgage debt. The plaintiff relied on the effect of the words in the conveyance.

Wright's executor cannot retain the illegal interest, but holds it for the use of the debtor. If he chooses to "donate" it, or allow it to be used as a set-off by his grantee, he wrongs no one.

Heath *v.* Page, 13 Sm. 121.

The mortgage sued on did not become "separated and distinct from the rest," when Keziah Sulouff accepted the conveyance. "The cases collected in Campbell *v.* Sloan (12 Sm. 481) unite in deciding, with unmistakable emphasis, that the taint of usury cannot be eradicated by the substitution of one security, or one set of securities, for another, so long as the original debt survives."

Miller *v.* Irwin, 4 Norris, 378.
Lucas *v.* Bank, 28 Sm. 228.
Thomas *v.* Shoemaker, 6 W. & S. 179.

June 7, 1880. THE COURT. This was an action of scire facias on a mortgage brought by the executor of the mortgagee against the mortgagor with notice to terre tenants. The defence was payment. A considerable amount of the payments given in evidence consisted of moneys paid in excess of legal interest due by the mortgagor, and claimed to be money of the mortgagor in the hands of the mortgagee and therefore to be deducted from the amount due upon the mortgage in suit. In point of fact the present mortgage was one of four originally given to secure payment of a debt of $12.441.43. Each mortgage was upon a different tract but the debt was a single indebtedness arising out of various transactions, and the amount fixed by an undisputed settlement between the parties. The plaintiff's testator executed a deed to the defendant, David P. Sulouff, on August 26, 1869, for seven tracts of land, the whole consideration being $13,441.43, of which $1000 was paid about the time of the conveyance. On the same day the grantee, Sulouff executed four mortgages to the grantor Wright, upon four of the tracts for the payment of different sums at different times, but aggregating the sum of $12,441.43. The mortgage in suit was one of these four and was for $3175.30, payable on April 1, 1873, and covered a farm containing 332 acres. On this mortgage usurious interest was paid, the amount of which is undisputed, and being deducted, leaves a balance due Feb. 23, 1878, of $2139.64. This sum, together with interest to the date of the verdict, was claimed as the amount due the plaintiff. But the Court permitted other payments of excessive interest upon the other mortgages to be deducted from the amount due upon the mortgage in suit, leaving a balance due of $800, and for this amount a verdict was entered by the direction of the Court. The question is upon the correctness of the action of the Court in allowing credit for the usurious interest paid upon the other mortgages. It would hardly be pretended that there was any error in the ruling of the Court below if the parties had remained the same throughout, and the payments had all been made

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directly by the original mortgagor to the mortgagee. But the plaintiff claims, and it was the fact, that the parties did not remain the same and that the payments were not all made by the mortgagor. On January 25, 1872, D. P. Sulouff and wife conveyed the land bound by the mortgage in suit to Keziah Sulouff in consideration of $1000, "and the payment of the mortgage to John Wright by David P. Sulouff." In the habendum clause of the deed was the provision that the property was to be held "subject to the payment of the lien of mortgage of John Wright by said David P. Sulouff."

It is claimed that after this conveyance Keziah Sulouff became the debtor for the mortgage of Wright; that she was bound to pay the whole of it, and that no credit could be allowed for the usurious interest paid on the other mortgages by D. P. Sulouff. It is argued that D. P. Sulouff was free from all liability in relation to the mortgage, and could have no possible interest in an action brought against the land; and, further, that the sci. fa. on the mortgage was a proceeding *in rem* against the land alone. We cannot agree to the conclusions drawn from these premises. D. P. Sulouff, the original mortgagor, is one of the defendants in the suit. He gave a bond, the payment of which was secured by this mortgage, and of course he is personally liable on the bond for the whole amount mentioned therein. If any deficiency should arise after the land is sold under the sci. fa. he would be obliged to make it good. He is therefore directly interested, first, as an actual defendant on the record, and, secondly, as being personally liable for the same debt, and bound to respond for any deficiency resulting from the sale of the land. It would be very strange if he could not be permitted to reduce the amount of his liability in an action against himself on the mortgage given to secure the payment of the bond upon which his personal liability remained. Moreover, although it may be very true that, as between D. P. Sulouff and Keziah Sulouff, she was bound to pay the mortgage, that obligation on her part could not relieve him from his personal liability to Wright, the mortgagee. Again, it must be observed that Keziah Sulouff did not agree to pay any particular sum as representing the amount due upon the mortgage. It is not stated in the deed that she is to pay a specific money consideration, the aggregate of the mortgage and the $1000 to be paid to D. P. Sulouff. She is to pay him that $1000, and she is to pay also "the lien of the mortgage," which means the amount due on the mortgage. What that amount is must be ascertained outside of the deed. As that sum was the amount legally due by D. P. Sulouff to John Wright, the state of the indebtedness between them becomes not merely a legitimate but a necessary subject of inquiry. It is too plain for argument that, as between them, the payments of usurious interest upon the other bonds and mortgages, the whole representing one original debt, may be deducted from the amount of the mortgage in suit. It follows that the Court below was right in permitting the deduction of the amounts of excessive interest paid upon the other bond given by the defendant D. P. Sulouff to Wright, and therefore the judgment is affirmed.

Opinion by GREEN, J.

Jan. '81, 265. Jan. 10, 1881.

Allegaert v. Smart.

Landlord and tenant—Partial failure to deliver possession of leased premises—Set-off—Damages—Measure of damages for failure to deliver possession by lessor, in absence of mala fides—Speculative damages cannot be recovered.

Where a lessee has entered into possession of a part of the leased premises, but the lessor has, without *mala fides* on his part, failed to deliver up possession of another part thereof, the lessee cannot set up such failure as a defence to an action for the use and occupation of that portion of which he has had possession.

In such case the lessee may lawfully defalk the damages he has sustained by reason of his failure to obtain possession of the whole of the premises demised, but such damages can only consist of the money actually paid by him on the faith of his contract, and if no such money has been paid, his damages are but nominal.

S. leased to A. three adjoining properties to be occupied as stores. A former tenant of one of the properties refused to surrender possession until eighteen months after the commencement of A.'s lease, when she was ejected by legal proceedings instituted by S. A. had in the meantime entered into possession of the other properties, and eventually of this also. In an action of debt by S. against A. for the use and occupation of the premises of which he had obtained immediate possession:

Held, That A. having elected to enter into possession of part of the premises, was liable for the fair rental value thereof, notwithstanding the lessor's failure to deliver possession of the other part.

Held, that the damages sustained by the lessee, and which it was competent for him to set off against the lessor, were merely nominal, and that evidence as to the lessee's loss, resulting from disarrangement of his business, was inadmissible as set-off.

Held, further, that evidence of loose conversations by S. with his former tenant to the effect that she might remain in possession, and that A. should not have the premises in question, fell far short of an offer to prove fraud, or *mala fides*, on the part of the lessor, and was properly rejected.

Error to the Common Pleas No. 4, of Philadelphia County.

Debt for use and occupation, brought by John Smart against Peter Allegaert. Pleas, "Nil debet, payment with leave, set-off, etc."

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The facts of this case, as they appeared upon the trial, together with the opinion of THAYER, P. J., discharging a rule for a new trial, taken on behalf of the defendant, are fully reported in 8 WEEKLY NOTES, 217.

On the trial, plaintiff asked one Fox, a witness, what was the yearly value of premises No. 204 North Eighth Street, and of each of the other premises leased to defendant, and what defendant had agreed to pay as rent for each of the same. To both of these questions witness replied, $1500. Defendant objected to these questions. Objections overruled, evidence admitted.

Defendant offered to prove "That in August, 1875, Smart, the plaintiff, in conversation with Mrs. Buckly (the witness), told her she could remain in the premises (No. 204), that Mr. Allegaert could not have the store, and that she remained there." Plaintiff objected; objection sustained.

Defendant also offered "to prove that in consequence of not getting possession of the store No. 204, defendant was obliged to store the goods bought for that store, and that they fell in price and were damaged by storing, and to show the loss sustained thereby." Plaintiff objected; objection sustained.

The Court charged the jury, *inter alia*, as follows: "The defendant has not given any evidence to show that he has sustained any damage, which the law would take cognizance of; remote or speculative damage cannot be allowed, and your verdict, therefore, should be for the plaintiff for the fair rental value of the stores and dwellings actually used and occupied by the defendant."

Verdict and judgment for the plaintiff accordingly.

Defendant took this writ, assigning for error, *inter alia*, the admitting of plaintiff's evidence above referred to, the ruling out of defendant's offers of evidence above cited, and that portion of the charge of the Court set forth above.

Theodore F. Jenkins, for plaintiff in error.

The defendant did charge *mala fides* on the part of the landlord in renting to him after he had already agreed with Mrs. Buckly that she should remain in possession of No. 204, and "if the landlord wrongfully dispossesses his tenant of any portion of the demised premises, the rent is suspended for the whole."

Linton *v.* Hart, 1 Casey, 193.
Reed *v.* Ward, 10 Harris, 144.
Seabrook *v.* Moyer, 7 WEEKLY NOTES, 139.

Mrs. Buckly's retention of possession did cause injury to the defendant; the question, therefore, was, who was the wrongdoer, Mrs. Buckly or the plaintiff? If Mrs. Buckly was, then the defendant could claim as a set-off only the actual loss sustained by him, but if Smart was the wrongdoer, there could be no apportionment of the rent, and defendant would be entitled to a certificate for his actual loss, and the value of his bargain.

Bitner *v.* Brough, 1 Jones, 127.

The lessee was put to great expense in the expectation of having three stores to devote to his business. He bought goods accordingly, which he was forced to store, and which have become spoiled and depreciated in price. He claimed a set-off in this action for the actual loss sustained by him on this account, and he is entitled to this as damages, even though the plaintiff may have acted *bona fide*.

Bitner *v.* Brough, *supra*.
Benson *v.* Cessna, 12 Smith, 148.
Meason *v.* Kaine, 17 Smith, 126.
Wall *v.* Real Property Co., L. R. 9 Q. B. 249.
Simpson *v.* Railway Co., L. R. 1 Q. B. Div. 274.
Watterson *v.* Railroad Co., 24 Smith, 208.

Wm. C. Hannis and *George Junkin*, contra.

When a tenant enters, but is prevented from obtaining the whole of the premises by a person holding a part under a prior lease from the landlord, it has been placed upon the same footing as an eviction by title paramount, and the landlord has been permitted to recover for use and occupation on a *quantum meruit*.

Christopher *v.* Austin, 1 Kernan, 218.
Hurlbut *v.* Post, 1 Bosw. 40.
Etheridge *v.* Osborn, 12 Wend. 529.
Ludwell *v.* Newman, 6 T. R. 458.
Tomlinson *v.* Day, 2 Brod. & Bing. 680.
Camarillo *v.* Fenlon, 49 Cal. 207.
Bennett *v.* Bittle, 4 R. 344.
Seabrook *v.* Moyer, 7 Norris, 447.

There was nothing to show *mala fides* in the offer to prove that the plaintiff had said something to Mrs. Buckly "in conversation." It could not have been authority to her to remain, and in point of fact the suit against her proved that fact.

A lessor, who for no wilful fault is unable to deliver possession, stands in the same position as a vendor who has acted in good faith, and yet is unable to make title. In such case the vendee cannot recover for the loss of his bargain, but can only recover what he has paid on account, with interest and expenses; and if he has paid nothing, he can only recover nominal damages.

McClowry *v.* Croghan, 1 Grant's Cases, 307.
Bitner *v.* Brough, 1 Jones, 139.
Dumars *v.* Miller, 10 Casey, 319.
Hertzog *v.* Hertzog, 10 Casey, 418.
Bowser *v.* Cessna, 12 Smith, 148.
Meason *v.* Kaine, 17 Smith, 126.

Speculative or remote damages, such as the plaintiff sought for the deterioration of his goods in quality and value, are in no case recoverable.

Fairman *v.* Fluck, 5 Watts, 516.
Prescott *v.* Otterstatter, 29 Smith, 462.

January 24, 1881. THE COURT. This judgment is affirmed upon the opinion of the learned President of the Court, on the motion for a new trial.

PER CURIAM. Judgment affirmed.

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Common Pleas—Law.

C. P. of Lycoming County. April 1, 1881.

Hays v. The Lycoming Fire Insurance Company.

Execution—Attachment execution—Mutual insurance companies—Liability of members of, to attachment execution for unpaid assessments on premium notes.

Assumpsit, by William H. Hays against the Lycoming Fire Insurance Company, to recover the amount of a certificate given by said company to the Eighth Avenue Railroad Company for loss sustained on property destroyed by fire, which was insured by the company defendant. Said certificate was afterwards transferred to plaintiff.

The facts of the case as they appeared in the opinion of the Court, were as follows:—

"The plaintiff having obtained a judgment against the company defendant, caused an execution to be issued and summoned numerous persons as garnishees. To this writ the defendant filed a plea and affidavit denying that the defendant is liable to the writ of execution attachment under its charter and the facts and circumstances of this case, etc. The plaintiff joined issue on the plea and affidavit. An agreement waiving trial by jury was entered into and filed, and thus the matters in controversy came before me for decision.

"The case came on to be heard on April 1, 1881, and was argued by counsel. At the hearing it was agreed that all the evidence submitted on a motion to quash the writ, etc., should be used as if taken for the purposes of this issue. It was admitted by counsel that the assets of the company defendant, consisting almost entirely of premium notes, are more than sufficient to pay its debts due for losses by fire.

"There are no disputed facts in the case. The facts necessary to an understanding of the case which I find are as follows: The judgment of the plaintiff in this case is founded on a claim for loss sustained on property destroyed by fire which was insured by the company defendant. The property destroyed was owned and the policy covering it was held by the Eighth Avenue Railroad Company. After the fire the loss was adjusted and the usual certificate, payable at a future day, given. This certificate was transferred to the plaintiff and on it his judgment is founded.

"The defendant is a mutual insurance company, having power to issue policies for a cash premium, as also on premium notes. The loss for which the plaintiff claims was covered by a cash policy.

"All the garnishees except Henry W. Watson, Esq., if indebted in any sum to the defendant, are only so indebted by reason of being policy holders and members of the company, on whose premium notes assessments to pay losses and expenses have been levied, which remain unpaid.

"Henry W. Watson, Esq., is indebted to the defendant in no other way than as its duly authorized collector appointed to collect these same assessments.

"One of the assessments for which the garnishees are liable was levied to pay a large number of losses which occurred at and before a certain date, and includes the loss on which the plaintiff's judgment is founded."

Candor and *Munson*, for the plaintiff.

Johnson and *Watson*, for the defendant.

April 7, 1881. THE COURT (after stating the facts *ut supra*). The only question for solution in this case is whether or not unpaid assessments due on the premium notes of policy holders and members of the Lycoming Fire Insurance Company, are liable to execution attachment on a judgment recovered on a claim against the company for a loss by fire covered by a cash policy.

The charter gives no preference to cash policies in payment of losses, and provides no different method of paying them than that prescribed for all its policies. That the cash policies and premium-note policies stand on the same basis is no longer an open question in this State. (Hummell's Appeal, 28 P. F. S. 320; Schimpf & Son *v.* Lehigh Valley Mutual Insurance Company, 5 Norris, 373.)

I am of opinion that the plea of the defendant in this case is good. First, because the debt sought to be attached is not such a debt due to the defendant as is contemplated by the Act of Assembly authorizing the writ of execution attachment to issue.

The charter of the Lycoming Fire Insurance Company is a part of every contract of insurance it enters into. By its charter this company cannot levy and collect assessments from its members for the purpose of increasing its cash balance, nor for any other purpose than that therein prescribed, viz., to pay losses and incidental expenses. The company, as a corporation, cannot do as they please with the fruits of such assessments; they are mere trustees whose duties are to ascertain from time to time the amounts of money to be raised, to ratably assess the same on its members, and when collected to appropriate the money to the persons and purpose for which it was raised. They can only make such assessments for certain purposes, and when collected they cannot use the money for any other purpose.

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The assessments due from these garnishees are, therefore, not due to the defendant in its own right, although collectible in its name, but belong to those policy holders who have suffered the losses for which it was laid—as has been said by our Supreme Court, *they* have an immediate vested interest in them. (Rhinehart *v.* Alleghany County Mutual Insurance Company, 1 Barr, 359; Coston *v.* Same, Id. 322.)

But another reason why this writ will not lie in this case is, because a remedy for the payment of this debt is provided by the charter of the company, and it must be pursued.

The charter provides that debts of this kind shall be paid by assessments to be levied on the premium notes of those persons who are members of the company at the time of the happening of such loss:—

"In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any Act or Acts of Assembly of this Commonwealth, the said Acts shall be strictly pursued," etc. (Act 21st March, 1806, Purdon's Digest, p. 58, pl. 5.) That such remedy is exclusive is held in Koch *v.* Williamsport Water Company (15 P. F. S. 288), and many other cases.

If this company should neglect or refuse to make and collect assessments to meet its losses, it could be compelled by mandamus to do its duty in this regard. If it should attempt to use such funds when collected for any other than the purposes for which they were raised, it could be enjoined from so doing at the suit of any one interested. Thus we find the remedy provided is ample; and that it is appropriate and should be strictly pursued becomes apparent when we consider the rights of all the parties in the premises.

In the People's Fire Insurance Company *v.* Hartshorne & Co. (9 Norris, 470) Mr. Justice STERRETT, in delivering the opinion of the Court, says: "The essential principle on which mutual insurance companies are organized, is that each member will pay his proportionate share of expenses incurred and losses which happen during the period of his membership." From this it follows that members of such companies are not liable for losses which occurred before they became members, nor after they ceased to be such. They ought not to be compelled by any process of law to pay any portion of a loss for which they are not liable as members.

If an execution attachment can be issued as in this case, members may be compelled to pay for losses which otherwise they ought not to pay. If these assessments can be appropriated to the payment of the debt of any one who may attach them, they may be so reduced that they will not pay the debts for which they were assessed. These assessments are laid for a sufficient sum to pay the debts for which certain members are liable; if they are diverted to the payment of other debts for which those members are not liable, how is this deficiency to be made up? What authority of law is there to compel these members to pay more than their proportionate share of losses and expenses incurred during their membership?

Unless the remedy provided by the charter is pursued in the payment of such debts as the one now before us, some members of the company will be compelled to pay claims they ought not to pay, whilst others will be released from the payment of such as they should pay.

What I have said as to those garnishees who are members of the company, applies with equal force to the garnishee, Henry W. Watson, Esq., and besides, as to him it may well be said, that the funds in his hands are in the hands of the company. If these assessments are not subject to the writ of execution attachment in this case for either of the reasons assigned, it is of no importance that one of them was laid to cover losses including the one on which plaintiff's judgment is founded.

I am of opinion that the plea of the defendant is sustained by the law and the facts in this case, and it is now ordered that judgment be entered thereon in favor of the defendant.

Opinion by CUMMIN, P. J.

C. P. No. 1. March 26, 1881.

O'Malley v. O'Malley.

Equity—Examiner—Practice—Under what circumstances the Court will give an examiner power to exclude testimony.

Rule for an order to suppress certain testimony taken before an examiner, and to give him the powers of a master.

Bill in equity to declare a trust.

The matter was referred to Charles W. Beresford, Esq., as examiner to take testimony, and while he was so engaged the present rule was taken.

Archer, for rule.

A large amount of testimony utterly irrelevant has been taken and continues to be offered before the examiner, consisting of scandalous, indecent, and criminal charges against the character of defendant, as well as evidence tending to impugn his veracity, although defendant's testimony has not yet been offered. A witness is now before the examiner whose testimony, if true, would consign defendant to the penitentiary, and yet has no relevancy to the point at issue. The usual practice is no doubt to let in all the evidence, and then refer it to a master, but it is most unfair to the defendant that all this injurious evidence

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should be put on the record, although he may be and is quite prepared to rebut it.

Wollaston, contra.

This application is certainly novel, and the statements about this testimony seem to me exaggerated. The evidence complained of had an incidental bearing on the case, and was in fact elicited by defendant's cross-examination.

[ALLISON, P. J. Do you think you would be allowed, before a jury, to produce all this testimony affecting defendant's personal character, when the question was as to a declaration of trust?]

THE COURT made the following order:—

And now, March 26, 1881, ordered that the testimony taken to this date be referred to Chas. W. Beresford, Esq., as master, to report to the Court what evidence heretofore taken before him is impertinent to the issue and scandalous, or either, and if the same should be suppressed or expunged from the record, and it is further ordered that the said Chas. W. Beresford, Esq., be appointed master with his powers hereafter, as to admitting or excluding evidence or offers thereof, saving defendant's right to answer or rebut evidence admitted properly.

C. P. No. 4. March 21, 1881.

Schultz v. Asay.

Mechanics' liens—Apportioned claims—Bill of particulars to be considered in determining nature of claim—Apportioned claims only allowable against buildings adjoining each other and not separated by streets.

Sur motion for judgment *non obstante veredicto* on point reserved.

Scire facias sur mechanic's lien, by Schultz, trading as the Wilcox Lumber Co., against Asay *et al.*, owners, and Roberts *et al.*, contractors. William N. Whelen intervened by leave of the Court and defended as terre-tenant. The claim was for $201.05, and was filed against a certain two and a half story building on the south side of Butler Street for lumber furnished upon the credit of and used in constructing the same. For the amount of material furnished and the time when the same was furnished the claim referred to the accompanying bill of particulars, which claimant prayed might be taken and considered as part of his claim.

Bill of Particulars.

Caspar E. Asay

To Wilcox Lumber Co., Dr.

For lumber ordered by W. T. B. Roberts for houses on north and south sides of Butler Street, west of Thirteenth Street, Philadelphia. [Then follow items charged from Aug. 2, 1878, to January 13, 1879, aggregating $4825.08.] "The materials mentioned in the foregoing bill of particulars were furnished and delivered for and about the erection and construction, as well of the building mentioned in the annexed claim as of 23 other buildings of the same or similar description: twelve of which are situated on the north side of said Butler Street and the remaining twelve (of which the one within mentioned is one) of the 24 are situated on the south side of said Butler Street, west of Thirteenth, as shown by a plan annexed, etc. And against all of which buildings said claimant claims to have a lien for a proportionate part of the said debt for which claims are filed in the same Court to the present term. The annexed claim is for an equally apportioned or *pro rata* part of the said sum of $4825.08."

Upon the trial it appeared that the lumber in question was furnished for the above-mentioned twenty-four houses under a contract between the claimant and the contractors dated August 1, 1878, in which the right of lien against the houses was reserved. It was proved that the lumber was delivered to the contractors indiscriminately upon the credit of the houses, but no proof was given to show what proportion or amount of the lumber, was actually used in the erection of the particular house sought to be charged by the claim. It was in evidence, however, that the contractors in making up their orders for the lumber multiplied by the number of houses their estimate of the quantity of lumber required for each one. The houses were all alike and were erected at the same time. A verdict was rendered for the plaintiff subject to the opinion of the Court on the point reserved whether the plaintiff could recover under the lien as filed.

W. H. Drayton, for the motion.

The rule is that where the materials are furnished for two or more *contiguous* houses the claim may be filed against all the houses jointly or apportioned among them.

Pennock *v.* Hoover, 5 Rawle, 315.

A building is construed to mean any number of houses in one block.

Chambers *v.* Yarnall, 3 Harris, 265.

That is, provided they are embraced between streets and do not cross them. They must be built on the same lot.

Taylor *v.* Montgomery, 8 Harris, 443.

The only departure from this rule has been where the blocks were separated by a private alley.

Fitzpatrick *v.* Allen, 30 Smith, 292.

In Millett *v.* Allen (3 WEEKLY NOTES, 374), the statement leaves it in doubt whether the houses were in one block, and the Court imply that if they were not, the claim would be bad, as was ruled in French *v.* Kaign (Ibid. 495).

The mechanic's lien law, being for the protection of the mechanic, must be construed with a view thereto. But it cannot be extended by implication so as to cover claims against scattered houses. The claim according to the evidence is clearly apportioned. Parol evidence is of course admissible to support book entries, but the claim when once filed cannot be contradicted by parol.

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Wolf *v.* Batchelder, 6 Smith, 87.

The attempt here is substantially to amend, which cannot be done after the expiration of the statutory period of six months.

Day *v.* Garrett, 4 WEEKLY NOTES, 368.
Nason Co. *v.* Trustees, Ibid. 369.
Dearie *v.* Martin, 28 Smith, 55.

J. Quincy Hunsicker, contra.

This is a separate, not a joint or apportioned claim. The Act of 1806 only allowed a single claim, and the Act of 1836 did not take the right to file such claim away, but only enlarged the remedy. The bill of particulars is only to show how the debt is made up. The heading is merely a memorandum, and the averment in the claim is for the information of the owners. The evidence showing how the lumber was furnished for each of the twenty-four houses fully proves the claim. Section 13 of the Act of 1836 omits the words "adjoining," as does the Act of 25 April, 1850, extending the right of apportionment to material furnished, but limiting the claim to work and materials under one contract. The tendency is to make the *contract* the criterion rather than the adjoinder of the buildings. The strictness of the law is much relaxed.

Fitzpatrick *v.* Allen, 30 Smith, 292.
Davis *v.* Farr, 1 Harris, 170.
Harper *v.* Keely, 5 Harris, 234.

In Chambers *v.* Yarnall the question was merely as to the admissibility of certain book entries unaccompanied with any other proof to specify the buildings. "The offer of such proof," it states, "would have turned the scale." Millett *v.* Allen, *supra*, rules this case, as the record there shows the houses did not adjoin.

April 2, 1881. THE COURT (after stating the facts). The question is whether, upon such a state of facts, the claim can be maintained as a valid and legal claim under the Acts of Assembly and the construction which they have heretofore received.

Upon the argument it was contended by the plaintiff's counsel that this is not an apportioned claim. It is true that if we look to the formal part of the claim alone, as it was filed, rejecting altogether the bill of particulars which is annexed and made part of it, nothing is said there about an apportionment. But we are not at all at liberty to do that. The bill of particulars is an integral part of the claim, and must be read with it. (Knabb's Appeal, 10 Barr, 186; Donahoe *v.* Scott, 2 Jones, 45; Calhoun *v.* Mahon, 2 Har. 56; Hill *v.* McDowell, Ib. 175; McClintock *v.* Rush, 13 Smith, 203.)

Indeed, it must be apparent that if the plaintiff were to stand upon the claim alone, rejecting the bill of particulars, it could not be maintained, for "the amount of materials furnished and the time when they were furnished" no where appear with sufficient certainty, except in the bill of particulars. It is for that reason, doubtless, that the plaintiff in his claim prays that the bill of particulars *may be taken and considered as part of his claim.*

Looking then at the bill of particulars as an essential and integral part of the claim filed, it distinctly appears that the lien claimed is for $4825.08, and is against twenty-four buildings, twelve of which are in one block and twelve in another. "Against all of which buildings said claimants claim to have a lien for a proportionate part of the said debt." It is therefore perfectly plain that this is an apportioned claim, and not only an apportioned claim, but, so far as the bill of particulars is concerned, it is a joint apportioned claim, although if we regard the formal parts of the claim apart from and independently of the bill of particulars, it is on its face a single and unapportioned claim. But we are bound to read the bill of particulars as a part of the claim. As has been already said, if the plaintiff rejects the bill of particulars his claim is clearly invalid for uncertainty, inasmuch as it does not comply with the statutory requisites in setting out the "times and quantities." (Russell *v.* Bell, 8 Wr. 54; Rehrer *v.* Zeigler, 3 W. & S. 258; Lehman *v.* Thomas, 5 W. & S. 262; Witman *v.* Walker, 9 W. & S. 183.)

Is it competent then for the plaintiff to avoid the difficulty which clearly appears in his bill of particulars,—that this is an apportioned claim against houses in different blocks, by saying that the claim proper as filed is only against a single building, and is not apportioned in the claim itself? In other words, if the claim itself is clearly shown in the bill of particulars to be an apportioned claim against houses separated by a public street, and which, therefore, by no latitude of construction whatever can be said to be "adjoining," can it be properly treated as a single unapportioned claim, because it would so appear if we rejected entirely the bill of particulars? Is it competent to make an apportioned claim against buildings in different blocks a good claim by filing such a claim separately against each building? Are separate apportioned claims against houses in different blocks good, although joint apportioned claims against buildings so situated are bad? If the law is so, then such claims may be filed against a multitude of buildings for which materials are supplied under one contract in various and remote localities, where the materials have been furnished indiscriminately upon the joint credit of all, and the only standard of charge against each is an apportionment between all made by the claimant himself.

So far as the right to apportion claims for materials among several houses depends upon statutory authority, it is clear that the Acts of

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Assembly contemplate only "houses and buildings adjoining each other" as proper subjects of such apportionment, and the reason assigned for permitting the apportionment in the Act of 1831 is, that as to houses so situated "it sometimes happens that it is impossible for the person who has provided materials, to specify in his claim the particular house or building for which the several items of his demand were provided." Both the Act of 1836 and the Act of 1850, where they speak of apportionment, clearly refer to the apportionment previously authorized; that is, to the apportionment provided for in the Act of 1831, and not to any new or different kind of apportionment. The case of Pennock *v.* Hoover (5 R. 291), where the claims were made under the Act of 1806 and its supplement of 1808, was the case of claims filed against contiguous houses, and it was held that claims against such houses might be filed against all the houses jointly, or they might be apportioned and separate claims filed against each. Pennock *v.* Hoover, as well as the subsequent cases of Davis *v.* Farr (1 Har. 167), and Harper *v.* Keely (5 H. 234), are authorities which decide that either joint or separate apportioned claims may be filed against *adjoining* houses. But there is no case which holds that either joint or separate apportioned claims can be filed against houses not adjoining in any sense, but which are separated by streets, and therefore situated in different blocks, which decides that any right of fixing and charging the amount of a claim by the process of apportionment exists in the cases of houses so situated. The reason assigned by the Act and by the cases for permitting a charge by apportionment does not exist in such a state of things, for, as was said in Chambers *v.* Young (3 Har. 268), it is as easy to distinguish between separate blocks as it is between separate houses in different streets. The words "several houses and buildings adjoining each other" have been construed to mean any number of buildings owned by the same person, provided they are all in progress and are all situated in the same block (Young *v.* Chambers, 3 Har. 267; Taylor *v.* Montgomery, 8 Ib. 443); but in Young *v.* Chambers, and the subsequent case of Goepp *v.* Gartiser (11 Casey, 130), followed in our own case of French *v.* Kaign (3 WEEKLY NOTES, 495), it was distinctly decided that a material man cannot maintain a claim which rests upon an apportionment made between houses in different blocks, because such an apportionment is neither within the reason nor the letter of the Acts of Assembly, nor within any previous decision. Those were cases of joint apportioned claims. But the principle upon which they rest seems to us to control the present case, for, as we have already seen, the present case clearly appears by the bill of particulars to be in reality that of an apportioned claim against houses in different blocks, although it is ingeniously attempted to avoid the effect of that by filing a copy of this jointly apportioned claim against each house separately. There is no precedent and no authority for such a claim as this, and it would be extremely impolitic and dangerous in practice to allow it, for if it can be done, then a contractor under a contract for the erection of a multitude of buildings in different parts of the city, no matter how remote they may be from each other and how different from each other in their dimensions and plans, may fasten upon each of the buildings a claim resting upon no certainty whatever, but depending entirely upon guesses as to the amount which should be charged to each of them, and all the proof necessary to support such a claim will be, as in the present case, proof that credit was equally given to all the houses.

The cases relied upon in the able and ingenious argument of the plaintiff, Davis *v.* Farr, Harper *v.* Keely, Fitzpatrick *v.* Allen (30 Smith, 294), Rush *v.* Bank (2 WEEKLY NOTES, 263), Armbrust *v.* Galloway (2 Ib. 585), were all, without exception, cases of *adjoining* buildings, either actually adjoining, or constructively adjoining, in the sense that they were situated in the same block. All that was decided in Millett *v.* Allen (3 WEEKLY NOTES 374), was that separate apportioned claims may be filed when the materials have been indiscriminately furnished for several buildings. The case is but a confirmation of Davis *v.* Farr, Harper *v.* Keely, and the cognate cases. The record did not raise the question whether an apportionment could be made where the houses are in no sense adjoining, but situated in different blocks and separated by streets. Where materials are furnished to many houses, situated on different streets in different localities, it is certainly very easy to keep an account of the materials furnished for the different blocks, if not to the different houses. If a material man will not do so much as that, and seeks to apportion a large amount among different houses upon different streets, surely he ought to be prepared to show by measurement or by some similar proof what proportion of the materials was actually supplied to the house he seeks to charge. Otherwise, the practical result is that the apportionment is to be made according to his own arbitrary notions, without any regard whatever to the rights of owners, and that such an apportionment is to be supported by simply proving that lumber was furnished to the contractor upon the credit of all the houses under a single contract for a gross sum.

Judgment for the defendant on the point reserved *non obstante veredicto*.

Opinion by THAYER, P. J.

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Orphans' Court.

Feb. 23, 1881.

Lindsay's Estate.

Will—Direction to executors to set aside fund to yield annuity—Not required to enter security to protect residuary legatees unless insolvency or waste be shown—Constructive testamentary trust—Acts of Feb. 24, 1834, April 17, 1869, and May 17, 1871.

Sur exceptions to adjudication.

Joseph Lindsay, the testator, by his will, provided, *inter alia*, as follows:—

"I give and bequeath unto my sister-in-law so much of my estate as shall yield her an income of one thousand dollars per year during her natural life, and payable to her in quarterly instalments, commencing from the day of my death. After her death the part of my estate so set aside to revert back to my estate for the benefit of my residuary legatees."

He also enjoined upon his executors to appropriate sufficient of his estate to produce one hundred dollars a year to be expended in keeping a burial lot and vault in good order.

At the adjudication of the executors' account, the Auditing Judge directed them to set aside a sum which would be sufficient, when invested, to yield enough to meet the above annuity and charge.

The residuary legatees filed exceptions to the adjudication because the Auditing Judge had not therein directed security to be entered by the executors for the proper investment and safe-keeping of the fund in question.

Lockwood and *Sinn*, for the accountants.

William S. Price, for the residuary legatees.

March 19, 1881. THE COURT (after quoting the above provisions of the testator's will). The executors of the will are brother and sister-in-law of testator. Upon the adjudication of their account the Auditing Judge, *inter alia*, directed the setting apart of a sum sufficient to meet the annuity to the executrix, and the expense of preserving the cemetery lot in good order, the surplus income, if any, to be paid to the residuary legatees. Exceptions have been filed on behalf of the latter, because the Auditing Judge did not order and direct security to be entered by the executors for so much of the sum directed to be set apart and invested as is required to produce said annuity. It does not appear from the adjudication that any such request was made to the Auditing Judge and refused by him, nor has any award been made direct to the annuitant. She and her brother are considered as testamentary trustees, and they are jointly directed to set apart and invest the sum required for the purposes mentioned. After a careful examination of the will we think this was the intention of the testator, although inartificially expressed. The entire estate remaining after the payment of the debts is given to the executors with the duties enjoined upon them of paying the pecuniary and delivering the specific legacies, keeping the cemetery vault and lot in order, paying the premiums upon policies of life insurance, and finally to distribute the residue of the estate. The accountants, whether they are to be considered as executors or testamentary trustees, would not in either capacity be required to enter security, in the absence of proof of insolvency, waste, mismanagement or other circumstances prejudicial to the interests of those in remainder. In Sarah L. Keene's Estate (31 P. F. Smith, 133), there was a direct bequest to the legatee, one of three executors, and sole survivor at the death of the testatrix, of the sum of thirty thousand dollars, to be invested, the interest to be paid to her during life and after her death to her children, if any, but if she died without issue, the principal to go to her brothers for life, with remainder to their lawful issue. The auditor in that case adopted the view of the exceptants in the present instance, and reported distribution to the legatee for life, upon her giving security as required by the Act of Assembly, but our predecessor, ALLISON, P. J., held that an active trust was created, first for the legatee for life; second, for those contingently in remainder in several degrees, and therefore the surviving executrix could not be required to enter security. And the Supreme Court, in affirmance of this view, say: "Mrs. Mitchell, being herself an executrix, is not bound to give security for that which came into her hands, and cannot be required to give security to those in remainder." It is not strange that the residuary legatees, whose enjoyment of the bounty of testator may be postponed many years, should, solely as a precaution and without reflection upon the executors, desire to be protected against possible loss. And when there is a bequest of personal property, or the use of it for life or other limited period, or upon a condition or contingency, express provision has been made in behalf of those entitled in remainder. (Acts of February 24, 1834, April 17, 1869, and May 17, 1871, Purdon, 449, pl. 213, 214; Id. 452, pl. 231.) Yet, as we have already seen, executors in whom have been reposed trust and confidence, and, in the language of this testator, "without demanding or desiring any security," are not contemplated.

The exceptions are accordingly dismissed, and adjudication confirmed.

Opinion by HANNA, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, MAY 5, 1881.* [No. 3.

Supreme Court.

38 L. L 125

July, '79, 112, 101, 102, 103. January 21, 1881.

Appeal of Jordan and Porter, Assignees, etc.

Appeal of the First National Bank of Harrisburg.

Appeal of the Harrisburg National Bank.

Appeal of the People's Bank of Newport.

Equity—Bill of interpleader—When allowed—Assignment for the benefit of creditors—Drafts drawn before assignment but not accepted by the drawee—Effect of—Rights of creditor who has his money earmarked in a fund in the hands of an agent of the bank, as against the assignees for the benefit of creditors—Orders drawn by assignees—Effect of.

It is incumbent on a plaintiff in a bill of interpleader to show that he is ignorant of the rights of the respective parties who are called upon by him to interplead, or at least that there is a reasonable doubt in point of fact as to which claimant is entitled to the money, so that he cannot safely pay a fund in his hands to one without risk of being required to pay it again to another.

A firm in Baltimore, in accordance with its custom, sent certain checks to a bank in Harrisburg for collection. The bank entered the receipt of the checks on its books, and on the same day sent the firm a draft drawn on the Union National Bank of Philadelphia, its agent in that city, and forwarded the checks to said agent for collection. The following day the Harrisburg bank made an assignment for the benefit of creditors. The amounts of the checks were duly collected by the Philadelphia bank, and placed on its books to the credit of the Harrisburg bank. The draft was not presented until after the assignment, and was not accepted. In a contest between the assignees of the Harrisburg bank and the Baltimore firm, as to who was entitled to the fund in the hands of the agent:

Held, that the relation of the firm and the insolvent bank was that of bailor and bailee, and that as the money of the firm was found earmarked in the fund it was entitled to be paid in full.

Held further, that the fact of the firm presenting a claim before the assignees and a dividend being declared to belong to it in the distribution of the assets, which it never collected, would not estop it from collecting its draft out of the fund in the hands of the agent.

An unaccepted draft which does not designate that it is to be paid out of a particular fund, or that it is to operate as a transfer of a balance standing to the credit of the drawer in the hands of the drawee, will not work a legal or equitable assignment of a corresponding amount of the drawer's funds in the hands of the drawee.

If before acceptance or payment of such a draft, the drawer executes a voluntary assignment for the benefit of creditors, the funds in the hands of the drawee pass by the assignment, as assets of the insolvent's estate, to his assignees in trust for creditors, and the payee has no right of action against the drawee, nor can he claim the fund as against the assignees. The fact of the assignees subsequently giving the payee an order on the drawee for the amount of the draft will not permit its collection out of the fund. The order stands in no better position than the draft.

Appeals from the Common Pleas No. 3, of Philadelphia County.

No. 112. Appeal of Francis Jordan and Geo. W. Porter, assignees of the City Bank of Harrisburg.

No. 101. Appeal of the First National Bank of Harrisburg.

No. 102. Appeal of the Harrisburg National Bank.

No. 103. Appeal of the People's Bank of Newport.

The above were appeals from a final decree of said Court in a suit in equity in which the Union National Bank of Philadelphia were complainants, and the appellants, *inter alia*, respondents.

Bill in equity for an interpleader filed by the Union National Bank of Philadelphia, complainants, against Francis Jordan and George W. Porter, assignees of the City Bank of Harrisburg, the Harrisburg National Bank, the First National Bank of Harrisburg, the People's Bank of Newport, and H. Hopper & Co., defendants.

The bill set forth that the complainants were an incorporated banking association doing business in the city of Philadelphia; that the City Bank of Harrisburg, by a deed of general assignment, dated September 7, 1876, assigned, transferred, and set over unto Francis Jordan and George W. Porter all their property whatsoever in trust for the benefit of their creditors; that the complainants, having had business dealings with the City Bank of Harrisburg, at the date of the assignment held moneys for them on deposit, and still continued to hold the sum of $3003.90 standing to their credit upon complainants' books; that the City Bank of Harrisburg, before making the assignment, drew eight several drafts upon the complainants for a total sum of $4020.90, the tabular statement annexed showing the date of each, when presented, etc., but that said drafts had never been accepted by complainants; that the defendants, except the said Jordan and Porter, assignees, being holders of said drafts, on the one hand claimed the said fund, and had threatened to bring suit against complainants to recover the amount of their respective drafts, while the assignees of the City Bank of Harrisburg had, on the other hand, already brought suit to recover the said fund of $3003.90; that complainants were, and had at all times been

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ready and willing to pay the said sum of $3003.90 to whomsoever should appear to be entitled thereto; that by reason of the adverse claims the defendants ought to interplead touching their several rights, and be restrained by an injunction from proceeding in or commencing any action or actions at law against complainants in respect thereto. And the bill prayed, *inter alia*, that the defendants be directed to interplead, that the complainants be allowed to pay into Court the said sum of $3003.90, less their costs, etc., and that the defendants be restrained from proceeding in or commencing suits at law, etc. An affidavit was appended to the bill, setting forth that the facts therein contained were true.

A special injunction was granted in accordance with the prayer of the bill.

The assignees of the City Bank of Harrisburg demurred to the bill, on the ground that (1) the affidavit thereto attached did not deny collusion with any of the defendants; (2) that the bill did not aver that the complainants were not interested in the controversy; and (3) that the bill did not show sufficient ground of equity, there being no privity between the complainants and the draft-holders. The bill having been amended as to the first two particulars, the Court overruled the demurrer as to the third.

The assignees of the City Bank then filed their answer, alleging that this fund of $3003.90 was a balance due the City Bank on a current account between it and the complainants; that the complainants, having never accepted any of the drafts or orders, had never assumed any legal or equitable liability to said draftholders; that the assignees of the City Bank gave due notice of the assignment to the complainants, and, on demand, received of them an account in writing on September 27, 1876, showing a balance of $3003.90 to the credit of the City Bank on complainants' books, the payment of which the assignees then and at various times thereafter demanded, in their right as assignees; that none of said drafts were for the whole of said fund; that the assignees had not transferred to any one any portion thereof; that a dividend of $12\frac{52}{100}$ per cent. was paid the creditors of the City Bank on July 12, 1877, under a decree of the Court of Common Pleas of Dauphin County; that the Harrisburg National Bank, First National Bank of Harrisburg, and the People's Bank of Newport accepted the dividends allowed them respectively; that H. Hopper & Co. presented their claim, and a dividend of $28.91 was allowed them by said decree, which they had never received, because it had not been called for; that on or about December 6, 1877, the assignees brought suit to recover the said balance of $3003.90, and interest from September 27, 1876, the date of rendering said account; that the complainants had been negligent in filing their bill of interpleader, having so long retained possession of the fund, in spite of frequent demands upon them, whereby they had rendered themselves liable for interest thereon; and also that the liability of the complainants was still unliquidated, and that they were pecuniarily interested in the results of the suit, and that the suit was unnecessary and vexatious. The answer prayed that the pending injunction be dissolved, etc.

The answer filed by Hopper & Co. averred that they were the holders of one of the drafts mentioned in the bill. That the City Bank of Harrisburg, as their agent, collected their Pennsylvania drafts and checks, that in accordance with this custom, Hopper & Co., on the fifth day of September, 1876, sent to the bank nine checks for collection. Entries of these checks were duly made in the books of the bank on September 6, 1876, and on the same day the bank sent to Hopper & Co. the draft in question for the full amount of the checks, less costs of collection. These checks were duly collected by the Union National Bank, complainants, as agents for the City Bank of Harrisburg, and the amount thereof formed part of the fund in controversy.

The separate answers of the First National Bank of Harrisburg, and of the Harrisburg National Bank, admitted that the allegations of the bill were substantially correct, and averred that the respondents were the holders of some of the drafts mentioned in the bill. They claimed payment of the amount of their drafts, less the dividend already received by them from the assignees, as well on account of the drafts as by virtue of certain orders dated Nov. 2, 1876, and drawn by the assignees, directing the Union National Bank to pay to each of respondents the amount of their respective drafts. Of these orders they averred that the Bank complainants had due notice.

The answer of the People's Bank of Newport averred that they were holders of one of the drafts mentioned in the bill, and claimed that the amount was appropriated to them by virtue thereof less the dividend received from the assignees.

The Court ordered the fund to be invested in United States bonds *pendente lite*. Complainants filed a general replication to each of the answers, and the cause was referred to James Penn MacCain, Esq., as examiner and master.

The master found as a fact that the complainants were mere stakeholders, without any interest in the fund, and ready to pay it over to whomsoever it should be determined to belong. As to the other facts of the case he found them to be substantially as set forth in the bill and answers. He was further of opinion that the case was a proper one for an interpleader.

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As to the claim of Hopper & Co., he was of the opinion that they had traced the amount of their draft through the various steps of the transaction with the two banks, and that it was now found earmarked as part of the fund in controversy, and that, therefore, they were entitled to the full amount of their claim.

As to the claims of the First National Bank of Harrisburg, and the Harrisburg National Bank, he was of opinion that the drafts being given before the assignment for the benefit of creditors, coupled with the fact of the order of the assignees being subsequently given them, were circumstances sufficient to work an equitable assignment of the fund to the amounts of their drafts.

As to the People's Bank of Newport, he at first reported adversely, not thinking there was sufficient evidence of an equitable assignment in their case to justify their claim. Upon exceptions, however, he, after argument, concluded that they also had a just claim upon the fund.

He therefore ordered the costs to be paid out of the fund, awarded complainants $100 therefrom as counsel fee, awarded to Hopper & Co. the full amount of their claim, and directed the residue of the fund to be divided *pro rata* among the First National Bank of Harrisburg, the Harrisburg National Bank, and the People's Bank of Newport.

The assignees of the City Bank of Harrisburg filed exceptions to the finding of the master as regards the Union Bank of Philadelphia, and to his awarding the amounts of the drafts to the holders, and not awarding the whole fund to them as the assignees for the benefit of general creditors.

The Court, after argument, without delivering an opinion, entered a decree dismissing the exceptions as to the Union Bank of Philadelphia, and Hopper & Co., and sustaining them as to the First National Bank of Harrisburg, the Harrisburg National Bank, and the People's Bank of Newport, directing that half the costs should be paid by the latter banks, and half come out of the fund, and awarding the balance to the assignees of the City Bank of Harrisburg.

From this decree the assignees of the City Bank appealed, assigning for error, *inter alia*, the overruling of the demurrer to the bill, and the allowance of the claim of Hopper & Co.

The Peoples' Bank of Newport, the Harrisburg National Bank, and the First National Bank of Harrisburg also appealed, assigning for error the decree of the Court as above set forth, excluding them from participation in the fund and imposing upon them half the costs.

James S. Williams and *Hall* and *Jordan*, for the assignees of the City Bank, appellants in No. 112.

The bill is insufficient, because the only title shown in one set of claimants is merely the possession of unaccepted drafts which do not give them a right of action against the complainants either at law or in equity. A bill of interpleader must show that a privity subsists between the complainants and both classes of defendants or with neither of them; and it should not be permitted to lie where payment to one would effectually discharge the complainant from all liability to the other.

Shaw *v.* Coster, 8 Paige, 339.
Nickolson *v.* Knowles, 5 Madd. Ch. R. 47.
Darthez *v.* Winter, 2 Sim. & Stu. 536.
Wright *v.* Ward, 4 Russ. 215.
Finlay *v.* Am. Exch. Bank, 11 How. Pr. R. 468.
Badeau *v.* Rogers, 2 Paige, 210.
Bedell *v.* Hoffman, Id. 201.
Schuyler *v.* Pelissier, 3 Edw. Ch. 192.
Church *v.* Carr, 2 Barb. 60.
Lincoln *v.* Rut. & Bur. R. R. Co., 24 Vt. 640.
Glynn *v.* Locke, 3 Dru. & War. 11.

A mere pretext of title in one will not justify calling upon the other to interplead with him.

Story's Eq. Pl. § 292.
Cochrane *v.* O'Brien, 2 Jones & Lat. 380.

The bill must show a doubt *in point of fact* as to which of the defendants the debt or duty belongs.

Mohawk & Hud. R. R. Co. *v.* Clute, 4 Paige, 384.
Shaw *v.* Coster, 8 Id. 339.
Wilson *v.* Duncan, 11 Abb. Pr. R. 7.
Morgan *v.* Fillmore, 18 Id. 220.
U. S. Trust Co. *v.* Wiley, 41 Barb. 477.
Parker *v.* Barker, 42 N. H. 93.
Bowyer *v.* Pritchard, 11 Price Exch. R. 103.

The transaction with Hopper & Co. became a sale, when they accepted the City Bank's draft for their checks. The City Bank assumed the risk of collecting the checks, and Hopper & Co. having failed to give the Union National Bank notice of their claim of property in them, it was impossible to identify and earmark their proceeds after they had been mingled with other funds.

Thompson's Appeal, 10 Har. 16.
Stuyvesant Bank *v.* Nat. Mech's. Bank, 7 Lans. 197.
Bank of Metropolis *v.* New Eng. Bank, 6 How. 212.
The People *v.* M. & M. Bank, 78 N. Y. 269.
In re West of Eng. Bank, 40 L. T. Rep. (N. S.) 712.

By presenting their claim at the audit in 1877, and having a dividend awarded them, Hopper & Co. are estopped from claiming here under a different title.

Bigelow on Estoppel (2d ed.) 503, 508.
Adlum *v.* Yard, 1 Rawle, 163.
Burke's Estate, 1 Pars. Eq. 470.
Ralston *v.* Johnson, 5 Phila. 444.
Bispham's Prin. of Equity, § 304.
Farnham *v.* Burroughs, 1 Dickens, 63.

Henry Reed (*W. W. Wiltbank* with him), for Hopper & Co., appellees in No. 112.

The relation between Hopper & Co. and the City Bank was that of bailor and bailee; and the

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master has properly found as a fact that the proceeds of the checks are earmarked as a part of the fund in controversy. The dividend was awarded Hopper & Co. upon a mere inquiry by letter from them, and as they have never accepted it, other creditors have not been injured.

Charles Gilpin, for complainants in the bill, appellees in No. 112.

The complainants promptly rendered the account showing the balance in their hands. They were mere stakeholders, and always ready to pay to the parties decreed to be entitled to the fund.

The case was, therefore, a proper one for an interpleader.

George Tucker Bispham and *Robert Snodgrass* (*Wayne Mac Veagh* with them), for the First National Bank of Harrisburg, the Harrisburg National Bank, and the People's Bank of Newport, appellants in Nos. 101, 102, and 103.

By giving these drafts, prior to the general assignment for the benefit of creditors, the City Bank effected an equitable assignment *pro tanto* of the fund on deposit with the drawee.

Roberts *v.* Corbin, 26 Ia. 315.
McWilliams *v.* Webb, 32 Id. 578.
Kingman *v.* Perkins, 105 Mass. 111.
Blinn *v.* Pierce, 25 Vt. 29.
Munn *v.* Burch, 25 Ill. 40.
Anderson *v.* De Soer, 6 Gratt. 364.
Brooks *v.* Hatch, 6 Leigh, 542.
Wheatley *v.* Strobe, 12 Cal. 92.
In re Brown, 2 Story, 513.
Laubach *v.* Leibert, 6 Nor. 55.
1 Dan. Neg. Instr. § 19; 2 Id. §§ 1638, 1643, 1645.

The assignees cannot repudiate their orders of Nov. 2, 1876. They were a specific appropriation of so much of the City Bank's balance in the hands of the complainants.

Caldwell *v.* Hartupee, 20 Sm. 74.
Chase *v.* Petroleum Bank, 16 Id. 169.
Phœnix Iron Co. *v.* Philadelphia, 2 WEEKLY NOTES, 598.
Nesmith *v.* Drum, 8 W & S. 10.
Yeates *v.* Groves, 1 Ves. Jr. 281.
Row *v.* Dawson, 2 Lead. Cas. Eq. 1531.
Superintendent, etc., *v.* Heath, 2 McCarter's Eq. 27.

James S. Williams and *Hall* and *Jordan*, for the assignees of the City Bank, appellees in Nos. 101, 102, and 103.

Simple drafts or checks, as in this case, are merely executory mandates, which are revocable at any time before the drawee has committed himself to pay; and these were actually revoked by the drawer's general assignment on Sept. 7, 1876.

Bank of Mount Joy *v.* Gish's Assignees, 22 Sm. 13.
Carr *v.* National Sec. Bank, 107 Mass. 45.
Schroeder *v.* Central Bank of London, 34 L. T. Rep. 735.
Hopkinson *v.* Forster, L. R., 19 Eq. 74.
Cohen *v.* Hale, 3 L R. (Q. B. D.) 371.
Morse on Banking, p. 278–9.
Att'y.-Gen. *v.* Cont. L. Ins. Co., 71 N. Y. 325.
Rosenthal *v.* Mastin Bank, 21 Alb. L. J. 28.
Nat. Bank of Rockville *v.* Nat. Bank of Lafayette, 10 Reporter, 264.
In re Charles A. Smith, 15 Nat. B. R. 459.
Lunt *v.* Bank of North America, 49 Barb. 221
Dykers *v.* Leather Manufacturers' Bank, 11 Paige, 612.
Bullard *v.* Randall, 1 Gray, 605.
Tyler *v.* Gould, 48 N. Y. 682.
National Bank *v.* Eliot, 5 Am. L. Reg. 711.
Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82.
Bank of the Republic *v.* Millard, 10 Wall. 152.
Bank of Washington *v.* Whitman, 4 Otto, 343.
Loyd *v.* McCaffrey, 10 Wr. 414.

The orders of Nov. 2, 1876, are incapable of enforcement here, because there was no consideration for them; and had there been, they still lack the essential of an equitable assignment, namely, the specifying of a particular fund out of which they are to be paid.

Greenfield's Estate, 12 Har. 232.
Kennedy's Execrs. *v.* Ware, 1 Barr, 450.
Bispham's Prin. of Equity, § 167.
Story's Eq. Jur. § 1047, n. 2.
Hutter *v.* Ellwanger, 4 Lans. 9.
Brill *v.* Tuttle, 15 Hun. 289.

JORDAN AND PORTER'S APPEAL, No. 112. February 21, 1881. THE COURT. The facts disclosed by the bill, answers, and testimony were quite sufficient to give the Court jurisdiction in the present form of proceeding, and justify the decree from which this appeal is taken.

The Union National Bank of Philadelphia, as correspondent of the City Bank of Harrisburg, made collections and transacted business, which resulted in the credit balance of $3003.90 to the City Bank on the 7th day of September, 1875. The City Bank, having failed on that day, assigned all its property, credits, etc., in trust for creditors, to the appellants, who claimed the balance and immediately notified the bank not to pay any more drafts of the insolvent bank. On the eve of its failure, the City Bank gave to several of its creditors, including the Harrisburg National Bank, The First National Bank of Harrisburg, The People's Bank of Newport, and Hopper & Co., drafts as checks on the Union National Bank, aggregating over $4000, none of which were presented, payment thereof was refused, because of the drawer's insolvency. The holders, however, still insisted on payment of their respective drafts by the drawee, claiming that the drafts operated as an equitable assignment, or appropriation *pro tanto*, of the funds then standing to the credit of the drawer. In addition to this, Hopper & Co. claimed that the amount represented by their drafts was the proceeds of nine small checks, sent by them to the City Bank for collection, and by it forwarded to the Union National Bank for the same purpose. After considering the evidence bearing on this last point, the conclusion of the learned

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master, based, as we think, on sufficient testimony, was as follows, viz.: "The money of Hopper & Co. has thus been traced through the various steps of the transaction with the two banks, and is now found earmarked in the fund . . . at present in the custody of the Court." In addition to this, the respective claims of the Harrisburg National Bank, and the First National Bank of Harrisburg on the fund, were fortified, as they claimed, by the fact, that within less than a month after the assignment, the assignees gave each of them an order on the Union National Bank for the payment of their respective drafts. In view of these conflicting claims, the bank refused to pay either of the claimants until it was determined which of them was legally entitled to the money, or the parties themselves agreed upon some disposition of it that would not involve the bank in litigation. They each continued to insist on their respective claims and nothing was accomplished until December, 1877, when the assignees brought suit against the bank for the above-mentioned balance. The bill of interpleader, embodying the material facts in relation to the adverse claims on the fund, etc., was then filed by the bank, and finally resulted in the decree from which all the parties except the Union National Bank and Hopper & Co. have appealed. The claims of the three banks were allowed by the master, but rejected by the Court; that of Hopper & Co. was sustained, and the residue of the fund, less costs and expenses allowed to the bank, was decreed to appellants.

The demurrer to the bill was rightly overruled, and, in view of the circumstances which we have thus briefly outlined, we think the Court was clearly right in proceeding to make the decree complained of. For reasons that are quite sufficient, the claim of Hopper & Co. was sustained by both master and Court. The proceeds of their nine checks, intrusted to the City Bank for collection only, and by it transmitted to the Union National Bank for the same purpose, were clearly traced to the bank, and found to be a part of the very fund in controversy. The action of appellants themselves in ordering payment of drafts, held by the two Harrisburg banks, tended to complicate the matter, and rendered it at least doubtful, whether, in the end, these claims on the fund might not, as between the assignees and the banks, be adjudged valid. When the assignment was made, the assignees claimed the whole balance, and by their notice to the bank stopped payment of all checks or drafts of their insolvent assignor, and in a few weeks thereafter they gave the written order for the payment of the two drafts. The Union Bank might well suppose there was some consideration for this transaction, and deem it unsafe to pay the money until the claims of the several parties were settled.

It is doubtless incumbent on a plaintiff in a bill of interpleader to show that he is ignorant of the rights of the respective parties, who are called upon by him to interplead, or that there is, at least, reasonable doubt in point of fact, as to which claimant is entitled to the money, so that he cannot safely pay it to one without risk of being required to pay it again to the other. (Shaw *v.* Coster, 8 Paige, 339.) The facts found by the master, and established by the evidence, clearly bring the case within this principle; and in the bill, as amended, we discover no such imperfection as would have warranted the Court in adjudging it insufficient.

For the reasons given by the learned master, the substance of which has already been stated, the claim of Hopper & Co. was properly sustained. They were not estopped in consequence of having claimed a right to participate in the distribution of the general assets. They undoubtedly had such right by virtue of the draft they held, and there is no good reason why the fact of having asserted it should prevent them from following and identifying the proceeds of their own nine checks, if they were able to do so. They were not seeking to recover both the proceeds of their checks and a distributive share of the general assets. If they succeeded in obtaining the former, they, of course, had no intention of claiming the latter. Their contention was, that the proceeds of their checks was part of the fund in controversy, and, as regards that part, it did not belong to the assigned estate, but to them.

There is no error in that portion of the decree which relates to costs and expenses. The position occupied by the Union National Bank was analogous to that of a stakeholder. It admitted the correct balance, and was always ready and willing to pay the same to the party or parties entitled thereto, whenever it could be done without loss or risk of litigation. It derived no interest or benefit from the money. By direction of Court it was invested pending the proceedings to determine which of the adverse claimants was entitled to recover it, and the increase, of course, enures to the benefit of those who are entitled to the principal. In view of all the circumstances, the decree was right. It would have been inequitable to have imposed on the bank any part of the costs or expenses of a controversy which it had no hand in creating, and in which it had no other interest than that of self-protection.

Decree affirmed and appeal dismissed at the costs of the appellants.

Opinion by STERRETT, J.

FIRST NATIONAL BANK OF HARRISBURG'S APPEAL; HARRISBURG NATIONAL BANK'S APPEAL, Nos. 101 and 102. THE COURT. The draft or

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check which the City Bank, on the eve of its insolvency, drew on the Union National Bank, of Philadelphia, in favor of appellant, was in the ordinary form of such instruments; and there was no evidence *aliunde* that it was designed to have any other than its ordinary legal effect. It designated no particular fund out of which it was to be paid, contained no words importing a transfer of the whole or any part of the balance then standing to the credit of the drawer, nor did it even correspond in amount with that balance. It is well settled that such a check or draft, without more, is neither a legal nor equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. It gives the payee no right of action against the drawee, nor any valid claim to the funds of the drawer in his hands. If before acceptance or payment of the draft, the drawer executes a voluntary assignment for the benefit of creditors, as was done in this case, the funds in the hands of the drawee pass by the assignment as assets of the insolvent's estate to his assignees in trust for creditors. (Lloyd *v.* McCaffrey, 10 Wright, 410; Bank of Mount Joy *v.* Gish's Assignees, 22 P. F. Smith, 13; Bispham's Prin. of Equity, sect. 167; Morse on Banking, 278–279, 470; Carr *v.* The National Security Bank, 107 Mass. 45; Attorney-General *v.* Continental Life Ins. Co., 71 N. Y. 325.) In Bank of Mount Joy *v.* Gish's Assignees, *supra*, the principle involved in the present case was distinctly recognized and applied; and if it were necessary, numerous authorities to the same effect might be cited. In the case above cited from 71 N. Y. 325, the insurance company, in payment of a loss, had given its check on a banking institution in which it then had funds on deposit, more than sufficient to meet the check, but before it was presented the insurance company failed, and its receiver withdrew all the funds. In an opinion by Chief Justice Church, in which many authorities are collected and discussed, it was held that the check, not having been drawn on a particular fund, did not operate as an equitable assignment *pro tanto* of the money on deposit; and that the claim having been only liquidated, not paid, when the insurance company failed, and went into the hands of the receiver, whereby the rights of all creditors became fixed, the payee of the check was not entitled to payment out of the funds which the receiver had withdrawn from the bank, in preference to the general creditors. The authorities, both American and English, are quite uniform in holding that, until a check or inland bill of exchange, drawn in the ordinary form, is presented and accepted, it vests in the payee no title, legal or equitable, to the funds of the drawer on deposit with the drawee.

Before acceptance, he may withdraw his funds or stop payment of the check. The drawee is under no obligation to the payee or holder. Knowledge of the fact that checks have been drawn, does not render it obligatory on him to retain the deposit to meet them. These principles are indispensable to the safe transaction of commercial business. Their non-observance would frequently involve banking institutions and other depositories of money in responsibilities to conflicting claimants, and thus result in great embarrassment and loss, without any compensating advantage.

It was also claimed that the order of November 2, 1876, given by the assignees on the Union National Bank, directing payment of the draft held by appellant, operated as an assignment or equitable appropriation of a corresponding amount of the fund, but, in the light of the facts, it is difficult to see how the order could be any more effective for this purpose, than the draft itself. It was not negotiable nor did it purport to have been given for value, and in point of fact, it was without consideration. This of itself, is a sufficient answer to any claim based on the order.

There is no fact or circumstance connected with the giving of the check by the City Bank, or the order subsequently given by the assignees, upon which appellant can base a valid claim to any part of the fund. We discover no error in the decree made by the learned Court below.

Decree affirmed and appeal dismissed at the costs of appellant.

Opinion by STERRETT, J.

PEOPLE'S BANK OF NEWPORT'S APPEAL, No. 103. THE COURT. There is no material difference in principle between this case and that of the First National Bank of Harrisburg, just decided. In that case some reliance was placed on a fact, which does not appear in this case, viz., that the assignees of the City Bank had given an order on the Union National Bank, directing payment of the draft held by the First National Bank of Harrisburg, but, as we have seen in that case, the order was without consideration, and gave the bank no better claim on the fund, than it had before.

For reasons given in the case referred to, there is no error in the decree of the Court below.

Decree affirmed and appeal dismissed at costs of appellant.

Opinion by STERRETT, J.

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Jan. '81, 171. February 23, 1881.

Mitchell v. Steinmetz.

Vendor and vendee—Auction sale—Equity—Specific performance—Sale of ground-rent when premises out of which it is reserved are burdened by liens for taxes, etc.—Unmarketable title—What held to constitute.

A court of equity will never decree specific performance in favor of a vendor unless he is able to offer a title marketable beyond a reasonable doubt, nor against a vendee where he is able to show any circumstances which would make it unconscionable to do so.

A. exposed at public auction sale a ground-rent which was purchased by B. The terms were "cash on execution and delivery of the deed within fifteen days." The deed was duly executed and tendered, but B. refused to accept it on the ground that he had discovered since the sale, for the first time, that the land out of which the rent issued was heavily encumbered by municipal claims. In an action of assumpsit by A. against B. to recover damages for B.'s failure to comply with his contract, in which action it was agreed that the Court should "exercise as full equitable powers as if a bill in equity had been filed for specific performance of the contract:"

Held, that the circumstances of the case were not such as would warrant a court of equity in decreeing specific performance, and that therefore the defendant was entitled to judgment.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit by Joseph E. Mitchell and Mary A. his wife, in right of said wife, against Jacob Steinmetz. The facts as set forth in a case stated were substantially as follows:—

The said Mary A. Mitchell being the owner of a certain ground-rent of one hundred dollars per annum, reserved by deed dated July 12, 1864, on certain premises in the Twenty-fourth Ward of Philadelphia, on December 2, 1879, exposed said rent to public sale at the auction rooms of M. Thomas & Sons. The agent of defendant bought the same for $1600, the terms of sale being "cash on the execution of the deed within fifteen days from sale." A deed was duly executed by plaintiffs containing the usual covenants, and duly tendered to the defendant within the specified time. He refused, however, to accept it on the ground that, although the rent itself was unencumbered, there existed at the time of sale and still existed liens against the premises out of which said rent issued for taxes and municipal claims to the amount of $1684.79, together with interest and costs, of which liens defendant had, at the time of sale, had no notice, and which he had only discovered through searches taken out by him subsequent to said sale. The assessed value of the premises out of which said rent issued was at the time of sale $3300. The case stated further provided that the Court was to have authority to draw any inferences from the facts which a jury might draw, and to exercise as full equitable powers as if a bill in equity had been filed for specific performance of the contract of sale. If the Court were of opinion that the defendant was not bound to accept the conveyance, then judgment was to be entered for defendant. If they were of opinion that plaintiffs were entitled to recover of defendant the loss sustained by them by reason of defendant's non-fulfilment of his contract, then judgment was to be entered for plaintiffs in the sum of fifty dollars. The Court, after hearing, entered judgment for the defendant. Plaintiffs took this writ, assigning for error the entry of judgment for defendant on the case stated.

A. Sydney Biddle and *George W. Biddle*, for plaintiff in error.

The rent is a wholly different estate from the land out of which it issues.

Robb *v.* Beaver, 8 W. & S. 127.

Defendant cannot therefore object to the encumbrances on the ground as affecting the marketability of the rent. At any rate the amount of the encumbrances and the amount paid for the rent ($1685+$1600=$3285) were less than the assessed value of the premises. It is, therefore, clear that the vendee cannot refuse the title on this ground. Besides the liens were duly registered before the sale, and the vendee had therefore constructive notice of them. There is nothing in the present case which would cause real *bona fide* hesitation on the part of a Chancellor in decreeing specific performance.

Dalzell *v.* Crawford, 1 Pars. 37.
Staplyton *v.* Scott, 16 Ves. 272.
Berioley *v.* Carter, L. R. 4 Ch. 230.
Anshutz *v.* Miller, 2 WEEKLY NOTES, 549.

J. Sergeant Price, for defendant in error.

The liens with interest and costs aggregate $2184.79. The title to the ground-rent therefore is clearly unmarketable. The defendant is not therefore obliged to accept this title, because a court of equity will not enforce specific performance of a contract for the sale of real estate unless the vendor is able to offer a title which is marketable beyond a reasonable uncertainty. It must be not only a good title, but one which beyond a doubt will not involve the purchaser in difficulties either in point of law or fact.

Swain *v.* Fidelity Ins. Co., 4 Sm. 458.
Dalzell *v.* Crawford, 1 Par. Eq. Cas. 37.
Nicol *v.* Carr, 11 Cas. 381.
Colwell *v.* Hamilton, 10 W. 416.
Bumberger *v.* Clippinger, 2 W. & S. 311.
Speakman *v.* Forepaugh, 8 Wr. 363.
Wilson *v.* Cochrane, 10 Id. 229.
Doebler's Appeal, 14 Sm. 17.
Swayne *v.* Lyon, 17 Id. 436.
1 Sugden on Vendors, 337, 386–401.
Drewe *v.* Corp, 9 Ves. Jr. 368.
Freetly *v.* Barnhart, 1 Sm. 279.

The Act of Feb. 3, 1824, gives the lien for taxes, etc., priority to any "mortgage, judgment,

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debt, obligation, or responsibility which the said real estate may become charged with or liable to" after the passage of the Act.

Purd. Dig., 1084, § 1.
Pennock *v.* Hoover, 5 R. 291.
Kenege *v.* Elliott, 9 W. 262.

The very nature of a ground-rent shows that it is an "obligation or responsibility" within the scope of the Act.

Cadwallader on Gd. Rts. §§ 99, 193, 463.
Whitaker *v.* Brown, 10 Wr. 199.
Robb *v.* Beaver, 8 W. & S. 124.
Salter *v.* Reed, 3 H. 263.
Bosler *v.* Kuhn, 8 W. & S. 184.
Railroad Co. *v.* Morrison, 5 Phila. 515.
Gibber *v.* Smith, 2 Id. 84.
Brown *v.* Johnson, 4 R. 146.
Shoenburger *v.* Lyon, 7 W. & S. 184.
Phillips *v.* Bonsall, 2 Binn. 142.
Moroney *v.* Copeland, 5 Wr. 407.
Ingersoll *v.* Sergeant, 1 Whar. 336.

And the lien for taxes, etc., will not be discharged by any judicial sale, unless the proceeds are sufficient to pay them.

Act of March 11, 1846, Purd. Dig. 1089, § 29.

It makes no difference that the Act of Jan. 23, 1849 (Purd. Dig. 752, § 17), prevents a sale for non-payment of taxes from divesting the ground-rent; the lien is still there to prevent any one from improving the estate.

Perry *v.* Brinton, 1 H. 202.
Phila. *v.* Meager, 17 Sm. 345.

March 21, 1881. THE COURT. This proceeding, though in form an action at law, is in substance a bill for specific performance, and must be so treated. The case stated expressly provides, that the Court shall "exercise as full equitable powers as if a bill in equity had been filed for specific performance of the contract of sale."

The case briefly stated is this: The defendant purchased of the plaintiffs, at public auction, a ground-rent of $100 per year (par $1666.66), for the price or sum of $1600. The defendant's conveyancer procured searches against the premises out of which the rent issued, and found the same encumbered by municipal claims and taxes to the extent of $1684.79, and for this reason refused to take title to the ground-rent. The rent itself was not encumbered, but defendant alleges that the liens referred to, together with the ground-rent, equal if they do not exceed the value of the land.

A decree for specific performance is of grace, not of right. It will never be made in favor of a vendor, unless he is able to offer a title marketable beyond a reasonable doubt, nor against a vendee when he is able to show any circumstances which would make it unconscionable to do so. We need not review the decisions upon this subject. It is sufficient to refer to Colwell *v.* Hamilton (10 Watts, 413); Bumberger *v.* Clippinger (5 W. & S. 311); Dalzell *v.* Crawford (1 Pars. Eq. Cases, 37); Nicol *v.* Carr (11 Casey, 381); Speakman *v.* Forepaugh (8 Wright, 363); Swain *v.* Fidelity Ins. Co. (4 P. F. S. 455); Doebler's Appeal (14 Id. 9); Swayne *v.* Lyon (17 Id. 436).

It was urged, however, that the present contention is not within the cases cited, for the reason that the rule referred to applies only to a marketable title, while the defendant's objection is not to the title to the ground-rent, but to that of the ground out of which the rent issues, in other words, that the objection goes not to the validity of the title to the rent, but to its value as a security.

A ground-rent is an estate carved out of the land. The owner of the one has an estate in the rent; the other an estate in the land. Both are real estate, and subject alike to be encumbered by mortgage and judgment. While we have these two separate estates, they are, at the same time, inseparably connected. The rent issues out of the land, and the owner of the latter holds his estate subject to the rent. It needs but this brief statement of the nature of a ground-rent to show that the title thereto is indissolubly connected with the title of the land itself. To make the title to such land marketable, the title to the land out of which it is reserved must be marketable, otherwise we would have a rent reserved out of nothing.

What are the facts here? The land is heavily encumbered by municipal claims and taxes, which, by Act of Feb. 3, 1824 (P. L. 18), are made prior to all other liens and encumbrances. A judicial sale for the arrears of ground-rent, or upon any other encumbrance, will not discharge the lien of the taxes, unless the property brings enough to pay them. See Act of March 11, 1846 (P. L. 114). It is manifest, therefore, that this ground-rent is worthless, or its value greatly impaired by reason of the liens upon the land out of which it issues. These liens affect the title to the land, and whatever impairs the title to the land necessarily impairs the title to a rent issuing out of the land.

If the title to the land fails, the title to the rent falls with it. I presume it will be conceded that if this ground-rent had been subject to a prior mortgage on the land equal to the value of the latter, the title to the rent would have been worthless. In what respect does such case differ from the one in hand? In either event, the rent is subject to a paramount lien upon the thing out of which it issues, and which necessarily sweeps away the title to both. This, of course, has no reference to liens upon the land which do not affect the rent.

We are of opinion the Court below committed no error in entering judgment for the defendant upon the case stated.

Judgment affirmed.

Opinion by PAXSON, J.

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Jan. '81, 143. February 23, 1881.

The Lycoming Fire Insurance Company v. Brierly.

Mutual fire insurance companies—Act of May 1st, 1876, Sect. 56, relating thereto—Certificates filed under the Act as prima facie evidence—Affidavit of defence—Averment of claim.

Where assessments were made upon a premium note, given to a mutual fire insurance company, which contained a promise to pay the sum of $2000 "in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require," and a suit was brought to recover the amount of the assessments so made, the plaintiff filed, together with a copy of the note, a certificate of the character provided for in the Act of May 1, 1876, sect. 56 (P. L. 67), bearing the seal of the company, and signed by the president and secretary of the said company, averring the amount of the assessments so claimed:

Held, that the papers filed were not of such a character as to entitle the plaintiff to judgment for want of an affidavit of defence.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit by the Lycoming Fire Insurance Company against Byron Brierly, to recover two assessments, amounting together to the sum of five hundred dollars, levied by the said company upon a premium note of the said Brierly, held by them.

The plaintiff filed a copy of the note upon which suit was brought, which was as follows:—

$2000.

For value received in Policy No. 2293, risk commencing the 26th day of July, A. D. 1879, issued by the Lycoming Fire Insurance Company, I promise to pay to said company, or their treasurer for the time being, the sum of two thousand dollars, in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require. Witness my hand, at Philadelphia, the 26th day of July, A. D. 1879.

BYRON BRIERLY.

The plaintiff also filed two certificates prepared under the Act of May 1, 1876, sec. 56 (P. L. 67), the first of which was as follows:—

This certificate of the Lycoming Fire Insurance Company (being a mutual fire insurance company), duly incorporated, witnesseth: That on the 15th day of April, 1880, an assessment, No. 39, has been made by said company upon the premium note of Byron Brierly, of Germantown, county of Philadelphia, Pennsylvania, a member of said company, insured under policy No. 2293, dated the 26th day of July, 1879, amounting to two hundred and fifty dollars. And that the amount due is two hundred and fifty dollars.

Signed by the President, and attested by the Secretary of the said Lycoming Fire Insurance Company, who have affixed hereto the corporate seal of the same, at their office in Muncy, Pennsylvania, the 3d day of December, 1880.

{SEAL OF THE COMPANY.}

W. P. J. PAINTER, *President.*

Attest, JAMES M. BOWMAN, *Secretary.*

The second certificate recited that an assessment, No. 40, of $250, had been made by the said company upon the note of the said Brierly, on May 14, 1880, and was, in other respects, identical with the foregoing.

The 56th section of the Act of May 1, 1876 (P. L. 67), relating to mutual fire insurance companies, under which the plaintiff in this case filed the above certificates, together with the premium note, is as follows:—

"The certificate of any mutual fire insurance company, now in existence or hereafter incorporated, signed by the president and attested by the secretary of such company, with the seal affixed, setting forth that an assessment has been made upon the premium note or notes of any member, and the amount due by such member upon such note or notes, shall be *prima facie* evidence thereof in all the courts of this Commonwealth. But in all cases now pending or hereafter instituted, in any of the courts of the Commonwealth against any member of any such company, in which such member has, or may hereafter, within the time prescribed by law, file an affidavit setting forth that he, she, or they has or have already paid his, her, or their proportion of the loss for which the assessment was levied, or that the assessment was for more money than is necessary to pay the loss and necessary expenses of said company, or that his, her, or their signature or signatures was or were obtained by the practise of fraud, or false or fraudulent representations, such certificate shall cease to be evidence of anything whatever, and said company shall be compelled to prove its claim as other claimants do; and all acts or parts of acts, or charters or parts of charters, inconsistent herewith, are to such extent repealed."

The defendant filed an affidavit of defence, in which he suggested that the instrument filed by the plaintiff was not such an one as to entitle the plaintiff to judgment for want of an affidavit of defence. The plaintiff then obtained a rule for judgment for want of a sufficient affidavit of defence, which rule was subsequently discharged by the Court.

The plaintiff thereupon took this writ, assigning for error the action of the Court below in discharging the rule for judgment for want of a sufficient affidavit of defence.

T. Dimner Beeber, for plaintiff in error.

The plaintiff's right to judgment depends upon two questions. *First.* Was the copy of the note filed an instrument in writing for the payment of money under the second section of the Act of March 28, 1835 (Purd. Dig. 495)?

Second. Was the copy of the certificate filed sufficient evidence of the amount due on the note to entitle the plaintiff to judgment for want of a sufficient affidavit of defence?

There can be no doubt that the above note is an instrument in writing for the payment of money. The fact that the exact amount to be paid at any particular time is uncertain, can make no difference; for an averment respecting the amount claimed would be sufficient.

Imhoff *v.* Brown, 6 Casey, 504.

It is not denied that the certificates filed in

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this case are in the form prescribed by the Act of 1876. The Legislature plainly meant to say that in all ordinary cases the certificate under the seal of the company was to be *prima facie* evidence of the amount due on the note. The note left the exact amount, demandable at any one time, uncertain or unknown. The certificate declares that an assessment has been made upon the note, and that the amount so assessed is due. This is, in effect, an averment or statement respecting the extent of the plaintiff's claim and his right to sue.

Imhoff *v.* Brown, *supra.*

William C. Gross, for defendant in error.

It cannot be said that this note contains an unconditional promise to pay. It lacks certainty as to amount and as to time. It is not negotiable. And the Courts of this State have held that "an instrument of writing for the payment of money, to enable the plaintiff to have summary judgment under the Act, must be *positive* and *unconditional.*"

Dugan *v.* Loyd, 2 Miles, 259.
Artisan Loan Association *v.* Noris, 1 WEEKLY NOTES, 110.
Barnstine *v.* Gavaghan, Ibid. 506.
Gercke *v.* Montgomery, 6 Ibid. 238.

Neither do the certificates of assessment filed with the note bring the plaintiff within the Act of March 28, 1835. They are not the instruments upon which this suit is brought, nor are they part of the note. And, "where, by the instruments sued on, the defendant's liability is not absolute, but depends on the happening of a contingency, proof of its having happened cannot be supplied by averment."

Dickerson *v.* McCausland, 3 WEEKLY NOTES, 327.

March 7, 1881. THE COURT. It doubtless would be very convenient for mutual insurance companies to be able to obtain judgments for want of an affidavit of defence by filing with the premium note the certificates of assessments which, by the Act of May 1, 1876, are made *prima facie* evidence. But to hold so, would be to import a new provision into the affidavit of defence law, under which it has always been held that the bond, note, or other instrument sued upon must be such that the jury can give a verdict upon it alone without other evidence. The most that has been allowed has been an averment of demand, where that was necessary to entitle the party to interest at any particular rate, or as to the extent of his claim. (Bank *v.* Thayer, 2 W. & S. 443; Imhoff *v.* Brown, 6 Casey, 504.) Here facts independent of the note must be proved, and the plaintiff cannot file the evidence of such facts to compel the defendant to show his hand and answer to it.

Writ of error dismissed at the costs of the plaintiff, without prejudice, and record remitted.

PER CURIAM.

Jan. '81, 113. February 24, 1881.

The Camden and Philadelphia Steamboat Ferry Co. v. Monaghan. [No. 1.]

Negligence — Contributory negligence — Finding of referee — When conclusive — Act of May 14, 1874.

A passenger in a ferry boat was standing at the door inside the cabin while the boat was approaching the landing. The boat entered the slip without touching the piles on either side but struck the bridge with such force as to throw the passenger to the ground, whereby she sustained an injury. In an action by her against the ferry company to recover damages for the injury:

Held, that the plaintiff had not been guilty of contributory negligence.

The above case, having been submitted to a referee under the provisions of the Act of May 14, 1874, and having been finally removed to the Supreme Court on error:

Held, that it was not the province of that Court to review the referee's finding of negligence on the part of the defendant or his assessment of damages. Those are exclusively matters of fact as to which the referee's conclusions are to be treated as the verdict of a jury.

SHARSWOOD, C. J., dissents.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Bridget Monaghan against the Camden and Philadelphia Ferry Company to recover damages for injuries sustained by plaintiff while a passenger on defendant's boat, by reason of the alleged negligence of defendant's servants.

By writing filed it was agreed that the case should be submitted to the decision of Francis Rawle, Esq., as referee, under the Act of May 14, 1874, and that the said referee should file with his report a copy of the evidence which should be adduced before him, the right of a writ of error or appeal from the decision of said referee being reserved to each of the parties.

The facts as found by the referee in his report, filed November 18, 1880, were as follows:—

"The defendant is the owner of a line of ferry-boats plying between Philadelphia and Camden, N. J., in connection with the railroad line from Cape May, N. J., to Philadelphia. The plaintiff, a single woman of over forty years of age, on the evening of March 20, 1880, at about half past six o'clock, was a passenger on one of defendant's ferry boats on her way from Cape May to Philadelphia, having duly paid her fare between those two places. As the ferry boat on which she was travelling approached the Philadelphia slip, the plaintiff, in common with her fellow passengers, stood up ready to go on shore as soon as the boat landed; she moved towards the front of the boat, and, when the boat struck the bridge of the slip, was standing at the forward part of the cabin just inside the door. The

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door was a loose door, swinging freely both ways. Half of the door was open, and the plaintiff stood in front of this half; the other half was closed but not fastened. The sill of this door was an unusually high one, but of the kind that is common and necessary on ferry boats to keep water out of the cabin. The night was clear; there was a breeze, but not a strong one, blowing up the river; there was no unusual tide running. The boat ran into the slip without touching the piles on either side, and struck the bridge with such force as to throw the plaintiff down; in falling she struck the door sill, and sustained the injuries for which she brought this suit. They consisted of a fracture of the lower end of the fibula and a severe sprain about the ankle-joint." It was in evidence that plaintiff was the only passenger thrown down, though another only saved herself by clutching a post. The referee found that the defendant's ferry boat on the night in question was so negligently and carelessly conducted by the defendant's servants, as to bump into the bridge at the landing with sufficient violence to throw down the plaintiff and cause thereby, directly, the injuries for which she brought this action. Also that plaintiff was legally free from fault, and that the sole legal cause of her injuries was this negligence on the part of the defendant.

As to the question of damages, the referee found that the effect of the injuries would to a large extent be permanent, and reduce for the rest of her life, plaintiff's ability to support herself in her ordinary occupation; and therefore fixed her damages at $3200.

Defendant filed exceptions to this report on the ground, *inter alia:* 1. That there was no evidence to justify the finding that the boat "struck the bridge with such force as to throw the plaintiff down. In falling she struck the door sill"; the evidence being that owing to the position in which the plaintiff stood, the jar of the boat caused her to fall over the sill.

2. That there was no evidence to justify the finding that there was no contributory negligence on the part of the plaintiff, and that she did nothing that was not prudent, customary, and proper, there being no evidence that it is either prudent, customary, or proper for passengers on a ferry boat to stand just inside the sill of the cabin door, where a slight jar is likely to throw them down as the boat enters the dock. On the contrary, the fact that the plaintiff was the only passenger thrown down, was persuasive evidence that her position was the real cause of the accident.

3. That even if plaintiff was entitled to recover, the damages awarded were grossly excessive, and no justification for the amount is found in the evidence.

The Court, after hearing, dismissed the exceptions, and entered judgment for the plaintiff (see 9 WEEKLY NOTES, 368), whereupon defendant took this writ, assigning for error, *inter alia*, the dismissal of the exceptions to the referee's report above cited, and the entry of judgment for the plaintiff.

Wayne Mac Veagh and *G. T. Bispham*, for plaintiff in error.

There being no doubt as to the acts bearing upon the question of negligence, or the inferences to be drawn from them, the question is one of law for the Court, and is, therefore, properly reviewable in this Court.

Goshorn *v.* Smith, 8 WEEKLY NOTES, 289.

There was such contributory negligence on the part of defendant in error as should have barred her recovery. Her attitude and location, being unreasonable under the circumstances, brings her within the ruling of cases where the negligence of the passenger bars any recovery.

Penna. R. R. Co. *v.* Zebe, 9 Casey, 326.

Pittsburgh & Connellsville R. R. Co. *v.* McClurg, 6 Sm. 297.

Theo. Cuyler Patterson, for defendant in error.

The facts found by a referee under the Act of May 14, 1874, are not reviewable either by the Common Pleas or Supreme Court.

Lee *v.* Keys, 7 Norris, 175.

In order to defeat recovery of damages for defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury; in other words, it must be its judicial cause, and not merely one of its conditions.

Wharton on Negligence, § 303.

Pass. Railway *v.* Boudrou, 8 WEEKLY NOTES, 241.

March 14, 1881. THE COURT. The referee has found as a fact that the plaintiff in this action was not guilty of contributory negligence in the accident which caused her injury. The only escape from the effect of this finding would lie in the proposition that the undisputed facts of the case establish negligence *in se* on her part. To this point, therefore, the argument of the learned counsel for the plaintiff in error is directed. We find ourselves quite unable, however, to assent to his conclusions. The plaintiff below was a passenger by the defendant's ferry-boat from Camden to Philadelphia. As the boat approached the wharf she arose from her seat, along with the other passengers, and at the moment of the collision she was standing at the forward part of the cabin, just inside the door. The boat entered the slip without touching the piles on either side, but struck the bridge with such force as to throw the plaintiff down and produce the injury complained of. Of course, it is true that if she had remained in her seat she would not

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have been injured, but it does not necessarily follow that her act of leaving her seat was contributory negligence. Had she occupied a manifest place of danger, as, for instance, a position very near to the end of the boat where there was no railing, and been precipitated into the water by the shock of the collision, the contention of the defendant would be much more appropriate, and would, perhaps, be conclusive against her. But the position she was in at the moment of the accident was not one of apparent danger at all. She was inside the cabin near the door, in a place, and in an attitude apparently of perfect safety. It is the uniform habit of persons riding on steamboats to be upon their feet at will while the boat is in motion, and especially as it approaches the landing. It is one of the most comfortable and satisfactory features of steamboat travel that passengers are at liberty to move about from place to place on the vessel while it is in motion. It was not shown by any testimony in this case that there was any liability to danger in the position of the plaintiff at the time of the accident.

The referee finds that she acted as prudent people do in like circumstances, and his conclusion in this respect is so plainly in accordance with universal experience that it is impossible for us to find any error in it. We are clearly of opinion that the referee was correct in his finding that the plaintiff was not guilty of contributory negligence. This disposes of the case, because we do not consider it within our province to review either the finding of negligence of the defendant, or the assessment of damages. Those are exclusively matters of fact as to which the referee's conclusions are to be treated as the verdict of a jury, and are not subject to review in this Court, except where in a common law trial, before a jury, the assignment of error is such as can be heard and determined. (Jamison *v.* Collins, 2 Norris, 359; Lee *v.* Keys, 7 Norris, 175.) We see no error in this record.

Judgment affirmed.

Opinion by GREEN, J. SHARSWOOD, C. J., dissents.

Jan. '81, 113. March 19, 1881.

The Camden and Philadelphia Steamboat Ferry Co. v. Monaghan. [No. 2.]

Practice—Act of 25 May, 1874—When writ of error will not be deemed as taken for delay.

Rule for damages under Act of 1874.

This was an action to recover damages sustained by defendant in error through plaintiff in error's negligence. The referee found for plaintiff below, upon which finding judgment was entered by the Court below. On writ of error the judgment was affirmed on March 14, 1881. The opinion of the Court was delivered by GREEN, J. SHARSWOOD, C. J., dissenting.

The defendant in error then took a rule to show cause why damages and costs under the Act of May 25, 1874, should not be allowed; alleging, generally, in the affidavit that the writ of error had been taken for delay.

T. Cuyler Patterson, for the rule.

[SHARSWOOD, C. J. Do you think that you can maintain your rule when the record shows that there was a dissent?]

No dissenting opinion was filed, and the facts entitle the defendant in error to the rule.

Bispham, contra, was not called on.

PER CURIAM. Where, as here, there has been a dissent from the affirmance of the judgment, the writ of error cannot be deemed as having been taken for delay.

Rule discharged.

Jan. '81, 13. Jan. 4, 1881.

Taylor's Appeal.

Power of revocation—Will—When disposition in will not referring to power will take effect as a revocation.

A deed of trust conveying real estate contained a proviso that "it shall and may be lawful for the said grantors, and the survivor, by any writing or writings under their hands and seals, or under the hand and seal of the survivor of them, to revoke" the said trusts and declare new uses of the subjects thereof:

Held, that a will of the surviving grantor, whereby he devised the said real estate upon other trusts, but which contained no reference to the former deed of trust or power of revocation contained therein, would operate as a sufficient execution of said power.

Error to the Common Pleas No. 1, of Philadelphia County.

Bill in equity between Maria L. Taylor, complainant, and Elizabeth E. Smiley, defendant.

The facts of this case, together with the arguments of counsel, and the opinion of the Court below, are fully reported in 9 WEEKLY NOTES, 30, *q. v.*

Complainant took this appeal, assigning for error the dismissal of her bill by the Court below.

J. Alexander Simpson, for appellant.

Benjamin Daniels (*Joseph M. Pile* with him), for appellee.

January 17, 1881. THE COURT. The decree in this case is affirmed upon the opinion of the learned President of the Court below.

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM.

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Common Pleas—Equity.

C. P. No. 3. Dec. 14, 1880.

In re Estate of Sarah Vinton.

Stocks — Dividends — Trust estate — Dividends arising from the sale of gas-mains, pipes, lamps, etc., of a gas company—Respective rights of the tenant for life and the remainderman to such dividends—What are profits and what is capital.

Sur exceptions to auditor's report.

From the report of the auditor appointed to audit, etc., the account of the Penna. Co. for Insurances on Lives, etc., trustees for Sarah Vinton, under deed of trust of Jas. Martin, the following facts appeared: By deed of trust dated May 19, 1856, Jas. Martin assigned and set over to the above-named trustees, one hundred shares of the capital stock of the St. Louis Gas Light Co. in trust to receive all issues, profits, and dividends accruing therefrom, and to pay over the same to Sarah Vinton during her natural life, and after her death to transfer said stock to Frederick Vinton, or his legal representatives.

The St. Louis Gas Light Co. was incorporated by Act of the General Assembly of Missouri, Feb. 4, 1833, its objects, as stated in the preamble, being to erect works for supplying the city with gas for lighting the city, and for supplying the inhabitants with gas. Section 23 of the Act of Incorporation enacted that the company should have "the sole and exclusive privilege of vending gas-lights and gas-fittings in the City of St. Louis and its suburbs."

Subsequently, on January 8, 1841, the City of St. Louis, by indenture, granted to the St. Louis Gas Light Co. for and during the existence of their charter, the sole and exclusive privilege of lighting the streets, alleys, wharfs, public buildings, and other public places of the City of St. Louis. Later, the Laclede Gas Light Co. was chartered, and it, too, claimed an exclusive privilege to supply gas to the city. The contest between the companies continued, and on Feb. 8, 1873, a tripartite agreement was executed between the two companies and the city of St. Louis, by which the St. Louis Co. surrendered all claim to any exclusive privilege in certain parts of the city, sold to the Laclede Co. all the gas-mains, pipes, lamps, etc., within that part of the city; and the Laclede Co. agreed to pay the St. Louis Co. $650,000 in consideration of this contract. These pipes, mains, etc., had been originally paid for, partly from the capital stock of the company and partly out of the earnings. The Laclede Co. gave their note for the above sum, and at a meeting of the directors of the St. Louis Co. it was—

Ordered, That if the money to be paid "by the Laclede Gas Light Company, shall be paid by the 3d or 5th of May next, the president and secretary are directed to have a dividend of $600,000 entered on the books of the company, and to cause private circulars to be sent to the respective stockholders informing them of the amount of dividend then standing to their credit, and to pay the same on demand."

Accordingly, after the payment of said note, $50 per share was paid in accordance with said resolution, and accountant received the sum of $4995. It was in evidence that the ordinary form of declaring dividends was a resolution "that a dividend of — dollars a share be declared out of the earnings of the company for the last six months," etc. The accountant paid over the above sum of $4995 to the life-tenant, and claimed credit therefor; to this, objection was made before the auditor, who disallowed the credit, holding that the said sum was not a part of "the issues, profits, and dividends of the company." Exceptions were filed to this action of the auditor, on behalf of Sarah Vinton.

George Junkin, for the life-tenant, Sarah Vinton.

The presumption is, that the directors of the company did not transcend their authority, and declare a dividend of that which was not in their power so to distribute. The fund was produced by a compromise of a doubtful claim.

J. G. Johnson, for trustee, and *Edward Shippen*, for Frederick Vinton, the remainderman.

The fund was the produce of a sale of a part of the company's franchise, and is, therefore, principal and not rents, issues, and profits. The very form of declaring this so-called dividend shows that it was entirely differently regarded from the ordinary dividend.

Jan. 4, 1881. THE COURT. The St. Louis Gas Company sold their claim to the exclusive right to furnish gas to about one-half of the city of St. Louis, together with the pipes, lamps, etc., for supplying the gas, for $650,000; which sum they divided among their stockholders as a dividend. Was this dividend profits or capital? The company sold a part of their franchise, a part of their business and a part of the machinery necessary to carry on that business and make the franchise available and valuable.

The capital of a company is not merely the value of the shares. Everything which is necessary to carry into effect the purposes of the company is capital. Even when profits assume this character they become capital, and cannot be treated as profits, nor can they cease to be capital. Capital is necessarily a homogeneous whole. If this were not so, it might be converted piecemeal into profits or something else, and be extinguished.

In a gas company surely the right to supply gas, and the pipes and lamps by which it is sup-

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plied, must be regarded as capital as much as the building in which the gas is manufactured.

Even if it were shown that the whole $650,000 were paid alone for the pipes and lamps, and that they were purchased by the profits, their character as capital is not changed. When profits are used to extend enterprises of this kind they become capital as much as when they are used to purchase raw material. The fund in controversy was, therefore, properly distributed by the master as capital.

The exceptions are dismissed and the report confirmed.

Opinion by FINLETTER, J.

C. P. No. 4. March 14, 1881.

Fricke v. Magee.

Equity—Resulting trust not established by parol—Act of April 22, 1856—Statute of Limitations enforced in equity—Amendment of bill at bar.

Sur demurrer to bill in equity.

The bill as amended averred that the complainant became insolvent in January, 1867, and confessed judgment to the defendant Magee for the amount of his indebtedness to him, upon which judgment, execution was issued immediately. The bill then charged that in order to prevent a sacrifice of the defendant's property at sheriff's sale, and in consideration that Fricke would not bid against him, Magee agreed verbally that he would become the purchaser thereof as trustee for Fricke's family, afterwards sell the said property at private sale, and after paying his own and other judgments out of the proceeds, pay over the residue to the family of the complainant; that in accordance with this verbal agreement Magee bought various pieces of Fricke's real estate and nearly all his personalty at sheriff's sale (the title of certain real estate being taken in the names of third parties, who were also made parties to the bill); and that the complainant on February 1, 1867, executed an assignment for the benefit of creditors. After alleging that the terms of the trust had not been complied with but that Magee had disposed of the property to his own use, the bill prayed a discovery, account and conveyance.

J. Austin Spencer, for the demurrer.

A resulting trust in land only arises in case of fraud in obtaining title or from the payment of the purchase-money when the title is acquired. Since the Act of April 22, 1856, a trust in land cannot be established by parol without writing.

Barnet *v.* Dougherty, 8 Casey, 371.
Jackman *v.* Ringland, 4 W. & S. 149.
Kellum *v.* Smith, 9 Casey, 158.
Bickel's Appeal, 5 Norris, 204.

The Statute of Limitations is applied with the same effect in a court of equity as in a court of law.

Ashhurst's Appeal, 10 Smith, 290.
Hamilton *v.* Hamilton, 6 Harris, 20.

The remedy, if any, is at law. Equity will not execute a voluntary contract *inter vivos*.

Carhart's Appeal, 28 Smith, 100.

E. Hunn, Jr. (with him *F. C. Brewster*), contra.

The transaction was a mortgage, and as in Sweetzer's Appeal, 21 Smith, 264, such *maleficium* is shown as makes the defendant a trustee.

The agreement was no fraud on creditors, as it created a trust to pay them. It was supported by a sufficient consideration, viz., that Fricke refrained from bidding at the sale. The allegation of the assignment for the benefit of creditors should be stricken out; at most it is only surplusage. No promise was made to the assignee, and he can have no claim.

As Magee may have realized enough to pay his judgment but recently, the Statute of Limitations does not apply. Our only remedy is an account and reconveyance

G. W. Thorn, in reply.

This was merely a promise without consideration; and after the assignment the plaintiff had only a resulting trust after the payment of his debts by the assignee.

April 2, 1881. THE COURT (after stating the facts). This bill very naturally has been demurred to. It is quite clear that it is incapable of being sustained. So far as relates to the real estate which is alleged to have been the subject of this trust, the plaintiff is immediately confronted by the Act of 22d of April, 1856 (section 4, P. L. 553, 1 Brightly's Purdon, 724), which enacts that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void." The plaintiff's case, according to his own statement of it, is directly within the prohibition of this Act. It is an attempt to set up a parol trust founded upon the alleged agreement of a purchaser at sheriff's sale that he would buy the property for the defendant in the execution. It is the precise case of Jackman *v.* Ringland (4 W. & S. 149), and Barnet *v.* Dougherty (8 Casey, 371), except that in those cases the method adopted in the attempt to enforce the void trust was an action of ejectment, and in this case it is a bill in equity, a circumstance which cannot make the least difference in the application of the law. These cases were affirmed in Kellum *v.* Smith (9 Casey, 158), in which it was further held that every attempt to take such a parol trust out of the statute by converting it into a resulting trust must fail unless it can be shown

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that the alleged *cestui que trust* paid the money, or that there was fraud *at the time of the sale*, neither of which is pretended or alleged in this bill. That subsequent fraud will not raise a resulting trust is settled by many cases. Kellum *v.* Smith was followed by Nixon's Appeal (13 Smith, 279), which was also the case of a parol trust founded upon an alleged agreement to purchase one-half of the property at a judicial sale for the benefit of the alleged *cestui que trust*, and by Savings Bank *v.* Bennett (26 Smith, 402), Bennett *v.* Savings Bank (6 Norris, 382), and other cases to the same effect.

These determinations sufficiently show that the Act of 1856 is a flat bar to the maintenance of the parol trust which the plaintiffs set up in their bill. Even if they could give to the transaction set out in their bill any flavor of a resulting trust, a quality which there is not the least pretence to say it possesses, their claim would nevertheless have been barred long since by the 6th section of the Act already cited (P. L. 533, 2 Brightly's Purdon, 930), which requires a proceeding to enforce a resulting trust as to realty to be brought within five years after the trust accrued. Nothing is set out in the plaintiff's bill to take his case out of this provision of the statute. As to the personal property alleged to have been sold at the sheriff's sale the plaintiffs can no more maintain a bill in equity for the proceeds of it, after the lapse of thirteen years, than they could now maintain trover, account render or an action for money had and received for it. A chancellor applies the Statute of Limitations with the same effect that is given to it in a court of law. (Hamilton *v.* Hamilton, 6 Har. 20.) And the defendants have properly taken advantage of the statute by demurrer, as the objection appears on the face of the bill.

In addition to what has been observed it may be further said that the plaintiffs have in their bill inadvertently stated themselves out of court in setting out the fact that Henry Fricke, on the 1st of February, 1867, assigned all his property of every kind for the benefit of his creditors. This assignment of course covered the claims which are the foundation of the present suit, and the statement shows that Henry Fricke has no right to maintain this suit. When the effect of this was observed on the argument, the plaintiffs' counsel, in order to avoid the pitfall which the plaintiffs had thus unawares dug for themselves, asked leave to amend the bill by striking out this statement relative to the assignment for the benefit of creditors. But this motion cannot by any means be allowed. Amendments in equity are in the discretion of the Court. They are allowed with great caution where, as here, the bill has been sworn to; always in furtherance of justice, but never to aid a party in the suppression of material facts.

Demurrer sustained, and it is ordered that the bill be dismissed, plaintiff to pay the costs.

Opinion by THAYER, P. J.

Orphans' Court.

Feb. 23, 1881.

Fritz's Estate.

Return to sale of real estate by order of Court —Amendment, when not allowed—Act of March 23, 1867.

Sur petition of executor to amend return of sale.

The petition of Peter Fritz, Jr., executor of the estate of Peter Fritz, the decedent, recited an order of sale of real estate by this Court for the payment of debts, issued January 15, 1881, and his return thereunto of sale of premises to one Mary Bond.

The petition further alleged that the said Mary Bond had transferred all her right in said purchase, to one Wetherill, the purchaser of certain other premises sold under the aforesaid order of the Court, and that at the sale it was publicly announced to bidders that all the premises then about to be sold were to be disposed of free of all encumbrances, that being a part of the terms of the sale, and that this fact had been omitted from the return of sale.

The prayer of the petition was for a decree to amend the return of the executor to said order of sale, by inserting the terms of said sale and substituting the name of Wetherill for Bond. In behalf of a judgment creditor it was urged that this application should not be granted, but that an alias order of sale should issue.

J. Alexander Simpson, for petitioner.

John D. Bowman and *John D. Yarrow*, contra.

March 5, 1881. THE COURT. The petitioner asks leave to amend the return made by him to the order of sale of decedent's real estate for payment of debts, in two particulars. First, because the purchaser of two parcels of the realty sold has since transferred all her right in said purchase to the successful bidder for the remaining premises mentioned in said return, and the executor now seeks to substitute the latter for the original purchaser. And second, because at the sale it was announced publicly to the bidders that all the premises would be sold free and clear of all encumbrances, and that that was a part of the terms of the sale, and should have been so returned. This application is, however, resisted on behalf of a judgment creditor of decedent. In regard to the substitution of

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purchasers, it will be observed that the person named in the return to the order of sale is not a party to the present proceeding, and has had no notice of the proposed change, so far as we have been informed. If for no other reason it would therefore be improper to allow the return to be amended in the manner proposed. But if, as alleged, the purchaser at the sale has, since the return made by the executor, transferred her purchase, we think, under the circumstances, it is now too late to amend the return. It should have been made before the return of sale. And further, no good reason has been shown to amend the return, so far as respects the terms of sale. It is not stated by whom the announcement was made that the several properties would be sold clear of all encumbrances, nor was the same made one of the terms of sale by the Court. It was evidently not made by the petitioner, and if made, which is denied by counsel for the objecting creditor, was wholly unauthorized. The purchaser does not assert the fact, nor do the creditors, who are the parties to be injured by such a sale. And as the real estate sold is encumbered with mortgages, the Court would have no authority to prescribe such terms of sale without the consent of the mortgagees, for their lien would not be discharged by the sale. (Act of March 23, 1867; Bloomer's Estate, 2 WEEKLY NOTES, 68; Grice's Estate, Id. 211.)

This petition is accordingly dismissed.

Opinion by HANNA, P. J.

February 24, 1881.

Andress's Estate.

Widow's exemption of $300—An appraisement of real estate must be demanded by the petitioner in order to entitle her to the exemption out of the proceeds of real estate—Previous finding of jury in partition that premises cannot be divided will not excuse this requirement—Act of April 14, 1851.

Sur petition for widow's exemption of $300.

The facts set forth in the petition of Julia B. Andress showed that James G. Andress, husband of petitioner, died intestate, and that letters of administration were granted to the petitioner September 2, A. D. 1880. The estate of the decedent consisted of $140 in personal property, and an interest in certain real estate, which was afterwards sold under proceedings in partition in the Orphans' Court, the sheriff's jury having found that the same could not be divided. The petitioner asked the Court to decree that she be allowed to retain the $140 in personal property, and $160 from the proceeds of the sale of the real estate. It did not appear that any appraisement of the real estate had been asked for by the petitioner.

Joseph A. Abrams, for petitioner.

This case is distinguishable from Hufman's Appeal (31 P. F. S. 329), because in the proceedings in partition, the sheriff's jury found the real estate could not be divided.

March 5, 1881. THE COURT. Hufman's Appeal (31 P. F. Smith, 329), which reviewed the prior cases, decided that an appraisement of the real estate must precede the allowance of the widow's claim to exemption out of the proceeds of the sale of realty belonging to the estate of the deceased husband. The reason assigned was that the Act of 14 April, 1851, was intended to give to the widow what the debtor enjoyed under the Act of 9 April, 1849, and that by the latter Act, where the debtor elected to retain the whole or any part of the exemption, in real estate, an appraisement was required to determine whether the property could be so divided as not to injure the whole. The two Acts being thus in *pari materia*, the provision of the earlier Act for an appraisement was held to be imported into the Act of 1851.

There is no escape from the application of that decision to the facts of the present case. The widow elected to retain a portion of the exempted sum from the personal estate of her husband, and the balance from the cash realized by the sale of his interest in several pieces of real estate. Her failure to ask an appraisement of the latter was sought to be justified on the ground that the real estate was insusceptible of division. The same excuse, however, was urged in Hufman's Appeal, and it was met by the positive requirement of the statute. A further answer would be that whether land can be beneficially divided, can be judicially known only through an appraisement. It was also argued that as no objection by creditors had followed the publication of notice of the widow's election, the reason of the Act ceased in this instance. The notice, however, set forth an intention to retain the whole sum in cash, and gave no intimation that the widow's choice would affect the real estate. It is true that certain real estate of the husband still remains unsold, but it will not avail to the relief of the widow. Her right to elect having been once exercised, must be held to have been exhausted. (Baskin's Appeal, 2 Wr. 65.) It may be observed further, to relieve the case of any apparent hardship, that the exemption is a statutory bounty, and that to claim its benefit a strict compliance with the provisions of the Act may justly be insisted on.

The claim of the widow to the sum of $140 out of the personal property of the decedent is allowed, and her claim to $160 out of the proceeds of realty is rejected.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, MAY 12, 1881.* [No. 4.

Supreme Court.

Jan. '81, 209. February 19, 1881.

Commonwealth ex rel. McGurk v. The Superintendent of the County Prison.

Criminal law — Habeas corpus — New trial — Application for discharge under the provisions of the Act of Feb. 18, 1785 (2 Sm. L. 275), as modified by those of the Act of March 13, 1867 (P. L. 420) — When refused.

A prisoner being indicted for murder in the first degree was duly tried and convicted. Subsequently a new trial was granted him, and without any application for a continuance or delay on his part, four terms of court elapsed without his being able to obtain a second trial. Upon petition to the Supreme Court for his discharge under the provisions of the Act of February 18, 1785, § 3 (2 Sm. L. 275):

Held, that the Act only referred to the interval of time between the commitment and the first trial, and that its provisions could not be invoked so as to be made applicable to a second period of time commencing at the time of granting the new trial.

In the Supreme Court of Pennsylvania.

Habeas corpus. The petition of Theodore J. McGurk set forth that he was unjustly detained in the Philadelphia County Prison to await trial upon a bill of indictment charging him with the murder of one James Needs, on October 7, 1865. That on January 19, 1880, he was placed on trial in the Court of Oyer and Terminer of Philadelphia County, before ELCOCK, J., and a jury, and upon January 23, 1880, was convicted of murder in the first degree. That a motion for a rule for a new trial was immediately made, which rule, after argument, was made absolute upon May 1, 1880, the last day of the April Term. That from that day he had been anxious and ready for trial, and had made no application for a continuance or for delay from any cause whatsoever. That, being unable to obtain a trial, he, upon October 31, 1880, the last day of the October Term, being the fourth term at which Courts of Oyer and Terminer were held in Philadelphia County after the rule for a new trial had been made absolute, made application to the Court of Quarter Sessions of said County for a writ of habeas corpus, under the provisions of the Act of February 18, 1785 (2 Sm. L. 275, Purd. Dig. p. 755, pl. 4),* upon which he might be discharged from custody. That said writ being duly granted was made returnable October 29, 1880, and that after argument before MITCHELL, J., the motion for his discharge was, on January 21, 1881, refused (see 9 WEEKLY NOTES, 402), wherefore petitioner alleged that he remained in custody unjustly, because more than four terms of court had elapsed since he had been granted a new trial. He therefore prayed that a writ of habeas corpus, etc.

The writ was duly granted, and the application first came on to be heard on February 12, 1881. Walter G. Smith, Esq., for the relator, began his argument, when he was stopped by SHARSWOOD, C. J., who said: "I think you ought to have the record of this case here. You may have a good case, but for aught that appears, you may have applied for a continuance every term. Unless the District Attorney will admit the facts of your case, it must have evidence to support it."

George S. Graham, Esq., District Attorney. "I think this case is of such importance that the record ought to be here."

SHARSWOOD, C. J. "Let a certiorari issue to bring up the record, returnable Saturday, February 19, 1881."

Upon the return of the writ of certiorari, it appeared from the record that the facts set forth in the petition of the relator were true.

Walter G. Smith (*Effingham B. Morris* with him), for the relator. This application is entirely within the jurisdiction of the Court under the provisions of the Constitution. Even if it were not, it is too late now to object upon that ground, as this Court has already entertained the case by granting a writ of *certiorari* to bring up the record.

Constitution of 1874, Art. V. Sec. 3.
Act of Assembly of March 31, 1860, P. L. 437.
Clarke *v.* Commonwealth, 5 Cas. 134.
Commonwealth *ex rel.* Torrey *v.* Ketner, 8 WEEKLY NOTES, 133.

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* This Act provides, *inter alia*, that after a person has been committed . . . "if such person shall not be indicted and tried the second term, session, or court after his or her commitment, unless the delay happen on the application of or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment."

This provision is modified by the Act of March 13, 1867, P. L. 420 (Purd. Dig. 1201), which in sect. 1 provides, that sessions of the Quarter Sessions and Oyer and Terminer of Philadelphia shall commence on the first Monday of each month, instead of the days fixed theretofore by law for holding the same.

Sect. 4 of the same Act provides "that nothing therein contained shall be taken or construed to affect the Act of Feb. 18, 1785, as then applicable to said court, and that no person shall be . . . discharged under said Act, except upon the expiration of the fourth term therein created."

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The granting of a new trial in criminal cases supersedes the effect of a former trial, and wipes out the verdict. It is as if the case stood without ever having been tried. The provisions of the Act of February 18, 1785, as amended, are imperative, and, it appearing that four terms of court, at any of which petitioner was ready and might have been tried, have been allowed to pass by without affording him an opportunity for trial, through no fault or application for a continuance on his part, he should be discharged.

Hilliard on New Trials, 2d Ed., p. 74.
Edwards *v.* Edwards, 22 Ill. 121.
Hidden *v.* Jordan, 28 Cal. 301.
Act of Assembly of Feb. 18, 1785, Purd. Dig. p. 755, pl. 4.

George S. Graham, District Attorney, for the Commonwealth.

A similar application to the present one having been heard and decided by the Court below, this Court will not review its decision. This is a just and reasonable rule, as the Court below might readily refuse to discharge the prisoner upon grounds which would be solely within its own cognizance, and not being spread upon the record could not be brought to the knowledge of this Court.

Respublica *v.* Arnold, 3 Yeates, 263.
Commonwealth *v.* Jailer, 7 W. 366.
Clark *v.* Commonwealth, 5 Cas. 129.
Ex parte Walton, 2 Whar. 501.

The language of the Act of Assembly invoked here, refers to the giving of one trial within four terms next succeeding the commitment, not to some future trial. The Court having granted a new trial, the prisoner is then in its hands and not under the control of the District Attorney.

April 1, 1881. THE COURT. This is an application of the relator to be discharged from imprisonment under the Habeas Corpus Act of 18th February, 1785, re-enacted by section 54 of the Criminal Procedure Act of 1860.

If any person shall be committed for treason or felony or other indictable offence, it declares, *inter alia*, "if such prisoner shall not be indicted and tried the second term, sessions, or court after his or her commitment, unless the delay happen on the application, or with the assent of the defendant, or upon trial he shall be acquitted, he shall be discharged from imprisonment." The relator was committed at August Term, 1879, charged with murder, and a true bill therefor was found against him at the same term. He was tried at the January Term, 1880, and found guilty of murder in the first degree. A motion for a new trial was made in his behalf, and a rule granted. On the last day of the April Term it was made absolute. On the last day of the October Term, 1880, being the fourth term after new trial granted, the application for this discharge was made. At the January Term following, it was refused.

It is contended in behalf of the relator, that he was entitled to be discharged from imprisonment at the end of the second term after the new trial was ordered, under the Act of 1785. This presents the only question in the case. No complaint is made of any undue delay prior to the trial and conviction. What, then, was the object of the Act? It was to prevent wrongful restraints of liberty, caused by malice and procrastination of the prosecutor, producing a wilful and oppressive delay in the trial. (Commonwealth *v.* Sheriff, 16 S. & R. 304; Same *v.* Jailer, 7 Watts, 366; Clark *v.* Commonwealth, 5 Casey, 129.) The express language of the statute does not give this right of discharge in case "the delay happen on the application or with the assent of the defendant." Thus either application or assent of the defendant to a postponement of the trial deprives him of his right. Nor need it appear that he expressly applied for or assented to the delay. His assent may be presumed from any action of his naturally tending to produce such result. Hence if one under indictment induces the witnesses on the part of the Commonwealth to keep out of the way so that their attendance cannot be procured, he is not entitled to be discharged under the Act, although two terms have intervened after his commitment. (Respublica *v.* Arnold, 3 Yeates, 263.) So where one under indictment moved at the second term to quash the indictment, and the Court held the motion under advisement during the term, it was held that the delay was equivalent to a postponement with his consent, and that he was not entitled to be discharged under the Act. (*Ex parte* Walton, 3 Whar. 501.) Where the array of grand jurors was quashed at two successive terms after the arrest of the prisoner, for informality in selecting and drawing them, he was not entitled to be discharged. (Clark *v.* Commonwealth, *supra.*)

The relator had a trial as soon after his commitment as he desired it. There is no allegation that the postponement thereof beyond the second term was not on his application or with his assent. Then the letter and the spirit of the law were fully complied with. There was no unjust delay. After due effect was thus given to all the provisions of the statute, the defendant intervened. He asked for and procured an order for a new trial, which must necessarily be more than six terms after his commitment; he now seeks to apply a statute which limits the time between commitment and the first trial to the interval of time after a new trial ordered and the second trial being had. We find no warrant for such application, either in the letter or in the spirit of the statute. It is further contended, that

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inasmuch as when a verdict is set aside or a judgment reversed and a new trial awarded, the case goes back upon all issues of fact, as if it had never been tried, therefore this statute is made applicable. Conceding the correctness of the rule as to the manner and form to be observed in the second trial, yet the conclusion claimed by no means follows. The interval of time between the commitment and the close of the second term thereafter cannot be retraced, nor the statute, which might then have been invoked, be made applicable to a second period of time commencing long after the expiration of the time specified in the statute.

This application is based on the statute alone. Beyond a denial of its provision to the case, no arbitrary or unjust detention is alleged. We think, under the facts, the statute is not applicable. No other cause being shown for a discharge from imprisonment—

Prisoner remanded.

Opinion by MERCUR, J. GREEN, J., absent.

Jan. '79, 76. Jan. 3, 1881.

Drayton v. The North Pennsylvania Railroad Company.

Negligence — Railroads — Injury caused by the noise of steam escaping from a locomotive standing on the track — Contributory negligence — No liability for damages resulting from the ordinary and lawful use of the road.

A railroad company is not liable for damages resulting from the ordinary, legitimate and lawful use of their road.

A part of a railroad company's track ran alongside of and below the grade of part of a public road. A person was driving along said portion of the road with a horse, who, though not considered dangerous, disliked locomotives. The company's servants stationed a locomotive on the part of their track above described, and as the horse approached, allowed steam to escape, whereby the horse was frightened, shied, overthrew the vehicle he was drawing, killed himself, and caused other damage. In an action against the railroad company to recover damages:

Held, that there was no evidence of negligence on the part of the company defendant, and that a nonsuit was rightly awarded.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by William Heyward Drayton against the North Pennsylvania R. R. Co. to recover damages for an injury to plaintiff's minor child, and the loss of plaintiff's horse and wagon, caused by the alleged negligence of the defendants' servants. Plea, not guilty.

On the trial before FINLETTER, J., the following facts appeared: On the morning of Oct. 26, 1875, the plaintiff, with his wife, daughter, and three sons, was driving to Pennllyn station on the North Pennsylvania Railroad, where he intended to take the train for Philadelphia. The public road, upon which he was driving, a short distance before reaching the station crosses a hill and runs alongside of the railway track, which at the place of the accident lies from twelve to fifteen feet below the bed of the public road. When plaintiff reached the foot of the hill before coming to the station, he thought he heard a noise and stopped to listen, but upon hearing nothing, he drove on to the brow of the hill, where, for the first time, he discovered a locomotive on the track. The top of the smoke-stack of the engine was at that point about upon a level with the public road. A slight noise of escaping steam frightened the horse, who at once shied towards the bank opposite the engine, and overturned the wagon, from which the plaintiff and his family were thrown. One of the plaintiff's sons (a minor) was so badly injured in the knee that erysipelas set in, for which he had to be treated by a physician. The horse was killed, and the wagon was badly damaged. It was in evidence, that although the horse disliked locomotives, the family were in the habit of constantly driving him to the station, and the plaintiff did not consider him unsafe to drive.

At the close of the evidence for the plaintiff, the Court, upon motion of defendant, entered a judgment of nonsuit, which the Court in banc subsequently refused to take off.

Plaintiff thereupon took this writ, assigning for error the entry of judgment of nonsuit and the refusal to take off the same.

J. Howard Gendell, for the plaintiff in error.

Where the measure of duty is ordinary and reasonable care, the question of negligence is always for the jury.

West Chester & Phila. R. R. Co. *v.* McElwee, 17 Sm. 311.

Assuming that the defendants are not liable for damages resulting from the ordinary, careful, and legitimate use of their road, it is, nevertheless, their duty to use a very high degree of caution, care, and vigilance, to avoid doing injury to the person and property of others.

Frankford & Bristol Turnpike Co. *v.* Phila. & Trenton R. R. Co., 4 Sm. 345.

Whether this duty has been complied with, is a question for the jury.

Penna. R. R. Co. *v.* Barnett, 9 Smith, 259.

Where a railway is alongside of a highway, the company is bound to use their road in such a manner as is least calculated to interfere with the safety of public travel over the highway, and if it allows the steam whistle to be blown unnecessarily, whereby horses upon the highway are frightened and injury results, the company is liable in damages.

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Wood on Nuisances, 269.
Shearman & Redfield on Negligence, 534.

It is the duty of defendant to find a safe place to stop.

Frankford & Bristol Turnpike Co. *v.* Phila. & Trenton R. R. Co., 4 Smith, 345.
Manchester, South Junction & Altringham R. R. Co. *v.* Fullarton, 108 E. C. L. 53.

The cases cited on the other side are inapplicable, for they are cases in which the noise was made in the ordinary course of running trains. The presence of the train at that point cannot be defended on the ground even of necessity, but if it be assumed that it was necessary to station the train there, then it was the clear duty of the defendant to have given warning by bell, whistle, or flagman. In the absence of any such warning, the plaintiff had the right to assume that the track was clear.

Phila., Wilmington & Balt. R. R. Co. *v.* Stinger, 28 Smith, 219.

There is nothing to show negligence on the part of the plaintiff. Whether the horse was safe and properly driven, were questions for the jury.

Wm. Rotch Wister and *J. McGregor Gibb*, for the defendants in error. Before the plaintiff can recover, he must make out two propositions: (1) that there was negligence on the part of the company, and (2) that there was no contributory negligence on his part. The locomotive was not stationed at a crossing, or at a place within statutory prohibition, but was where it had a lawful right to be. The defendant cannot be held responsible for injuries arising from the lawful exercise of his undoubted rights upon his own premises, where the exercise of such rights is done in an ordinary way. There is nothing in this case to show other than the ordinary lawful use of steam; nothing to indicate an abuse of the privilege of the use of steam.

Phila., Wilmington & Balt. R. R. Co. *v.* Stinger, 28 Sm. 219.
The King *v.* Pease, 4 B. & A. 30.
Bordentown Turnpike Co. *v.* Camden & Amboy R. R. Co., 2 Harrison, 314.
Favor *v.* Boston & Lowell R. R., 114 Mass. 350.
Norton *v.* Eastern R. R., 113 Id. 367.
Burton *v.* Phila., Wilmington & Balt. R. R., 4 Harrington, 252.

A railway company is not liable for injuries suffered by animals solely in consequence of their being frightened by the noise necessarily made by an engine or trains.

Shearman & Redfield on Negligence, 486.

The measure of care and duty required of a railroad company is ordinary prudence.

Parrot *v.* Wells, Fargo & Co., 15 Wallace, 524.
Moshier *v.* Utica & Sch. R. R. Co., 8 Barbour, 427.

Where the plaintiff is not a passenger, the burden is on him to rebut the presumption that the defendant exercised due care.

Phila. & Reading R. R. Co. *v.* Heil, 5 WEEKLY NOTES, 91.

The plaintiff was guilty of contributory negligence in driving a horse known to be afraid of locomotives, which is a bar to recovery.

2 Redfield on Railways (4 Ed.), § 103.

January 17, 1881. THE COURT. We can discover no evidence of negligence in the defendants. Their locomotive was standing on their track, where it was their right to have it, and the horse of the plaintiff, approaching the locomotive on a side road, was alarmed at the letting off steam. Accidents of this character must be of frequent occurrence with horses not perfectly broken to the engine, which the horse in question seems not to have been. The defendants, as is admitted, are not liable for damages resulting from the ordinary, legitimate, and lawful use of the road. The case differs entirely from the Penna. R. R. Co. *v.* Barnett (9 P. F. Smith, 259), where, without giving notice of the approach of a train to a bridge crossing the railroad, the whistle was sounded directly under the bridge and frightened the horses of a traveller in the act of crossing the bridge.

PER CURIAM. Judgment affirmed.

Jan. '80, 360. January 12, 1881.

Baker v. Fehr.

Negligence—Contributory negligence—Burden of proof—Where there is no evidence of negligence the case should not be submitted to the jury.

When in an action for injuries or death alleged to have been caused by the negligence of defendants, or of their servants or agents, the evidence fails to disclose the negligence, or any facts from which it could reasonably be inferred, the Court should give the jury binding instructions to find for the defendants.

J. S. was riding in a passenger railway car, close alongside of which an ice-cart was proceeding in the same direction. The car stopped; J. S. jumped from the front platform a short distance before the team of the ice-cart, and without hearing or attending to the warning shouts of several bystanders, turned to the front platform of the car to take therefrom a basket. The driver of the ice-cart attempted to haul up his team as soon as he saw the position of J. S., but was too late. J. S. was knocked down and run over by the cart, and killed. In an action by his widow against the owner of the ice-cart, to recover damages for the death of her husband, alleged to have been occasioned by the negligence of defendant's driver:

Held, that no evidence of negligence on the part of the driver could reasonably be inferred, and that the Court should have instructed the jury to find for the defendant.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Fredericka Fehr *et al.* against John W. Baker, to recover damages for injury sustained by her in the loss of her husband, John Fehr,

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who was run over and killed by a wagon belonging to the said John W. Baker.

On the trial, before YERKES, J., the following facts appeared: At about 7 o'clock in the morning of the 2d of December, 1878, one George A. Gerlach, who was employed as a driver by John W. Baker, the defendant, a dealer in ice, was driving an ice-wagon belonging to the defendant, from Sansom Street, south along Sixth Street, towards Walnut Street, in the City of Philadelphia. A passenger car, upon which John Fehr was riding, was moving south along Sixth Street, a little ahead of the ice-wagon. At Walnut Street a detention occurred that was caused by a passenger car moving west along Walnut Street, as a result of which the Sixth Street car was delayed long enough to allow the ice-wagon to draw up alongside. In this relative position the Sixth Street car and the ice-wagon crossed Walnut Street, going south, at the rate of from four to six miles an hour, the car moving upon the track and the ice-wagon upon the east side of the street, close alongside the car. When they had passed over Walnut Street the car stopped to let off John Fehr, who quickly jumped down into the street, upon the east side, from the front platform of the car, and then turned towards the car to take a basket from the front platform. Several persons who saw the danger that threatened him from the approaching ice-wagon, called to him to give him warning. But he stood with his back towards the wagon, and apparently he did not hear; for in stepping backward from the car, he was struck by the swingle-tree of the ice-wagon, in spite of the efforts upon the part of Gerlach, the driver, to stop his team, and, being thrown down by it, the wagon-wheels passed over his body. The team attached to the ice-wagon was stopped immediately, and Fehr was picked up by the passers-by, but he died from the effects of his injury a few moments later.

The witnesses agreed that as soon as Fehr was seen by the defendant's driver, the latter used all possible exertion to stop his team, and that there was but an instant of time between Fehr's placing himself in front of the mules and his being run over by the wagon-wheels.

The defendant requested the Court to charge the jury, *inter alia*, as follows: "Eighth. There is no such evidence of negligence in this case as ought reasonably to satisfy you thereof, and therefore I instruct you that, upon the whole case, your verdict should be for the defendant."

Answer. "I refuse that point." (Seventh assignment of error.)

Verdict for the plaintiffs for $2000, and judgment thereon. The defendant took this writ, assigning for error, *inter alia*, the refusal of defendant's eighth point.

Silas W. Pettit (with whom was *John R. Read*), for plaintiff in error.

It is impossible to find anything in this evidence from which the jury could have inferred negligence, and it therefore became the duty of the Court to enter a judgment of nonsuit, or to give a binding instruction in the defendant's favor.

Goshorn *v.* Smith, 8 WEEKLY NOTES, 289.
Catawissa R. R. Co. *v.* Armstrong, 2 Sm. 282.
P., W., & B. R. R. Co. *v.* Stinger, 28 Ibid. 219.
Gerety *v.* Railroad Company, 31 Ibid. 274.
Hoag *v.* Railroad Company, 4 Norris, 293.

It is apparent that the decedent took no precaution at all before placing himself where his injury was inevitable. In this case the defendant's driver had no reason to suppose that any one would jump out from behind a corner directly in front of his mules, and, unless he was bound to foresee such a contingency, he was certainly not guilty of negligence in not providing against it.

Phila. & Reading R. R. Co. *v.* Yerger, 23 Sm. 121.
Phila. & Reading R. R. Co. *v.* Heil, 5 WEEKLY NOTES, 91.
Clark *v.* Phila. & Reading R. R. Co., Ibid. 119.
Penna. R. R. Co. *v.* Fries, Ibid. 545.
Hestonville P. R. W. Co. *v.* Connell, 7 Norris, 520.

Defendants in error did not appear and presented no paper-book.

March 25, 1881. THE COURT. This action was brought by the widow and children of one killed by an unfortunate accident. A right to recover rests on proving that negligence of the plaintiff in error caused the death, without contributory negligence of the person killed. The question now is, whether there was sufficient evidence of negligence on the part of the plaintiff in error to justify its submission to the jury?

The burden of proving the negligence is on the defendants in error. (McCully *v.* Clarke & Thaw, 4 Wright, 399; Railway Co. *v.* Hummell, 8 Id. 375; P. & R. Railroad Co. *v.* Yerger, 23 P. F. Smith, 121.)

This is not the case of a passenger killed or injured by a common carrier. Both parties to the accident were in the lawful use of a public street in this city. Each owed substantially the same duty to the other. That duty was to use the street with reasonable and ordinary care. Each was justified in assuming that the other would so use it. What is negligence and what is ordinary care must generally be submitted to the jury. This is so, if there be any dispute as to the acts claimed to establish the alleged negligence; but negligence is not to be found without evidence. It is not to be presumed from the mere fact of the occurrence of an accident causing injury or death. (Gramlich *v.* Wurst *et al.*, 5 Norris, 74.) Negligence is a question for the jury, if there be

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reasonable doubt as to the facts tending to prove it, or as to the just inferences to be drawn therefrom. (McKee *v.* Bidwell, 24 P. F. Smith, 218.)

The province of the jury is to find facts. If the facts be admitted or ascertained, it is the duty of the Court to declare the law thereon. (Catawissa R. R. Co. *v.* Armstrong, 2 Id. 282; Philada. & Read. R. R. Co. *v.* Yerger, 23 Id. 121; Goshorn *v.* Smith, 8 WEEKLY NOTES, 289.)

The main question in this case arises under the seventh assignment. It is whether there was any evidence of negligence on the part of the plaintiff in error to be submitted to the jury? If there was, no just complaint can be made of the charge of the Court.

This leads us to an examination of the evidence. There is no substantial conflict in the testimony of the witnesses. Fehr was a passenger in a street railway car moving down Sixth Street; Gerlach was driving an ice-wagon of the plaintiff in error. It was in the rear of the street car, and moving in the same direction, at a rate of from four to six miles an hour. The car stopped just south of Walnut Street. The driver of the wagon continued on for the purpose of passing the car. As his mules came opposite the car, Fehr, with a market basket on his arm, got off the front platform. A collision resulted between him and the wagon, causing the injury which resulted in his death.

On the trial, five persons who were eye-witnesses to the transaction testified. Two were called by the defendants in error, and three by the plaintiff in error. The first witness was driving a bread-wagon behind the ice-wagon. He merely heard some one halloo, and saw the man picked up from under the wheels of the wagon. The second witness called was the driver of the railway car. He swore: "I saw him run over; heard two or three voices cry; deceased walked deliberately against the mules; he paid no attention to cries; called 'go away from those mules'; swingle-tree caught him and threw him down, and the wheels went over him. Driver stopped wagon as soon as he could; he was trying his best to stop when he called to him." He further testified that Fehr was walking at a moderate gait, and "ran right against the mules."

The first witness called by plaintiff in error said his attention was first attracted by seeing decedent standing in the street, taking the basket from the car; that he "was coming north, was opposite and a little south of the car; when Fehr was taking the basket from the car, the ice-wagon was crossing Walnut Street. I halloed 'look out.' The driver of the ice-wagon halloed after I did, 'look out.' Fehr paid no attention; his back was towards Walnut Street, his face south; driver of ice-wagon pulled in when he halloed; . . . the driver pulled in all he could, and also called to deceased." Witness further testified: "We both hallooed very loud; the man did not appear to hear. It all occurred in about the time it takes to count five." The conductor of the car testified he was on the rear platform; did not see man get off; heard driver halloo; saw man struck by the swingle-tree; he was standing sideways towards the car, taking basket off; he was looking west (south?); it took about as long as it takes me to tell it; driver pulled in on mules best he could."

The driver of the ice-wagon swore the mules were past the front of the back platform when he first saw the man, and that he made an effort to hold up as soon as he saw him; that it was a dark, foggy morning; by his jumping off in front, and having dark clothes on, it frightened one of his mules, which was "skittish," and gave one jump, so he could not hold it in. He also testified that he and the other witnesses halloed to Fehr.

Thus it is shown that Fehr left the car in front, which is unusual, and not likely to have been anticipated by the driver. As soon as the latter saw Fehr, he promptly, by words and by action, endeavored to prevent the collision. He left nothing undone that was practicable for him to do. Fehr first stood in an exposed and dangerous position. He gave no heed to words of warning addressed to him in a loud voice on both sides. When he did move, instead of trying to avoid the danger, he "walked right against the mules." The driver had no reason to expect such action. He was therefore not required to guard against conduct which no person would have anticipated.

We discover no evidence from which negligence of the driver could reasonably be inferred, and it is settled law that a jury shall not be permitted arbitrarily and without evidence, to infer there was negligence. (Phila. & Read. R. R. Co. *v.* Yerger, *supra*, and cases above cited; Goshorn *v.* Smith, *supra*.) If there was any negligence, it appears to have been by the unfortunate decedent. It follows the learned Judge should have affirmed the eighth point submitted by the plaintiff in error.

Judgment reversed.

Opinion by MERCUR, J.

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Oct. & Nov. '80, 74. Oct. 18, 1880.

Wetter, to use, v. Kiley.

Promissory note—Arbitration—Appeal—What amounts to waiver of enforcing contract not to,—Consideration—Negotiability—Choses in action—Assignment.

A suit upon a promissory note containing a clause waiving appeals was submitted to arbitrators, who, on October 12, found for the plaintiff. On October 24, defendant took an appeal, and, on November 5, plaintiff's counsel obtained from defendant's a plea which was duly filed. On November 10, plaintiff applied for, and subsequently obtained, a rule to show cause why the appeal should not be stricken off:

Held, that the act of plaintiff's counsel in obtaining from defendant a plea, was a direct and unqualified recognition of his right to be in Court as appellant, and was as effectual as a waiver of the right to quash, and that the rule to strike off the appeal was properly discharged.

The maker of non-negotiable paper may defeat a recovery upon it in the hands of a third party to whom it has been transferred for a valuable consideration, by setting up want of consideration, even though it may have been given by him to the payee for the latter's accommodation, and expressly in order to enable him to raise money thereon.

Error to the Common Pleas of Clarion County.

Assumpsit by Henry Wetter to the use of the First National Bank of Clarion against J. B. Kiley, upon the following promissory note:—

$2000.00. CLARION, PA., Feb. 5, 1878.

Ninety days after date I promise to pay to the order of Henry Wetter, two thousand dollars, at the First National Bank of Clarion, Pa., without defalcation for value received. If not paid at maturity waiving exemption, inquisition, appeals; without stay of execution, and with five per cent. attorney's commission.

[Signed] J. B. KILEY.

[Endorsed as follows:]

For value received I assign the within note to the First National Bank of Clarion, and guarantee the payment of same at maturity.

[Signed] H. WETTER.

A rule of reference was entered by plaintiff, and the case submitted to arbitrators, who, on October 12, 1878, filed an award in favor of the plaintiff for $2153.90. On October 24, 1878, defendant appealed from the award, the same day filing an affidavit and recognizance. On November 5, 1878, plaintiff's counsel obtained from the defendant's counsel a plea in the cause, viz., non-assumpsit, payment with leave, etc., which was the same day duly filed. On November 10, plaintiff applied for a rule to show cause why the appeal should not be quashed and stricken off, on the ground that the defendant had, in the note in suit, waived the right of appeal. On November 14, the rule was granted, and on April 10, 1879, discharged. On the trial before JENKS, P. J., it appeared that the note in suit was the third renewal of a note originally given by Kiley to Wetter, for the accommodation of the latter, without any consideration whatever, and that Wetter had expressly agreed with Kiley that when the note came due he would attend to it.

The plaintiff asked the Court to instruct the jury as follows:—

"*Third.* That if the defendant, Kiley, executed and delivered to H. Wetter the note on which suit is brought for the express purpose of enabling Wetter to negotiate it and obtain the money on it from any one to whom Wetter could negotiate it, and Wetter, in pursuance of such express understanding, negotiated it to the bank for full value, the bank is entitled to recover the amount of the note and interest." *Refused.*

The defendant asked the Court to charge as follows:—

"Such want of consideration as mentioned in third point would fatally affect the note in the hands of the equitable transferee, the First National Bank of Clarion; and if the said bank, before it expended its money in the purchase of said note, was not induced to take it by the declaration of Kiley that it was a valid instrument, and would be paid at maturity, there can be no recovery in this case. The assignee of such chose in action takes it subject to all defences to which it was subject in the hands of the assignor." *Affirmed.*

The Court, in its general charge, also instructed the jury as follows: "You will remember that the equity lay chiefly in this agreement, that Henry Wetter would see that the note was paid or protected. Now, the bank would take that first note subject to that agreement, and the defendant could plead it against Wetter, and could plead it against the bank."

Verdict and judgment for defendant. Plaintiff took this writ, assigning for error, *inter alia*, the action of the Court in discharging the rule to show cause why the appeal should not be stricken off and quashed, the refusal of plaintiff's point above cited, the affirmance of defendant's point above cited, and the portion of the general charge set forth above.

Wilson and *Jenks*, for plaintiff in error.

Defendant's stipulation not to appeal should have been enforced by striking off his appeal. The action of plaintiff in obtaining defendant's plea was a mere inadvertence, which should not interfere with his rights.

Wynn *v.* Bellas, 10 Casey, 160.
Dawson *v.* Condy, 7 S. & R. 366.
Case *v.* Dunmore, 11 Harris, 93.
Lauck's Appeal, 12 Harris, 426.
Bowman *v.* Smiley, 7 Casey, 225.
Rogers *v.* Playford, 2 Jones, 181.

If this note had been negotiable, no doubt could be entertained as to the right of recovery,

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although the holder might know that the maker had received no consideration.

Moore *v.* Baird, 6 Casey, 138.
White *v.* Hopkins, 3 W. & S. 99.
Lewis *v.* Hanchman, 2 Barr, 416.
Walker *v.* Bank of Montgomery, 12 S. & R. 382.
Taylor *v.* Gitt, 10 Barr, 428.

Although this note is not negotiable, the same rule applies. The credit given the payee is sufficient consideration to the maker; and, besides, the maker put it in the hands of the payee to raise money upon it, and is, therefore, estopped from taking defence against a person who has taken it *bona fide* in pursuance of this original purpose.

Hind *v.* Holdship, 2 Watts, 104.
Davis *v.* Barr, 9 S. & R. 137.
Hennis *v.* Page, 3 Wh. 275.
Louden *v.* Tiffany, 5 W. & S. 367.
Diamond *v.* Lawrence Co., 1 Wright, 353.
Thomas *v.* Commissioners, 8 Casey, 218.

Knox and *Maffett*, for defendant in error.

The plaintiff was too late in moving to strike off the appeal after expressly admitting its validity by obtaining a plea from defendant.

Heckert's Appeal, 13 S. & R. 105.
Wilson *v.* Kelley, 2 WEEKLY NOTES, 482.
D. & H. Canal Co. *v.* Loftus, 21 Smith, 420.
Brown *v.* Jones, 7 Watts, 433.

The note in suit, since it contained the five per cent. clause, was non-negotiable.

Woods *v.* North *et al.*, 3 Norris, 407.

The assignee of a chose in action takes it subject to all the defences to which it was subject in the hands of the assignor.

Rider *v.* Johnson, 8 Harris, 190.
Miller *et al. v.* Kreiter to use, 26 Smith, 78.
Bower *v.* Hastings *et al.*, 12 Casey, 235.
Edgar *v.* Kline, 6 Barr, 327.
Weaver *v.* Lynch, 1 Casey, 449.
Weaver *v.* McCorkle, 14 S. & R. 304.
Ashton's Appeal, 23 Smith, 153.
Buchanan *v.* Wurtz, 5 Watts, 151.
Keagy *et al. v.* Commonwealth, 7 Wright, 70.
Jaqua *v.* Montgomery, 5 Am. R. 168.
Daniel on Negotiable Instruments, 553-4-5.

Nov. 8, 1880. THE COURT. We cannot say that the Court below did wrong in refusing to quash the appeal from the award of arbitrators. It is true the defendant's agreement, waiving the right of appeal, might have been enforced, had an attempt in that direction been made at the proper time. But it is no less true, that the payee of the note, in which that agreement is found, might waive by his laches his right to enforce it. In the case of the Delaware & Hudson Canal Co. *v.* Loftus (21 P. F. S. 418), it was held that acquiescence in an appeal may be inferred from an appearance by the plaintiff, acceptance of pleas, and a delay in moving to quash until the third term. Substantially the same doctrine will be found in Hackert's Appeal (13 S. & R. 104). In Sleck *v.* King (3 Barr, 211), a motion to quash an appeal was held to be too late after the plaintiff had filed his narr.; and in Brown *v.* Jones (7 Watts, 433), it was said, *per curiam*, that after a plea the motion to quash is too late.

In the case under consideration, as to time, the plaintiff was sufficiently prompt, but some time before the motion to quash, the attorneys of the plaintiff made application to the attorneys of the defendant, and obtained from them a plea, which was duly filed. This was a direct and unqualified recognition of the defendant's right to be in Court as an appellant, and was certainly as effectual as a waiver of the right to quash, as any mere delay could have been, and yet, as we have seen, delay of itself will bar such right. A rule such as this may be regarded as over strict and technical, but it has its foundation in the fact that Courts are properly jealous of anything which tends to prevent trials by jury, and hence will take advantage even of mere technicalities, in order to favor that right.

The remaining assignments of error may be discussed together, as they involve a single principle; the right of the maker of non-negotiable paper to defeat a recovery on it, in the hands of a third party, to whom it has been assigned for a valuable consideration by setting up the want of consideration, or any equitable condition to which it was subject when in the hands of the payee. The note in suit was the third renewal of an original, executed by the defendant to Wetter, the legal plaintiff, on the 19th of May, 1877. Admittedly, it was made for the accommodation of the plaintiff; the parties, at the time, no doubt thinking it was negotiable. Since it was intended that Wetter should have it discounted for his own purposes, Wetter, at the time he received the note, agreed, which indeed would follow as of course, that he would, in commercial parlance, take care of this paper.

Under these circumstances, the Court was asked to say to the jury, that if Kiley executed and delivered this note to Wetter for the express purpose of enabling him to negotiate and obtain money on it, the bank to which it was passed could recover. The Court refused so to charge, and in this we think it did right. In the first place, the note was not negotiable; it could pass only by assignment, and that assignment would convey to the assignee only that which the payee was entitled to receive from the maker after settlement of all accounts and equities between them. Paper of this kind falls into the same class with bonds and other specialties, of which it is said by Chief Justice SHIPPEN, in a note to the case of Roussett *v.* The Ins. Co. (1 Bin. 433), if the obligor had before the assignment, which was made under the terms of the Act of 28th of May, 1715, any just demand

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against the obligee, which he might have set up against him, had there been no assignment, he might in like manner set it off against the assignee, who takes the bond subject to all the equities existing between the parties before the assignment. This rule, he says, is, however, subject to one exception. "If the assignee when he is about to take the assignment, calls upon the obligor to know whether the whole money is due, and the obligor tells him it is a good bond, but is entirely silent as to any claim of his against the bond, he can never afterwards open his mouth against the demand of the assignee."

So in Rider *v.* Johnson (8 Har. 190), it was held that the assignee of a chose in action, not negotiable, takes it subject to all the defences to which it was subject in the hands of the assignor, including set-off of cross demands, legal or equitable. We also find it ruled in Weaver *v.* Lynch (1 Ca. 449), that in order to stop the obligor of an assigned bond from setting up a defence, the assignee must show that he was induced to take the bond specially through the declarations of the obligor that he had no defence. Now, without multiplying authorities upon points about which there ought to be no dispute, we are at a loss to see how Kiley estopped himself from setting up a defence which was certainly good against Wetter. No declarations of his to the bank officers induced them to take this paper; on the other hand, if we consult the assignment, it was taken on the guaranty of Wetter that he would pay it when due. Let it be then that Kiley gave this note to Wetter for the express purpose of enabling Wetter to raise money upon it. This was after all but a private agreement between the parties, which was never communicated to the officers of the bank; they never acted upon any such understanding: how, then, can they set up to estop the defendant, a transaction to which their corporation was not a party, and of which they, when they took the assignment, knew nothing? Besides this, the duty of inquiry was upon them, and had they made that inquiry they would have discovered just what was found by the jury, that not only was the note drawn to Wetter, in order that he might raise money on it, but that he, at the same time, had agreed to pay it when it fell due. Had the bank known this fact, when it took the assignment, no one, we apprehend, will pretend to say that it could, nevertheless, hold Kiley; and yet, on all authority it was its duty, through inquiry of Kiley, to have known this very fact, and if did not have this knowledge, the fault was with its own officers, and no one else.

Judgment affirmed.

Opinion by GORDON, J.

January, '80, 349. January 5, 1881.

Dewees v. Letchford.

Execution—Sale of real estate—Act of June 11, 1879—Rule on purchaser at sheriff's sale to bring ejectment within ninety days—Errors and appeals—What not subject of a writ of error.

Before a party can obtain the benefit of the Act of June 11, 1879 (P. L. 127), compelling a purchaser at sheriff's sale to bring an ejectment within ninety days, the rule taken under the Act must be made absolute, and final judgment entered thereon. Hence an ejectment brought pending a rule under the Act to show cause, is in time, although issued more than ninety days after service of the rule to show cause upon the purchaser.

Quære. Whether a writ of error lies to an order discharging a rule to show cause taken under this Act.

Error to the Common Pleas No. 3, of Philadelphia County.

Rule obtained by Susan Dewees against Thomas Letchford by virtue of the provisions of the Act of June 11, 1879 (P. L. 127), to bring an action of ejectment within ninety days.

On Jan. 5, 1879, the sheriff, under a judgment against Peter Dewees, husband of the plaintiff, sold as his property certain premises in the city of Philadelphia to the defendant, Letchford. Upon the petition of Susan Dewees, setting forth that she was the owner and in possession of said premises, the Court, on Sept. 15, 1879, granted a rule on defendant to bring his action of ejectment within ninety days from service thereof, or show cause why the same could not be brought, which rule was served upon defendant on Sept. 26, 1879. Defendant filed an answer on Oct. 28, 1879, denying the fact of possession by Susan Dewees at the time of filing her petition, and the Court ordered depositions to be taken upon the rule. On Dec. 31, 1879, prior to filing the depositions, defendant issued his summons in ejectment. Afterwards the depositions were filed and the Court discharged the above rule, and subsequently discharged another rule taken by plaintiff to quash the summons on the ground that it issued more than ninety days after service of the first rule. Plaintiff took this writ, assigning for error the discharging of the rule to bring ejectment within ninety days and the discharging of the rule to quash the summons in ejectment.

J. D. Yocum, for plaintiff in error.

Section 2 of the Act of June 11, 1879 (P. L. 127), provides that whenever the purchaser after due service of the rule "shall fail to appear and show cause why such action cannot be brought within ninety days after such service, it shall be the duty of the Court to enter judgment against the parties served, and make the rule absolute, which judgment shall be final and conclusive,

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between the parties, their heirs and assigns; and thereafter no action of ejectment for the recovery thereof shall be brought." Here it is not pretended that the defendant showed any cause for not bringing his action within the ninety days, and the writ having been issued six days after the expiration of that time, should have been quashed.

W. H. Baker and *Geo. L. Crawford*, for defendant in error.

The Act of Assembly makes the *entry of judgment*, and not the lapse of time after service of the rule, the bar to the action, and see—

Letchford *v.* Dewees, 37 Leg. Int. 493.

January 17, 1881. THE COURT. We think it very clear that the Court below were right in their construction of the Act of June 11, 1879 (P. L. 127). The rule to show cause why the purchaser should not commence an action within ninety days must be heard and decided, and the rule made absolute before he can be barred of his action. By the words of the Act, the rule is "to bring the action within ninety days from the service of such rule, or show cause why the same cannot be so brought." Upon non appearance or failure to show cause, it is made the duty of the Court to enter final judgment, and thereafter no action of ejectment can be brought. Here there was an answer to the rule, filed within the ninety days, and subsequently the rule was discharged. We are bound to presume that it was for sufficient cause. The Act gives no appeal or writ of error to this Court. But no motion to quash has been made and we give no opinion upon the question whether this writ of error lies.

Order affirmed.

PER CURIAM.

Common Pleas—Equity.

C. P. No. 4. March 17, 1881.

Citizens' Pass. Railway Co. v. Donohugh.

Corporations—Passenger railway companies—Taxation for municipal purposes—Acts of August 25, 1864 (P. L. 1030), and April 29, 1844 (P. L. 497)—Taxation of horses used for drawing cars of public carriers.

Sur motion to make temporary injunction perpetual on bill filed and served, no plea, answer, or demurrer having been filed.

Bill in equity filed by the Citizens' Passenger Railway Company against William J. Donohugh, Collector of Delinquent Taxes. The bill set forth that the complainant was duly incorporated under the Act of March 25, 1858; that in 1880 the City of Philadelphia caused the horses owned by the plaintiff, used in moving its cars over its tracks, and absolutely requisite to the enjoyment of its franchises, to be assessed for city taxes; and that there was no authority in law for such assessment. The bill prayed for an injunction.

J. W. M. Newlin, for the complainant.

It is the settled policy of the Commonwealth that all the property of railroad companies, real or personal, which is requisite for the enjoyment of their franchise, shall be exempt from local taxation; and there is no distinction between steam railroads and horse railway companies.

Hestonville, M. & F. P. R'y Co. *v.* Phila., 8 N. 210.

The Act of April 21, 1858, P. L. 385, authorizes the City of Philadelphia to tax only a portion of the real estate of railroad companies in that city.

Lehigh Coal and Nav. Co. *v.* Northampton Co., 8 W. & S. 334.
Railroad Co. *v.* Berks Co., 6 Barr, 70.
Schuylkill Nav. Co. *v.* Berks Co., 1 Jones, 202.
Wayne Co. *v.* Del. & Hud. Canal Co., 3 Harris, 352.
Northampton Co. *v.* Lehigh, etc., Co., 25 Smith, 463.

While Wayne Co. *v.* Del. & Hudson Canal Co., *supra*, is apparently an authority for the city's right to tax horses of a railroad company, it is not so; for the Court said expressly that the horses were not "necessary incidents" to the franchise. The complainant's charter authorizes the city to tax its dividends over a certain sum. Why this express, if there were general authority?

The Act of April 8, 1873 (P. L. 64), abolishing tax exemption, and the provisions of the new constitution requiring uniformity in taxation and abolishing exemptions, do not make the exempt railway property taxable.

Northampton Co. *v.* Lehigh Coal and Nav. Co., 25 Sm. 463.

The car license fee is not a tax, but a license fee under the police power of the city.

Union Pass. R. W. Co. *v.* Phila., 2 N. 429; 8 WEEKLY NOTES, 377.

But even if the personal property of railroad companies were liable to taxation by ordinance, the city has not exercised the supposed authority. The Act of August 25, 1864 (P. L. 1030), does not execute itself, and the city ordinance of September 22, 1879, is not an execution of it. The Act of 1864 required the city (1) to designate what subjects of taxation, mentioned in the Act of 1844 (P. L. 497), should be assessed; and (2) to provide a system for the assessment and collection of such taxes. This the city has never done. The assessors have no right to designate the property; for that authority is conferred

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upon Councils. The assessment by the assessor was therefore void.

Hilliard on Taxation, 308.

Councils could not confirm an invalid assessment.

Doughty *v.* Hope, 3 Denio, 249.
Burrows on Taxation, 370.
Cooley on Taxation, 227, 259.

It is not pretended that Councils have ever provided a system of taxation under the Act of 1864. Indeed, their reasons for not acting appear in the reports of the commissioners appointed to consider the subject.

Journal of Select Council, 1865, 242.
Id. 1871, 258.

C. A. V.

April 2, 1881. THE COURT. A tax of two dollars on the hundred having by ordinance and with the usual formalities been levied by the city of Philadelphia upon the horses owned by the plaintiffs, and used by them in moving their cars over their tracks, and the said tax being unpaid, the plaintiffs have filed a bill by which they seek to enjoin the collector of delinquent taxes from enforcing payment of the tax by means of the remedies provided by law for the collection of delinquent taxes.

By the Act of August 25, 1864, it is enacted that "the Select and Common Councils of the city of Philadelphia shall have the power to levy a tax for municipal purposes on all subjects of taxation specified by the thirty-second section of the Act of April 29, 1844, and to provide by ordinance a system for the assessment thereof, and for the collection of taxes thereon" (P. L., 1864, p. 1030). Among the subjects of taxation specified in the thirty-second section of the Act of April 29, 1844, horses are expressly enumerated (P. L. 497, Brightly's Purdon, 1380). It is perfectly clear, therefore, that horses in general are a species of property taxable for municipal purposes. But it is contended by the plaintiffs that horses used by passenger railway companies are not liable to taxation, upon the ground that they are necessary for carrying on the business for which they are incorporated. The argument is, that all property which is indispensable for carrying on the business for which a company is incorporated is exempt from local taxation; that horses are indispensable for passenger railway companies, and that, therefore, they are exempt from such taxation. If the major premise were true, the syllogism would doubtless be a perfect one, but it is hardly necessary to say that there is no such principle, and that corporations, although they have greatly grown in power and numbers of late years, have not yet attained to the bliss of entire immunity from taxation. The argument is based upon a misapprehension of the grounds upon which the decisions upon this subject rest. In order to make any species of property taxable it must be shown that it is embraced in some enumeration or description of subjects contained in the law which is supposed to subject it to taxation. In the earliest case in our own reports in which such a question arose, the Permanent Bridge Company *v.* Frailey (13 Sergeant & Rawle, 422), it was decided that under the Act of April 11, 1799, authorizing the taxation of "all lands, houses, and lots of ground," the permanent bridge over the Schuylkill at Market Street was not taxable, because it could not be properly comprehended under any of the subjects of taxation mentioned in the Act. "It is neither land, house, nor lot," said Chief Justice Tilghman, "and in order to make it an object of taxation it must be shown to fall within the list of enumerated articles." Upon this ground it was held not to be taxable and upon this ground alone. The decision in the Lehigh Coal and Nav. Co. *v.* Northampton Co. (8 W. & S. 334) in which it was held that the bed, berm-bank, towpath, and toll-houses of the canal company were not taxable as real estate under the Acts of April 15, 1834, and April 29, 1844, rested upon precisely the same reason. "They cannot be considered as either 'lands, houses, or lots of ground,' according to the true meaning of the Acts and a fair interpretation thereof," said Judge Kennedy. It was a question of what the intention of the Legislature was —of judicial interpretation of the words indicating the subjects intended to be made liable to taxation by the Acts.

In all the subsequent cases in which similar questions arose, Reading R. R. Co. *v.* Berks County (6 Barr, 70), Wayne Co. *v.* Delaware and Hudson Canal Company (3 Harris, 351), Schuylkill Navigation Co. *v.* Berks County (1 Jones, 202), West Chester Gas Company *v.* Chester County (6 Casey, 232), and Carbon Iron Company *v.* Carbon County (3 Wright, 251), the decisions turned upon the same point, viz., whether the description of the property sought to be taxed was or was not fairly within the intention of the Legislature, as indicated by the words of the Acts—whether canals, toll-houses, depots, water-stations, etc. etc., were intended to be included under the general designation of "houses, lands, and lots of ground." In none of these cases did the Court lend the least countenance to the idea that corporations, as such, were exempt from taxation, either for State or county purposes. No such pretension was ever encouraged by the Court. On the contrary, it was expressly repudiated by the Court in Carbon Iron Company *v.* Carbon Co. (3 Wright, 251), where a fruitless attempt was made to exempt the lands of an iron company from taxation for

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State and county purposes. In the case of Wayne County *v.* The Delaware and Hudson Canal Co., already cited, it was held that although the reservoirs, lock-houses, engineers' offices, etc., were not within the Act of April 29, 1844, not being "houses, lands, or lots of ground," within the meaning of that Act, their horses used in drawing their cars on the railroad were taxable for State and county purposes. This is a case, therefore, directly in point upon the present question. It required the aid of the constitution and special legislation to exempt churches, burial grounds, colleges, academies, hospitals, and institutions of public benevolence and charity—legislation which, in the great majority of cases, would have been altogether unnecessary, if the principle contended for by the plaintiff's counsel had any foundation in law. When we consider the facility with which corporations may now be erected under the Acts of 1874 and 1876, the small number of persons necessary to constitute them, and the extent and variety of the business in which they are engaged, it must be apparent that the application of such a doctrine as that which is contended for by the plaintiffs, would be in the highest degree unequal, unjust, and oppressive to the people. The cases referred to did not proceed at all upon any theory or claim of exemption on the part of the corporations as such, but upon the sole ground that the property sought to be taxed was not within the words and intent of the Act imposing the tax. The Legislature itself is not competent to enact a law exempting corporations from taxation for property which would be liable to taxation under the general laws of the Commonwealth in the hands of natural persons, for such an Act would be in direct contravention of Article 9, Section 2, of the Constitution. They may designate the subjects upon which taxes may be levied, but all such taxes must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

When we find, therefore, "horses" expressly mentioned in the Act of 29th April, 1844, among the various kinds of property subject to taxation, we may be sure that it means horses, whether they belong to private individuals or to private corporations, such as the plaintiffs are. There is here no latitude for construction, and no doubt calling for interpretation. If horses are necessary for prosecuting the business of passenger railway companies, so are they necessary for prosecuting the business of numberless private individuals, but in neither case are they exempt from taxation on that account. The franchise which the plaintiffs enjoy is to be a body politic and corporate, their business the carrying of passengers, but there is nothing in the nature of either which clothes them with immunity from the taxation which is imposed upon the general public.

Ordered that the injunction be dissolved.

Opinion by THAYER, P. J.

Common Pleas—Law.

C. P. No. 3. Dec. 13, 1880.

Eckel v. Association.

Pleading—Replication—Demurrer—What is a departure in pleading—Action on a policy of life insurance—Waiver of the sufficiency of notice of death.

Sur demurrer to special replication.

Debt, by Aaron Eckel, assignee of Christopher Kauber, against The New Era Life Association, to recover the sum of five thousand dollars on a policy of insurance on the life of Christopher Kauber, who died January 20, 1879. The policy provided, *inter alia*, that sixty days after said association should receive reasonable and satisfactory proof of death of the said Kauber they would pay the amount. The narr. recited the death of said Kauber, alleging that "of all this the defendants afterwards, to wit, on the first day of February, 1879, received due and legal, reasonable and satisfactory notice and proof." The plea averred, *inter alia*, as follows: "the defendants deny having received due and legal, reasonable and satisfactory notice and proof of the death of said Kauber, or any proof whatever prior to the bringing of suit." The replication set forth, "that plaintiff ought to have his action notwithstanding anything in said plea, because at the time the said plaintiff furnished said defendants with proof of death, defendants did not object to the sufficiency thereof, nor did they do so at the time of demand of payment of the policy of insurance nor until after suit brought, but based their refusal to pay the said sum of money demanded on the ground of fraud and collusion to cheat defendants."

Defendants demurred to this special replication, on the ground that it alleged matter in excuse of peformance of a condition precedent to the right of action, after having declared an express actual performance, and after having formally joined issue upon special pleas denying such actual performance, and because said spe-

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cial replication attempted to put in issue mere inference and matter of law, was argumentative, evasive, and a departure.

W. Henry Smith, for demurrer. The replication must not depart from the allegations in the declaration in any material matter.

Chitty, 644, Ed. 1859.

A replication which neither pursues the declaration nor fortifies it, is a departure.

Burk *v.* Bear, 3 Clark, 312.
Scott *v.* Ins. Co., 9 Phila. 266.
Burk *v.* Huber, 2 Watts, 306.
McSherry *v.* Askew, 1 Y. 79.

Alex. Simpson, Jr., contra. Where an insurance company place their refusal to pay, upon a ground distinct from that of full notice and proof of death, they are deemed to waive any further compliance with the condition as to such notice and proof of death, and they cannot afterwards, without any pretence that they have been deceived or mistaken, change their ground and insist upon better proof of death.

Miller *v.* Ins. Co., 2 E. D. Smith, 268.
Vos *v.* Robinson, 9 Johns. 195.
Francis *v.* Ins. Co., 6 Cowen, 404.
Etna Ins. Co. *v.* Tyler, 16 Wendell, 401.

When the insurers refuse to pay on special grounds other than the insufficiency of proof, it is a waiver of the right to object.

Heath *v.* Ins. Co., 1 Cush. (Mass.) 257.
Coursin *v.* Penna. Ins. Co., 10 Wright, 323.
Tayloe *v.* Ins. Co., 9 How. 390.

The matter set up, if true, acts as an estoppel as against defendants. When there are special pleas, it is necessary to reply the estoppel or to be debarred from proving it.

Knight *v.* Ins. Co., 37 Leg. Int. 82.

C. A. V.

Jan. 4, 1881. THE COURT. Demurrer sustained with leave, etc.

C. P. No. 4. March 18, 1881.

Wynkoop v. Wynkoop.

Will—Testamentary power to sell—Joinder of interest and power—Presumption on execution in such case—Equity—When funds impressed with a trust may be followed—Ejectment.

Sur rule for a new trial and motion for judgment *non obstante veredicto*.

Ejectment, by Benjamin J. Wynkoop, H. P. Garabedean, and Hannah Matilda his wife, in right of said wife, and Joseph P., Kate S., and George H. Wynkoop, minor children of George H. Wynkoop, deceased, by their guardian, against Alfred Wynkoop, Almira Ann Wynkoop, Francis A. Wynkoop, and Helen W., Henry N., and Joseph S. Wynkoop, children of Benjamin N. Wynkoop, deceased, to recover an undivided fifth part of a five-sixths interest in certain premises on Marshall Street in the city of Philadelphia.

On the trial before THAYER, P. J., the following facts appeared.

One Abraham Wynkoop died in 1852 seised of certain premises, No. 137 North Eleventh Street, in the city of Philadelphia. By his will bearing date May 10, 1843, said testator provided, *inter alia*, as follows:—

"To my Wife Hannah Wynkoop I leave and bequeath all my Real Estate and Personall Estate to have & to hold during her natural life (if she remains my widdow) she may sell the Dwelling house No. 137 North Eleventh Street if she thinks it for the best and the comfort of herself and her children."

The residue of testator's will is reported at length in Hoffner *v.* Wynkoop, *ante*, p. 3. It contained no express disposition of the real estate except as above to the wife for life. Prior to the date of this will, in 1842, Joseph Wynkoop, a son of testator, died leaving children. Such of them as are now living and the issue of such as are dead, were the plaintiffs in the present suit. The testator also left at his death a wife and four children, viz., Alfred, Almira Ann, Francis A., and Benjamin N. Three of these children, still living, and the descendants of Benjamin N., who died in 1857, were the defendants in this suit.

On November 23, 1869, Hannah Wynkoop, widow of testator, sold and conveyed the premises on Eleventh Street to one Lancaster for $5000. All the defendants, such as were under age by their guardian, joined in this conveyance. The deed contained a recital of the power of sale given to the widow by her deceased husband's will, but did not in express terms purport to be an execution of the power. It also recited that the grantors comprised all the heirs and representatives of Abraham Wynkoop, deceased. None of the descendants of Joseph Wynkoop became parties thereto.

The $5000, purchase-money of these premises, together with $1000 belonging to Almira Ann Wynkoop, was used by the grantors in the above deed for the purchase of the premises in question upon Marshall Street, which premises were afterwards duly conveyed to them in manner following, viz., to Hannah Wynkoop for life with remainder to defendants in fee.

Said Hannah Wynkoop died in 1878. Plaintiffs thereupon brought this ejectment, claiming that Abraham Wynkoop died intestate as to the Eleventh Street premises, except as regards the life estate to his widow therein, and that therefore when the same were sold, the proceeds were charged with a trust for the heirs of said intestate, and that plaintiffs were entitled therefore to a one-fifth share in said proceeds, and further that said proceeds being traced into the Marshall Street

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premises, plaintiffs were entitled to follow their share in its converted form.

The Court ordered a verdict to be entered for plaintiffs, subject to the following reserved points:—

(1) Whether, by the will of Abraham Wynkoop there was a devise of the Eleventh Street property to his children, or whether he died intestate as to the fee thereof.

(2) Whether, if Abraham Wynkoop died intestate as to the Eleventh Street property, the plaintiffs, as heirs-at-law, can recover an interest in the premises in question on Marshall Street equal to their interest in the Eleventh Street property.

C. S. Pancoast, for the motion,

The evident intention of the will is that the wife should have an estate for life with remainder over to the children.

Tayler *v.* Wells, Style, 301.
Parker *v.* Nickelson, 1 DeG. J. & S. 177.
2 Jarman on Wills, 109.
Hall *v.* Lietch, L. R. 9 Eq. Cas. 376.
Farrer *v.* St. Catharine's College, 16 L. R. Eq. 19.
Marsh *v.* Hague, 1 Ed. Ch. 174.
Jordan *v.* Fortescue, 10 Beav. 259.
Langston *v.* Langston, 8 Bligh, 167.
McKeehan *v.* Wilson, 3 Sm. 76.
Abbott *v.* Middleton, 7 H. L. Cas. 68.
In re Daniel's Trust, L. R. 1 Ch. Div. 375.
Walker *v.* Quigg, 6 Watts, 87.

Where one has both a power and an interest, a conveyance without reference to the power will be deemed to have been made by virtue of the ownership, though the ownership was not co-extensive with the power.

Hay *v.* Mayer, 8 Watts, 203.
Jones *v.* Wood, 4 Harris, 25.
Birdsall *v.* Richards, 6 Id. 256.
Wetherill *v.* Wetherill, Id. 265.

The present case is substantially an attempt on the part of a holder of an alleged superior title to recover the consideration received by the grantors, on confirming the alleged defective title of the grantee. This is against all authority. He should bring ejectment against the grantee.

There is no resulting trust in this case. A resulting trust is raised only from fraud in obtaining the title or from payment of the purchase-money when the title is acquired.

Glidden *v.* Strupler, 2 Smith, 401.
Barnet *v.* Dougherty, 8 Casey, 371.
Nixon's Appeal, 13 Smith, 279.
Danzerisen *v.* Miller, 1 Leg. Gaz. Rep. 215.

Benjamin P. Wrigley (*William Hopple* with him), contra.

The Supreme Court has so construed this will as to give plaintiffs an interest undoubtedly in the premises on Eleventh Street.

Hoffner *v.* Wynkoop, 10 WEEKLY NOTES, 3.

The proceeds of the sale of said premises were therefore impressed with a trust for the benefit, *inter alia*, of plaintiffs and they may follow those proceeds in their converted form.

Edwards *v.* Edwards, 3 Wright, 369.
Harrold *v.* Lane, 3 Smith, 268.
Robertson *v.* Robertson, 9 Watts, 43.
Haines *v.* O'Conner, 10 Watts, 320.
Seichrist's Appeal, 16 Smith, 237.
Maul *v.* Rider, 1 Smith, 385.
Church *v.* Ruland, 14 Smith, 432.
Price's Appeal, Ibid. 472.

April 2, 1881. THE COURT. We regard the decision of the Supreme Court affirming the judgment of this Court in the case of Hoffner *v.* Wynkoop (10 WEEKLY NOTES, 3), as settling the construction of Abraham Wynkoop's will. The opinion of Justice TRUNKEY in that case makes it clear that Hannah Wynkoop, now deceased, who was the widow of Abraham, took under the will a life estate in all the real estate, coupled with a power to convert the Eleventh Street house into personalty by a sale, if, in her discretion, she should see proper to do so, and that the remainder in fee in all the real estate, being undisposed of by the will, passed under the intestate laws to the heirs of Abraham Wynkoop. This decision therefore disposes of the first point reserved upon the trial and rules it in favor of the plaintiffs.

On the second point we are of opinion that the deed executed by Hannah Wynkoop to Thomas A. Lancaster, November 23, 1869, for the Eleventh Street house, ought to be regarded as a good execution on her part of the discretionary power given to her in her husband's will. Although her interest in the house was only a life estate, her power was more extensive than her interest, and, so far as the right to convert the fee was concerned, was a power in gross. That the testator intended to give her the power to sell the whole estate in the Eleventh Street house does not, we think, admit of doubt, and this appears to have been the opinion of the Supreme Court in the case already referred to. That Hannah Wynkoop, when she united with the others in making the deed to Lancaster, supposed that the whole estate in the Eleventh Street house was thereby transmitted to the purchaser no one can reasonably doubt, nor can it be doubted that she intended that the deed which she executed should have that effect so far as any power which she possessed was efficacious to accomplish it. It is true that in her deed to Lancaster it is not expressly declared that she executed it in pursuance of the power, but that is not necessary. No doubt if one having both an interest and a power executes a deed which contains no reference to the power, and there is no evidence of an intention that the deed should operate beyond a transfer of his interest, a presumption will arise that it was intended only for that purpose and not as an execution of the power. The cases cited by the defendant's counsel go no further

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than this. But here the power given to Mrs. Wynkoop was fully recited in the deed to Lancaster, which is a significant circumstance, and all the facts show that she believed, and that it was her intention, not only that the life estate, but the entire fee should pass. It is well settled that it is not necessary to the valid execution of a power, that the instrument which executes it should purport to be made in execution of the power. It is sufficient if the subject of the instrument is the same subject over which the power is given, and if the intention can be fairly deduced from all the circumstances, for it is always in the main a question of intention. If then the deed to Lancaster executed by Mrs. Wynkoop may, under all the circumstances, and in view of all the facts, be fairly considered, not only as a transfer of her life estate, but an execution of the discretionary power which she had under her husband's will to dispose of the Eleventh Street property, it certainly is not deprived of any of its virtue in that respect by the fact that certain of the heirs, for greater assurance, united with her in making that deed. In this point of view we may regard their act in becoming parties to the deed as a mere act of supererogation, and altogether unnecessary to give it effect in passing the title. Lancaster paid a full price for the property, and it is plain that both he and Mrs. Wynkoop supposed he was getting a good title. It is plain that he did acquire a good title, if the deed executed by Mrs. Wynkoop was efficacious as an execution of her power. If it was not, then he obtained only a defective title, and both his expectations and her intentions were frustrated. In that event Lancaster is cheated, and must stand the brunt of an action of ejectment by the grandchildren of Abraham Wynkoop, while he will be turned over to an action against the present defendants, if perchance he can obtain redress in such an action. We are of opinion that the deed executed by Mrs. Wynkoop ought to be regarded, under all the circumstances, as a valid execution of her power under her husband's will.

And this would seem to settle the second point reserved, for the rest is clear. If the deed to Lancaster signed by Mrs. Wynkoop is regarded as a valid execution of the power which she held in trust for herself and the heirs in remainder, then the execution of that trust impressed upon the proceeds of the sale the same incidents which belonged to the realty itself, and these proceeds became a *trust fund* which those who are entitled to it may follow and claim wherever it can with certainty be recognized and identified, no matter what alteration of form it may have undergone. Upon this part of the case not the least doubt rests, for it was not only proven, but admitted at the trial, that the proceeds of the sale to Lancaster were immediately and without any change invested in the purchase of the Marshall Street house which is the subject of this ejectment. Both transactions were concluded and settled at the same time, and the deed for the Marshall Street house made to Hannah Wynkoop for life, with remainders to the present defendants, but omitting the plaintiffs, who were equally entitled to participate in the inheritance with them. The plaintiffs therefore are not endeavoring in this suit to raise a resulting trust out of the purchase-money paid for a wrongful and ineffective transfer of their estates by the other heirs, but to follow and reclaim their share of the *trust fund* which was realized from the execution of the power which Mrs. Wynkoop held *in trust* for herself and all the heirs in remainder, and which fund passed intact and unchanged into the Marshall Street house.

Ordered that the rule for a new trial be discharged and that judgment be entered for the plaintiffs on both of the points reserved.

Opinion by THAYER, P. J.

Orphans' Court.

April 2, 1881.

Soley's Estate.

Dower charge—Act of Feb. 24, 1834—Orphans' Court has no power to authorize discharge of, by payment to administrator.

Sur petition of owner of land charged with widow's dower.

The petitioner set forth that in pursuance of an order of the Orphans' Court on October 18, 1873, the widow and administratrix of Robert W. Soley, deceased, sold at public sale a certain lot of ground in this city upon the following terms: one-tenth of the purchase-money (being the interest of the administratrix as widow) to remain in the hands of the purchaser, during the life of the widow, and the interest thereof, at six per cent. per annum, to be paid to her by the purchaser, his heirs and assigns, and if not paid to be recoverable by due process of law, and at her decease said share of the purchase-money to be paid to the parties legally entitled thereto, and the remainder of the purchase-money to be paid in cash upon the execution of the deed. That

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Thomas F. Burkart became the purchaser for $8300; that the sale was confirmed by the Court and a deed made to him conveying the premises, under and subject to the payment of the interest on the sum of $830 to the widow, in lieu of dower, and to the payment of said sum at her death, unto such persons as should then be entitled thereto. That Burkart on March 23, 1875, conveyed the premises in fee to the petitioner, also subject as aforesaid. That petitioner is desirous of paying off the said principal sum of $830, and the widow has agreed to release all her interest therein and in said real estate. But petitioner is unable to pay said principal to the parties entitled, because one of the parties is under age, another is only entitled to a life interest in part thereof, and there are two other parties entitled to life interests in one other part thereof. The petitioner therefore prayed leave to pay the said sum of $830 unto the administratrix upon her giving security for its faithful application, and for an order directing her to execute and deliver to petitioner a deed of release and quit claim for said premises, releasing the same from the said sum of $830.

The widow and administratrix accepted service of notice of the filing of the petition.

W. E. Brand, for petitioner, cited—

Unangst *v.* Kraemer, 8 Watts & Serg. 391.

April 23, 1881. THE COURT. By the Act of March 29, 1832 (Purdon, 437, pl. 158), it is provided that if "the widow of the decedent be living at the time of a partition of his real estate, she shall not be entitled to payment of the sum at which her purpart or share shall be valued, but the same, together with the interest thereof, shall remain charged upon the premises, and the interest shall be annually paid by the persons to whom the real estate shall be adjudged, their heirs or assigns, to the widow during her natural life, and on her death, the said principal sum shall be paid by the persons to whom the real estate was adjudged, their heirs or assigns holding the premises, to the persons thereunto legally entitled." This section had reference, it will be observed, to the case of an acceptance by the parties in interest of the real estate, or its purparts, at the valuation. But the same Act by the 43d section made provision in the event of a refusal by the heirs to accept, and directed that upon a sale of the real estate, "the share of the widow of the purchase-money shall remain in the hands of the purchaser during the natural life of the widow, the interest to be paid to her annually by the purchaser, his heirs and assigns, holding the premises, and at her decease, her share of the purchase-money shall be paid to the persons legally entitled thereto." This so-called share of the widow, by the express terms of the Act, represents her dower in the real estate, and is not personalty, but remains realty. It is not a mere lien upon the land in the hands of the purchaser, but possesses the dignity of an estate in the nature of a rent charge, recoverable by distress, and is not divested by a judicial sale. (See cases in note to Purdon, 437.) Hence the intent of the Legislature that the widow should never receive in money the principal of her share is obvious, and that it should not be paid by the purchaser to the executor, administrator, or trustee making the sale is equally clear. It is to remain a charge upon the land in the hands of the purchaser and his alienees, until the death of the widow, and then is to be paid to the parties legally entitled at that time. Such being the case we have no power to relieve the petitioner. It is immaterial that the widow is willing to release all her interest, which is but the right to receive six per cent. per annum upon the sum of $830 for life. She has no authority to release the land from the payment of the principal sum, nor to receive the money, neither has the Court any jurisdiction to authorize such release by or payment to her.

There is nothing to prevent the widow from releasing to the petitioner her right of dower, but then, he must in order to discharge his land make distribution to the parties legally entitled to said principal sum. The Court has no such authority. By the 46th section of the Act of 24th of February, 1834 (Purdon, 443, pl. 181), it is expressly provided that the share of a tenant for life, in case of a sale in partition, shall not be paid to him or her, but remain charged on the real estate sold, or other real estate according to the directions of the Court. It is evident therefore that petitioner must distribute the amount charged upon his land upon his own responsibility. Cases like the present have heretofore arisen, and will doubtless again occur, and while we would be pleased to aid purchasers at sales in partition and their alienees, yet, in the absence of legislation, we have not the requisite jurisdiction. The petition is dismissed.

Opinion by HANNA, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, MAY 19, 1881.* [No. 5.

Supreme Court.

Jan. '80, 228. February 14, 15, 16, 1881.

Cuthbertson's Appeal.
Appeal of the Contributors to the Pennsylvania Hospital.
Appeal of the Zoological Society.

Will—Issue of devisavit vel non—Testamentary capacity—Burden of proof of, when shifted—Confidential adviser—Effect of large bequests to confidential adviser by one aged or infirm.

Where an alleged testator is shown by evidence to be weak in mind, whether arising from age, bodily infirmity, great sorrow, or other cause tending to produce such weakness, though not sufficient to create testamentary incapacity, and the person whose advice has been sought and taken in the making of the will receives a large benefit by the terms thereof, it must be shown affirmatively, in order to support such instrument, that the alleged testator had full understanding of the nature of the disposition contained in it.

Every man who draws a will in his own favor under the circumstances mentioned above, should be required to prove affirmatively all the circumstances connected with the drawing of the will, and must make it appear that the alleged testator was laboring under no mistaken apprehension as to the value of the property or as to the amount he was giving to his confidential adviser, but that the gift was his free and intelligent act.

Appeals from the Orphans' Court of Philadelphia County.

Appeal of James Cuthbertson and James Georgeson and Agnes his wife, in right of said wife, and of Jeanie Cuthbertson.

Appeal of the Contributors to the Pennsylvania Hospital.

Appeal of the Zoological Society.

The above were appeals from a decree of the Orphans' Court of Philadelphia County, refusing to award an issue *devisavit vel non*, to determine whether a certain paper purporting to be a codicil to the last will of John L. Neill was a valid codicil or not.

Before the examiner appointed to take testimony, it appeared that John L. Neill, a native of Leith, Scotland, came to Philadelphia in 1828, where he engaged in business, in the prosecution of which he acquired a large fortune. At various times he lost his children, his brothers, and sisters, and finally on November 21st, 1876, his wife. In the early part of November, 1876, Mr. Neill was affected with a slight stroke of paralysis. There was evidence that the effect of this stroke, together with the death of his wife, had been to break Neill down, and to afflict him with aphasia, a disease which deprives the sufferer of the power of expressing his ideas in words, which interferes with his articulation, and to a certain degree enfeebles the intellect. There was strong evidence, on the contrary, that at the time of the execution of the codicil hereinafter mentioned, his mind was perfectly bright and unclouded, and that he was possessed of memory, intelligence, and speech.

On December 1, 1876, Neill sent for John S. Yardley, a conveyancer, who from time to time had acted as his agent in certain business matters, and was also a personal friend, for the purpose of drawing a codicil to a will which Neill himself had drawn and executed on April 28, 1874. Mr. Yardley called in the evening, received instructions from Neill, and returned the following evening with a codicil drafted, which was read over to Mr. Neill in the presence of three subscribing witnesses, who were Dr. Thos. M. Drysdale, the attending physician, Wm. C. McPherson, a builder and also a witness to Mr. Neill's first will, and Caleb Keeny, a neighboring druggist. Miss Lambert, a sister-in-law of Mr. Neill, was also present.

Neill executed the codicil by appending his mark to it, being unable to write by reason of the stroke of paralysis which he had had.

The day after the execution of the codicil, Miss Lambert again read it to Neill, who then instructed her to put it away in his drawer, where it remained until the death of Neill in September, 1877. After the execution of this codicil Neill had other strokes of paralysis, and for some considerable time prior to his death he was speechless.

By this codicil bequests in the will amounting to $173,000 to various legatees were reduced to $35,000. Among others, legacies of $25,000 each to James Cuthbertson, Agnes Georgeson, and Jeanie Cuthbertson were reduced to $2500 each; a legacy of $5000 to the Pennsylvania Hospital was reduced to $2000, and a legacy of $10,000 to the Zoological Society was reduced to $2500. The codicil in addition constituted Yardley residuary legatee and devisee. The estate was estimated to be worth several hundred thousand dollars.

The will and codicil were admitted to probate by the Register, without objection being made thereto, but subsequently James Cuthbertson *et al.* took an appeal to the Orphans' Court from the order of the Register admitting the codicil to probate, and asked the Orphans' Court to award

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an issue of *devisavit vel non* to determine the validity of said codicil.

After argument, the Orphans' Court entered a decree refusing the issue, HANNA, P. J., delivering the opinion of the Court, and PENROSE, J., a concurring opinion. (See 37 Leg. Int. 39.) From this decree James Cuthbertson *et al.*, the Contributors to the Pennsylvania Hospital, and the Zoological Society appealed, assigning for error the decree of the Court refusing to grant the issue prayed for.

H. J. McCarthy and and *Hon. Wm. A. Porter*, for James Cuthbertson *et al.*; *A. Sydney Biddle* and *Geo. W. Biddle*, for the Contributors to the Pennsylvania Hospital; *W. W. Montgomery* and *Samuel Wagner*, for the Zoological Society, appellants.

The facts in dispute, in view of the circumstances of the case, entitled us to an issue. The bequest to Yardley placed the question as to undue influence under the line of rulings as to voluntary conveyances *inter vivos*, which compel the voluntary grantee to show disposing capacity and an accurate knowledge of the circumstances on the part of the grantor.

Huguenin *v.* Baseley, W. & T. Lea. Ca. Eq. (4th ed.), 1156–1192.
Wistar's Appeal, 4 Sm. 60.
Rhodes *v.* Bate, L. R. 1 Ch. App. 252.
Tyler *v.* Gardiner, 35 N. Y. 595.
Delafield *v.* Parish, 25 Id. 9.

Under the decisions of this Court the relations of the legatee and the testator, taken in connection with the testator's condition, mental and physical, cast the burden of proof of fairness upon the legatee.

Boyd *v.* Boyd, 16 Sm. 283.
Frew *v.* Clarke, 30 Id. 170.
Tyler *v.* Gardiner, *supra*.

Under the circumstances it was not necessary for the contestants to prove either fraud or testamentary incapacity.

Boyd *v.* Boyd, *supra*.

Robert N. Willson, for the appellees.

Undoubtedly the presumption is in favor of Neill's entire sanity and testamentary capacity.

McMasters *v.* Blair, 5 C. 298.
Thompson *v.* Kyner, 15 Sm. 368.
Tawney *v.* Long, 26 Sm. 106.
Cauffman *v.* Long, 1 Norris, 72.

Conceding that there is a conflict of testimony, the law is that an issue will not be granted where upon the whole testimony the will ought to stand.

Graham's Appeal, 11 Sm. 43.
Cozzens's Will, Ibid. 196.
De Haven's Appeal, 25 Id. 337.
Cauffman *v.* Long, 1 N. 72.
Wainwright's Appeal, 8 N. 220.

Mere solicitations do not amount to undue influence.

Miller *v.* Miller, 3 S. & R. 267.
Tawney *v.* Long, 26 Sm. 106.

The mind of the testator must be shown to have been subjugated by some kind of coercion which subverts his independence.

McMahon *v.* Ryan, 8 Harris, 329.
Eckert *v.* Flowry, 7 Wr. 46.
Thompson *v.* Kyner, 15 Sm. 368.

The testimony of the contestants falls far short of this.

February 14, 1881. THE COURT. Boyd *v.* Boyd (16 P. F. Smith, 283) established a general principle of the highest importance for the protection of persons who call in professional or other advisers, to assist them in making their last wills. That principle may be briefly stated thus: Where the alleged testator is shown by evidence to be weak in mind, whether arising from age, bodily infirmity, great sorrow, or other cause tending to produce such weakness, though not sufficient to create testamentary incapacity, and the person whose advice has been sought and taken, receives a large benefit under the instrument propounded as a will, it must be shown affirmatively that the alleged testator had full understanding of the nature of the disposition contained in it. The general rule undoubtedly is, that testamentary capacity and knowledge of the disposition made are presumed. Where the testamentary capacity is perfect, fraud or undue influence must be shown. In such case the undue influence must be such as to destroy the freedom of will of the party, or at least very much to impair it. But not so in the case of an old, infirm, and mentally weak man, disposing of his estate in favor of his confidential adviser. These principles were all affirmed and recognized in Frew *v.* Clarke (30 P. F. Smith, 170). That case did not in the least shake the principle of Boyd *v.* Boyd, which was fully supported by the authorities, and is founded on sound principle and the wisest policy. Wills are generally prepared according to instructions given to the scrivener privately, when no one else is present, and to hold that in the case supposed it is sufficient to prove the formal execution of the paper in the presence of witnesses, and then throw upon the contestants the burden of proving fraud, undue influence, misrepresentation, or mistake, would open the door wide for the arts of the cunning and designing to succeed in their nefarious purposes. Every man who draws a will in his own favor, under such circumstances, should know that he will be required to prove affirmatively all the circumstances connected with the drawing of the will, and that it must appear that the alleged testator was laboring under no mistaken apprehension as to the value of his property and the amount he was giving to his confidential adviser. It has been decided that the beneficiary himself is a competent wit-

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ness to prove the will. He cannot complain, then, that the rule is hard or unjust which requires him to make it clearly appear that the gift to him was the free, intelligent act of the testator. In truth, we were not called on in Frew *v.* Clarke to re-examine the decision in Boyd *v.* Boyd. In the latter case it was held merely, that upon the evidence there given, the Judge below was right in submitting the case to the jury. In Frew *v.* Clarke, upon the trial of the issue of *devisavit vel non* below, the question had been submitted to the jury, and the verdict sustained the instrument propounded as a will. Mr. Justice MERCUR says, in the opinion of the Court delivered by him: "If the mental capacity of McCully (the testator) had been impaired, if he had become weak from age or bodily infirmity, although not to such an extent as to destroy his testamentary capacity, it might have shifted the burden of proof, and required the defendant in error (the legatee) to negative by evidence a presumption of undue influence. It is shown, however, that McCully's mental capacity was not impaired." Of course, upon the principle of Boyd *v.* Boyd, the judgment of the Court below had to be affirmed. There were other questions in the case. Whether the paper propounded was a will or an obligation sealed and delivered *inter partes*, and whether, conceding it to be testamentary, Clarke, the legatee, was a competent witness to prove it. Upon these questions the Court was divided, but not upon the general principle settled in Boyd *v.* Boyd.

We consider that the case presented on these appeals is entirely within that principle. Had the only question been on the testamentary capacity of John L. Neill, there would be reason to hold that there was not sufficient evidence to justify a jury in setting aside the codicil. Had it been drawn without advice and suggestion by Neill himself, as was the original will, it must have stood. But it cannot be disputed that there was evidence, we think enough to carry the case to a jury, that the testator was not the same man physically and intellectually when he executed the codicil as when he made the original will. A jury might reasonably so conclude from the evidence. Then the onus was thrown on Yardley to prove that Neill fully understood the value of his property, and the probable residue after paying all his legacies. It would not be proper for us to express any opinion upon the weight of the evidence as bearing upon this question. Upon the issue to be granted, it must be submitted to a jury under proper instructions from the Court.

There may be a case where the alleged undue influence is applicable only to a single independent provision in a will, and that provision may fail, leaving the rest of the will to stand. It is certainly not this case, where the clause objected to is a residue, and that residue made up or largely increased by alterations made, as a jury may conclude, under the same influence for that purpose. It may be, however, that if the bequest of the residue in the codicil fail and the rest stands, the general direction of the will in the fourteenth item will apply to the legacies in the codicil as taking the place merely of the legacies from item 20 up to item 39 in the original will. Upon this point we express no opinion. In either case the appellants have an interest to contest the codicil.

Decree reversed, and it is ordered and decreed that the issue prayed for in the Court below be granted, and the record remitted for further proceedings.

Opinion by SHARSWOOD, C. J.

Jan. '81, 56. March 3, 1881.

Macungie Savings Bank to use v. Bastian.

Banks—Stock subscriptions—Set-off—Right of a depositor in an insolvent bank to set off his deposit against an assessment due by him on account of his stock subscription.

The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is a trust fund for the benefit of creditors.

The board of directors of an insolvent bank having duly made an assessment on unpaid stock subscriptions for the purpose of meeting the liabilities of the bank, a depositor cannot set off the amount due him on account of his deposit, against the amount of assessment due by him on account of unpaid stock subscriptions.

Jordan *v.* Sharlock, 3 Norris, 366; Fox's Appeal, 8 WEEKLY NOTES, 556, distinguished.

Error to the Common Pleas of Lehigh County.

Assumpsit, by the Macungie Savings Bank to the use of Charles W. Cooper, assignee of said Bank, against Reuben Bastian, to recover unpaid assessments upon a stock subscription.

The plaintiff, under a rule of court, filed a statement setting forth that the Macungie Savings Bank was duly incorporated on the 28th day of March, 1867, that at the opening of the subscription book Bastian subscribed for 100 shares of stock of the par value of twenty dollars per share, paying on account therefor five dollars per share, and that he duly received the certificate. That on the 29th of April, 1878, the bank made an assignment to the use plaintiff, and the assets not proving sufficient to pay the debts, the Board of Trustees, by resolution dated September 23, 1879, made an assessment of fifteen dollars per share, to recover which amount upon each of defendant's shares this suit was brought.

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The defendant filed an affidavit of defence alleging, *inter alia*, that on the 25th of March, 1877, and the 7th of May, 1877, he became a depositor in the bank in the several sums of forty-two hundred dollars and two hundred and twenty-five dollars for which he received and still held certificates of deposit, that said sums were still due and unpaid, and that he claimed to set off these sums against the amount due by him for his stock subscription.

The Court (ALBRIGHT, P. J.) discharged a rule for judgment for want of a sufficient affidavit of defence.

The plaintiff took this writ, assigning for error the action of the Court in refusing to enter judgment for want of a sufficient affidavit of defence.

C. J. Erdman, for the plaintiff in error.

The capital stock of a corporation is a trust fund for the payment of its debts.

Wood *v.* Dummer, 3 Mason, 308.
Germantown Pass. R. W. Co. *v.* Fitler, 10 Smith, 124.

There is no such mutuality of demand between a stock subscription and a deposit, as will permit the latter to be set off against the former. This mutuality is a cardinal rule of interpretation of our Statute of Defalcation.

Stuart *v.* The Commonwealth, 8 W. 74.
Sawyer *v.* Hoag, 17 Wallace, 610.

The subscription is *debitum in presenti solvendum in futuro* and in no sense can be said to arise out of the same right or between the same parties as a deposit.

Pittsburgh and Connelsville R. R. Co. *v.* Clark *et al.*, 5 Cas, 146.

In Jordan *v.* Sharlock (3 Nor. 366), the bank held the note of the depositor and each party was a creditor of the other on account of transactions arising in the regular course of business. This is the distinction between this case and that; here there cannot be said to be any regular business transaction or any such mutuality as would bring the case within the privileges of the statute.

Henninger and *De Walt*, for the defendant in error.

Both parties were indebted to each other. The assignment cannot change the character of the indebtedness. Each had a money demand against the other, and this is sufficient to bring the case within the statute. The case is however decided by—

Fox's Appeal, 8 WEEKLY NOTES, 556.
Jordan *v.* Sharlock, 3 Norris, 366.

March 14, 1881. THE COURT. The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is undoubtedly a trust fund for the benefit of its creditors. (Germantown Railway Co. *v.* Fitler, 10 P. F. Smith, 131; Woods *v.* Dummer, 3 Mason, 308; Mann *v.* Pentz, 3 Comstock, 422.) While such unpaid subscriptions pass, as assets, to the assignee under a voluntary assignment for the benefit of creditors, and the directors of the insolvent corporation may be required to make such calls on subscribers to the stock as may be necessary to enable him to collect the same, they still retain the impress of trust funds and must go into the hands of the assignee intact, for the purpose of distribution among those for whose benefit they were intended. In this respect they differ from ordinary choses in action belonging to the assignor at the date of assignment. Against the latter, legitimate claims of set-off may exist, and what remains, after deducting the same, is all that can properly be considered a part of the trust fund.

The demand against defendant in this case is not grounded on business transactions between him and the bank since its organization. It originated in the very creation of the bank, of which he was one of the corporators. As a condition precedent to the granting of letters of incorporation, they were required by the sixth section of the charter "to raise and form a capital of not less than five nor more than fifty thousand dollars, in shares of twenty dollars each" for the security of depositors. The defendant subscribed for one hundred shares of the capital stock thus required and paid twenty-five per cent. thereof. By resolution of the board, after the assignment, the remaining seventy-five per cent was "called in for the liquidation of the indebtedness of the corporation." He refused to pay in obedience to the call, and when suit was brought by the assignee in the name of the bank, to recover the balance due and owing by him on his subscription, his defence was that the bank was indebted to him as a depositor in a much larger sum, and therefore he should not be compelled to pay.

If such a defence were entertained, the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the common benefit of all alike, and apply it to the sole benefit of the defendant, who, at best, has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead. From the fact that the directors called in the whole of the outstanding subscriptions for the purpose of liquidating the indebtedness of the bank, we have a right to assume that it is all required for that purpose. If defendant's indebtedness to the bank at the date of the assignment

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had been founded on an ordinary business transaction, such as making or indorsing a note, he might with some show of reason insist on setting up by way of defence a counter-claim as depositor. This would bring him within the principle of Jordan *v.* Sharlock (3 Norris, 368).

In Sawyer *v.* Hoag, Assignee (17 Wal. 610), it is held that a stockholder indebted to an insolvent corporation for unpaid shares, cannot set off against this trust fund for creditors a debt due him by the corporation; that the fund arising from such unpaid shares must be equally divided among all creditors. That case, it is true, arose under the National Bankrupt Act; but, so far as the principle now under consideration is concerned, the right of set-off and rule of distribution, under that Act, do not materially differ from our voluntary assignment law.

The defence set up in this case derives no support from the principle involved in Fox's Appeal (8 WEEKLY NOTES, 556). The fund for distribution there included proceeds of outstanding subscriptions to capital stock of the Kutztown Savings Bank, which had been collected by the assignee. The whole fund was insufficient to pay depositors who claimed that, as a preferred class, they were entitled to the fund for distribution to the exclusion of other creditors, and, if not entitled to the entire fund, they had at least an exclusive right to that portion of it which represented capital, collected by the assignee; but it was held that the depositors as a class had no exclusive right to the whole or any particular portion of the fund.

As the case was presented to the Court below, we are of opinion that the plaintiff was entitled to judgment for want of a sufficient affidavit of defence.

It is ordered that the record be remitted to the Court below with instructions to enter judgment against the defendant for fifteen hundred dollars with interest from the time the same was due and payable according to the call, unless other legal or equitable cause be shown to said Court why such judgment should not be so entered.

Opinion by STERRETT, J.

Jan. '80, 262. March 4, 1881.

Green's Appeal.
Miller v. The East Penn Iron Co.

Equitable estoppel—What will work—Meaning of words "first mortgage"—Are equivalent to "first lien"—One negotiating bonds so endorsed is estopped from filing a mechanic's lien in his own behalf and claiming priority thereon over the claims of holders of such mortgage.

In this State, the words "first mortgage" have a fixed, definite meaning, and imply that the lien of the mortgage is prior to any other claim.

Rice's Appeal, 29 Sm. 168, approved.

A contractor agreed to build a furnace for an iron company, and to be paid partly in money and partly in bonds of the company, to be secured by a first mortgage of the company's property, and guaranteed by the Phila. & Reading R. R. Co. After beginning his work certain of the bonds were received by the contractor and negotiated by him to third parties, the bonds being duly guaranteed and stamped on their face "First Mortgage Bonds." Subsequently, the contractor, not being paid in full by the company, filed a mechanic's lien against the furnace for the amount he claimed to be due him. The company's property having been sold under a subsequent judgment, and the proceeds paid into Court for distribution:

Held (affirming the judgment of the Court below), that the contractor was estopped, as against the guarantor of the bonds and the purchasers thereof, from setting up any claim on his mechanic's lien, in priority to the lien of the mortgage securing the bonds.

Appeal of R. C. Green from a decree of the Common Pleas of Berks County, distributing the proceeds of a sheriff's sale of certain real estate of the East Penn Iron Co.

The matter was referred to Frank R. Schell, Esq., as auditor, from whose report the following facts appeared: On April 15, 1874, one John F. Noble entered into an agreement with the East Penn Iron Company to construct for it two joint blast furnaces on its premises, said Noble to be paid therefor in instalments as the work progressed the sum of $180,000, as follows: "$30,000 in current funds of the United States, $85,000 in first mortgage bonds of the company, principal and interest guaranteed by the Phila. & Reading R. R. Co., and 65,000 in stock of the East Penn Iron Co." Noble began work in May, 1874, but was much embarrassed by payments not being made regularly to him. On Nov. 21, 1874, certain subcontractors filed a mechanic's lien for $17,000 against the furnaces, wherein the company were named as owners, and Noble as contractor. Meanwhile, the company had entered into an agreement with the Phila. & Reading R. R. Co., whereby the latter was to guarantee bonds of the company for $75,000, secured by a first mortgage upon its property, the bonds and mortgage to be executed to a certain bank as trustee, and to be delivered by it to Noble when the guarantor should direct. On December 30, 1874, the bonds and mortgage were executed, each bond being stamped on its face "First Mortgage bond"; the guarantee was entered into, and the mortgage was recorded Feb. 1, 1875. The Phila. & Reading R. R. Co., however, refused to allow the issue of all the bonds, but agreed that some of them should

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be issued to Noble, who was to sell the same and employ the proceeds of their sale to pay off the above-mentioned mechanic's claim. Bonds to the amount of $48,000 were accordingly issued to Noble, and the mechanic's claim of $17,000 paid off out of the proceeds of their sale. The bonds were negotiated by Noble to third parties. Subsequently other liens were filed by subcontractors against the furnaces to the amount of about $9000, and, for this reason, the guarantors declined to allow the issue of any more bonds. In July, 1875, the furnaces were completed, and on Nov. 3, 1875, Noble, not having received the full consideration promised him, filed a mechanic's claim against the furnaces for $51,953.03; which lien he assigned to the appellant, Robt. C. Green, on April 11, 1876. A sci. fa. issued on the claim and judgment for $35,000 was confessed thereon. This judgment was subsequently opened on the application of the Phila. & Reading R. R. Co. Afterwards, one Miller obtained a judgment against the company, issued execution thereon, and sold the company's real estate, consisting of the two furnaces in question, for $55,000, which sum was paid into court and referred to the auditor in this case for distribution. Before the auditor, it was admitted that the amount of the liens of the subcontractors should first be allowed from the fund. The residue was claimed (1) by Green, the assignee of Noble's mechanic's lien, who claimed by virtue thereof, and (2) by the holders of the bonds secured by the mortgage and guaranteed by the Phila. & Reading Railroad Co., on the ground that Noble had by his action in negotiating the same, estopped himself and his assignees from denying that they constituted a first lien upon the premises. The auditor held that there was no such estoppel. He, therefore, after payment of costs and fees, awarded from the fund: (1) The amount of the claims of the subcontractors; (2) $34,172.44, the amount he found due upon Noble's claim; (3) the residue of the fund he awarded pro rata to the bondholders.

Exceptions were filed to the report, by Noble, on the ground, *inter alia*, that the amount awarded him was less than was due him, and by the holders of the bonds and by the Phila. & Reading R. R. Co., guarantors thereof, on the ground that the auditor erred in awarding distribution of any part of the fund to Noble's mechanic's claim, before the bondholders were paid in full. The Court (HAGENMAN, P. J.) overruled Noble's exception and sustained that of the bondholders and of the Phila. & Reading R. R. Co., and a decree was entered awarding the whole fund, after payment of the subcontractors' claims, to the bondholders. From this decree R. C. Green, assignee of Noble's mechanic's lien, took this appeal, assigning for error the action of the Court in making distribution to the bondholders prior to paying his mechanic's claim, and in not awarding to him the full amount claimed on his lien.

G. R. Kaercher and *James Ryon* (with them *J. M. Healy*, *Horace Roland*, *S. H. Kaercher*, and *F. W. Hughes*), for appellant.

The amount awarded us by the auditor was much less than was due; the Court should have decreed us the sum of $47,600.

It is claimed that Noble's acceptance of the bonds and his negotiation thereof did not estop him from setting up a claim on his lien. It is not pretended that he is a party to any agreement waiving his right to file a lien nor is it denied that he could have filed a lien if no bonds had been issued. If the company had entirely failed to perform their agreement, it is not questioned but that Noble would have had such right; does, then, their part compliance deprive him of his legal right to a lien for the unpaid balance? The bondholders and the guarantors cannot raise the question of estoppel. Noble had a right to all the bonds, and they have refused to deliver $27,000 thereof to him. They must show performance on their part before they can invoke the doctrine of estoppel. As to the bonds being negotiated by Noble, while marked on their face "First Mortgage Bonds," it is to be remembered that this is the assertion of the Iron Company and not of Noble. In negotiating the bonds, he merely delivered them with this assertion of the Iron Company and without any warranty, express or implied, from him. It is not claimed that Noble waived his rights to file a lien, or that he made any assertion as to the mortgage being a first lien, when he negotiated the bonds. "First mortgage" does not mean "first lien;" and the Court's assumption that such was the words' meaning was groundless. Moreover, the words had reference to the state of facts at the time the bonds were negotiated, which was before the lien was filed, and there is no evidence that buyers bought on the faith thereof. The bond gave notice of the mortgage, and this gave notice of the property and its situation: an inspection would then have shown that mechanics' claims might be filed.

The evidence before the auditor did not fulfil the requirements of an estoppel.

Waters's Appeal, 11 Casey, 523.
Knouff *v.* Thompson, 4 Harris, 361.
Ream *v.* Harnish, 9 Wr. 378–9.
Rhodes *v.* Childs, 14 Sm. 25.

G. F. Baer, for appellees.

The amount awarded to the appellants by the auditor is quite as much as they can be entitled to in any view of the case.

It is perfectly clear that the filing of the lien was a violation of the understanding of the parties. After the lien was filed, the mortgage

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was no longer a first mortgage; these words have a perfectly fixed and definite meaning in Pennsylvania, and everybody concerned with the bonds had a right to believe they were what they claimed to be. Moreover, the parties' own interpretation of the contract has been in accordance with this meaning, for the guarantors refused to issue the bonds until the then existing mechanic's claim was paid off; and Noble acquiesced in this. The case fully comes up to the requirements of an estoppel.

McCully *v.* R. R., 8 Casey, 32.
Guiterman *v.* Landis, 1 WEEKLY NOTES, 622.
Cornish *v.* Abington, 4 H. & N. 556.
Carr *v.* R. R., L. R. 10 C. P. 317.
Covert *v.* Irwin, 3 S. & R. 283.
Calder *v.* Chapman, 2 Sm. 360.
McElrath *v.* R. R., 5 Sm. 189.

March 28, 1881. THE COURT. After the completion of the furnaces, Noble filed a claim under the Mechanic's Lien Law for $51,953.03. The auditor found the balance due him was $34,172.44. His counsel alleges that the auditor erred in stating the sum due less than it should be, and that the true balance is $47.600. This is less than the amount of bonds Noble received, and the fund for distribution is not sufficient to cover those bonds after deducting liens of subcontractors. Then if Noble's lien is not entitled to priority over the mortgage, it is useless to consider the alleged errors by which his claim was reduced.

Noble agreed to construct the furnaces for the consideration of $180,000 to be paid by the East Penn Iron Company, $65,000 in its stock, $30,000 in current funds, and "eighty-five thousand dollars of first mortgage bonds of said company, principal and interest guaranteed by the Philadelphia and Reading Railroad Company." Subsequently, the East Penn Iron Company and the Philadelphia and Reading Railroad Company made an agreement, reciting that the former had made one hundred and fifty coupon bonds for five hundred dollars each, and a first mortgage upon their property therein mentioned, to secure the payment thereof, and the latter guaranteed the payment of said coupons and bonds on certain conditions, among which were that the trustee should hold the bonds clear of any control of the East Penn Iron Co., which should not be entitled to receive them until authorized by the guarantor upon its becoming satisfied with the progress of the construction of said furnaces. Noble was not a party to the agreement between the companies. His contract contains nothing of conditions of guaranty. Before any bonds were authorized to be delivered to the East Penn Iron Co., a mechanic's lien was filed, and Noble arranged to pay that lien because of the guarantor's refusal to deliver the bonds while the same remained unsatisfied. From this he knew that the guarantor insisted upon the mortgage remaining what it purported to be by both agreements. And with this knowledge he received all the guaranteed bonds, which were delivered to the East Penn Iron Company, $48,000; nor did he then assert in any way the right of priority of lien.

That Noble could file his claim and hold his lien as against the East Penn Iron Company has not been disputed, but the appellees contend that he is estopped from priority over the mortgage. The appellant denies that Noble either agreed with or represented to any one that the mortgage should have preference to his lien. Conceding for the present inquiry, that his contract did not preclude the lien, then it dated from the commencement of the work, and was continued by filing the claim within six months after its completion. He bound himself to take less than half the contract price in first mortgage bonds to be guaranteed by a third party. What would the security to the guarantor be worth with a prior lien for the remainder of the price? Each bond bore on its face the words "First Mortgage Bond," and also the guaranty. Every one that Noble received, he sold for just what it purported to be. The guarantor could well infer his agreement to postpone his mechanic's lien, and the buyer would naturally believe he had done so. If he had a mental reservation to hold his lien against the guarantor and purchasers of the bonds, fortunately the law deals with expressions and acts of parties, rather than their secret intentions.

The Act of April 6, 1830, provides, that, when the lien of a mortgage upon real estate shall be prior to all other liens upon the same, the lien of such mortgage shall not be destroyed or affected by sale of the real estate by virtue of any writ of *venditioni exponas*. That any one who contracts for a first mortgage, or who deals in first mortgage bonds, does not know the phrase means the mortgage described in that statute, is incredible. This mortgage has long been esteemed the safest and most valuable of all real estate securities for investments. The holder is not compelled to be ever watchful lest a subsequent creditor may sell at judicial sale and buy the property at a price that saves his debt at the loss of prior lien creditors. In the business of half a century, a first mortgage has come to be very well understood to be one prior to all other liens. That is the kind of mortgage which was guaranteed, and the bonds thereby secured Noble received on his contract. The learned Judge of the Common Pleas well said: "When the parties covenanted for a first mortgage, it implied a first lien as clearly as if words to that effect had been inserted in the agreement itself. In the

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plain, ordinary, and popular sense first mortgage means first lien. When railroad bonds are sold in the open market as first mortgage bonds, all persons understand them to be first liens. When we speak of lending money on first mortgage, no thought of anything but a first lien is entertained."

This meaning of first mortgage is so thoroughly grounded, as to lead to the sequence that a second mortgage is understood to be one without intervening liens between it and the first. (Rice's Appeal, 29 P. F. S. 168.) There, Ahl had a covenant for certain bonds. The able master said: "The contract was that he should have $80,000 in second mortgage bonds, which meant that there was to be no intervening encumbrance, and the confessing of the two judgments and then tendering to him the second mortgage bonds was not a compliance with the contract." AGNEW, C. J., characterized the act of placing on the property an intervening encumbrance as a breach of good faith; and PAXSON, J., said, "The bonds offered were not such a security as under his agreement he was entitled to receive."

Appellant's counsel urge that the indorsement, "First Mortgage Bonds," is an assertion of the East Penn Iron Company and not Noble's. Yet first of all, Noble covenanted for such bonds. Is it possible that when he sold them, he made no assertion? He sold them as they appeared. At their date Noble's lien existed, and filing the claim only had the effect to continue it. The bonds gave notice of the mortgage, and he held out the declaration "First Mortgage Bonds." For such he contracted, as such they were guaranteed, and as such the holders bought them. The Court is not simply called on to say whether "mortgage" and "lien" are synonymous. The question is not one of synonyms, nor of technical definitions of words as found in dictionaries. But what does a written contract, made in Pennsylvania respecting securities on real estate, mean? When it calls for a first mortgage it means one prior to all other liens. When a party gives such mortgage, or sells a bond secured thereby, showing the facts on its face, or when he induces another to guarantee it as such, unless there be some qualifications expressed, he shall not afterwards set up a lien against the guarantor and holders of the bonds. His plainly implied contract stands in his way.

Green stands in Noble's shoes. There is not a scintilla of evidence to give him a better position than his assignor would have, had no assignment been made.

Decree affirmed and appeal dismissed at the costs of the appellant.

Opinion by TRUNKEY, J.

Oct. & Nov. '80, 203. October 18, 1880.

Walbridge's Appeal.

Mechanics' liens—Execution—Levari facias—Act of June 16, 1836, § 105 et seq. (P. L. 780)—Construction of—Summary proceedings by purchaser at sheriff's sale to obtain possession of realty.

A purchaser at a sheriff's sale under a levari facias issued upon a judgment obtained on a mechanic's lien filed under the provisions of the Act of June 16, 1836 (P. L. 696), may institute the summary proceedings provided for in the Act of June 16, 1836, § 105 *et seq.* (P. L. 780), and the supplement thereto, and recover thereby possession of the premises so purchased by him.

Appeal from the Common Pleas of Erie County.

Bill in equity between Mary L. Spaulding, complainant, and C. H. Walbridge, defendant.

The bill set forth that complainant was the owner of a certain house and lot in the city of Erie; that defendant claimed title to said premises by virtue of a sale under a levari facias on a certain mechanic's lien which had been filed against the same; that defendant had instituted proceedings in pursuance of the provisions of the Act of June 16, 1836, § 105, etc. (P. L. 780), and the supplement thereto passed May 24, 1878 (P. L. 134), before an alderman and a jury of six to recover possession of said premises, in which proceedings a verdict had been rendered awarding possession to the defendant; that the complainant was advised that said Act and its supplement conferred no jurisdiction in the case of a purchaser buying at a sale on a levari facias sur mechanic's lien, but that the defendant, nevertheless, was about to have execution on the verdict rendered in said proceedings, which execution complainant averred would work her great and irreparable injury. The bill further set out, that under the terms of said Act, no certiorari to the proceedings instituted thereunder would act as a supersedeas, and therefore prayed for an injunction to restrain the defendant from having execution as aforesaid.

The Court granted a preliminary injunction in accordance with the prayer of the bill.

The defendant then filed an answer, admitting the facts averred in the bill, but alleging that defendant had a good right to avail himself of the provisions of the said Act of June 16, 1836, § 105 *et seq.*, and the supplement thereto, to recover possession of said premises.

The cause was heard on bill and answer and after argument the Court, in an opinion by GALBRAITH, P. J., entered a decree continuing the injunction already granted.

Respondent appealed, assigning for error the

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action of the Court in granting and continuing the preliminary injunction.

Clark Olds (with him *Benson* and *Brainerd*), for appellant.

The summary proceedings to recover possession are first given to a purchaser at sheriff's sale by the Act of March 14, 1814 (6 Sm. L. 132). This Act applies in cases of sales "by virtue of any execution." The Act of June 16, 1836, § 105 (P. L. 780), is an amendment to this Act. The words therein, "any execution as aforesaid," refer to the phrase already cited in the Act of 1814, and will therefore of course include a sale on a levari facias sur mechanic's lien.

The Act of 1836 is a remedial one, and should receive a broad and liberal construction.

Pentland *v.* Kelly, 6 W. & S. 483.
Oakland R. R. Co. *v.* Keenan, 6 Smith, 202.

E. L. Whittlesey (with him *Frank Gunnison*), for appellee.

The Act of June 16, 1836, § 105 (P. L. 780), refers only to cases of purchases at sales "by virtue of any execution as aforesaid." This clearly refers to the executions named in the prior sections of the same Act, in none of which is the levari facias on mechanic's lien named.

Oakland R. R. Co. *v.* Keenan, 6 Smith, 202.

This writ was first given by an Act of the same date as the preceding, viz., June 16, 1836 (P. L. 696). Prior to that time the writ of execution on a mechanic's lien was a fi. fa. The respondent, therefore, cannot institute proceedings under the Act of 1836 (P. L. 780). The latter Act is in derogation of the common law, and to be strictly construed.

Camp *v.* Wood, 10 Watts, 118.
Alberty *v.* Dawson, 1 Binn. 105.
Walker *v.* Turner, 9 Wheat. 541.
Griffith *v.* Frazier, 8 Cranch, 9.

Other clauses of this Act contain the words, "execution as aforesaid," which have been held not to refer to writs of levari facias sur mechanic's lien.

Schmidt *v.* Stetler, 21 Pitts. L. J. 34.

So an order of sale in an action of partition has been held not to be within the Act of June 26, 1836, § 105.

Fitzgibbons *v.* Keller, Purd. Dig. 660, note (d).

So the general exemption law of 1849 has been held not to apply to a sale under a levari facias sur mechanics' lien or mortgage.

Laucks's Appeal, 12 Harris, 426.
Bld. Assn. *v.* O'Connor, 3 Phila. 453.
Morgan *v.* Noud, 5 Clark, 93.
Gangwere's Appeal, 12 Casey, 466.
Craig *v.* Craig, 1 WEEKLY NOTES, 613.

The mechanics' lien law should not be extended beyond its express terms.

McCay's Appeal, 1 Wright, 125.

Nov. 15, 1880. THE COURT. This case presents the question whether a purchaser under a levari facias on a judgment obtained on a mechanic's lien may obtain possession in like manner as if he had purchased at a sale made on a vend. ex. ? The necessity of giving a purchaser at sheriff's sale some more expeditious method of getting possession than by action of ejectment, was recognized at an early day. Hence, the preamble to the Act of 6th of April, 1802 (3 Smith's Laws, 530), declares: "Whereas, great inconveniences have been experienced from the unjust detention of lands and tenements sold by sheriffs under executions from the several Courts of this commonwealth, the purchasers whereof have been obliged to bring ejectments, and to subject themselves to all the delays and expenses incident to law proceedings, to recover the possession from the person as whose property the same was originally sold, the desperate circumstances of whom usually preclude the possibility of obtaining damages or any other compensation whatever for such unjust detention: for remedy thereof," it proceeded to enact, "that whenever any lands or tenements shall hereafter be sold by the sheriff or coroner of any county, by virtue of any execution issued out of any court of record of this Commonwealth, it shall be lawful for the purchaser thereof" to give notice to the defendant as whose property the same was sold, or to any one in possession under him, of said sale, and to require the possession thereof to be delivered to the purchaser within three months after the date of such notice. In case of neglect or refusal so to do, the Act proceeded to declare that complaint might be made to two justices of the peace, who should summon a jury, and the case might proceed to judgment and a writ of possession. Thus this Act applied to every purchase of real estate made at sheriff's sale, on every execution that might be issued out of any court of record. It made no distinction whether the judgment was on a mortgage, mechanic's lien, or other claim. It wholly disregarded the form of the execution on which the sale might be made.

On the 1st April, 1803, an Act was passed giving a mechanic's lien for labor and materials in erecting any building "within the city of Philadelphia, the district of Southwark, and the township of the Northern Liberties." This was repealed by the Act of 17th March, 1806 (4 Sm. Laws, 300), which gave a preferred lien for work done and materials furnished in the construction of any building within the city and county of Philadelphia, provided an action for the recovery was brought, or claim therefor filed, within six months after the same was done or furnished. A purchaser at sheriff's sale under this Act, undoubtedly had all the remedies whereby to obtain possession, given by the Act of 6th April, 1802. It is alleged that, inas-

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much as the Act of 16th June, 1836 (P. L. 695), prescribes that execution on judgments recovered on mechanics' liens shall be by levari facias, and the Act of same date (page 761), relating to executions, does not specifically refer to that form of execution, its language is insufficient to give to one buying at a sale made on a levari facias, the remedy given by § 105 of the Act. That section declares (Purd. Dig. 660, pl. 134): "Whenever any lands or tenements shall be sold by virtue of any execution as aforesaid, the purchaser of such estate may, after the acknowledgement of a deed therefor to him by the sheriff, give notice to the defendant as whose property the same shall have been sold," requiring him to surrender the possession thereof, within three months from the date of such notice. On failure to comply, the Act authorized application to be made to two Justices of the Peace, or Aldermen, who shall proceed in the manner therein directed. It is claimed that the language, "any execution as aforesaid," applies only to a writ of fieri facias or venditioni exponas. It is true, much of the Act does relate to executions of those forms; yet it has a much wider scope. The words, "as aforesaid," appear in many sections where the manifest intention is to apply to sheriff's sales on all forms of executions. The following may be cited as illustrations: in case of dispute concerning the distribution of the money arising in all cases of sale on execution as aforesaid, the Act gives the Court power to hear and determine the same; if any fact connected with such distribution be in dispute, the Court may direct an issue to try the same, and the judgment thereupon is subject to writ of error; any one aggrieved by the decree of the Court in case of distribution made without the intervention of a jury, may appeal therefrom to this Court; whenever the proceeds of a sale upon execution as aforesaid shall be more than sufficient to satisfy the liens on the property sold, the officer making such sale may pay over the surplus to the debtor; if the officer by whom any real estate shall have been taken in execution shall die, resign, be removed from office, or his term of office shall expire before sale thereof, or if after sale, and before any deed shall have been executed and acknowledged by him, the sale may be made and the deed be executed and acknowledged by a succeeding officer; it also prescribes the manner and length of time real estate shall be advertised before a sale thereof; it directs as to the manner in which, and the time when the deed shall be acknowledged; it further authorizes the purchaser of "any real estate at a sheriff's sale," to cause the judgment and all the process issued thereon to be fully set forth in the deed to be executed to him therefor. In regard to all action covered by these provisions, the Act of the same date relating to mechanics' liens is silent. It proceeds no further than to direct the form of writ on which sale shall be made. No words therein indicate an intention to withhold from a purchaser at sheriff's sale the summary method of acquiring possession given in case of sale on other judgments. This Act is the basis of all existing laws relating to mechanic's liens. None of the many supplements thereto gives any substitute for the provisions to which we have referred, nor takes them away. To ascertain what action shall be taken after execution issued in regard to advertising, executing and acknowledging a deed, and the remedy given to a purchaser, we must look elsewhere. Section 105 of the other Act of the same date, entitled An Act relating to executions, furnishes the information and gives the remedy. The two Acts must be construed together. They so far deal with one general subject, as to be in *pari materia*. Having been passed on the same day, the reason for so considering them is strengthened. What is wanting in one is supplied by the other in so far as they are not in conflict.

No authority is cited which holds, since the Acts of 16th June, 1836, that a purchaser at a sale, made on a levari facias, whether issued on a judgment recovered on a mechanic's lien, or on judgment obtained on a mortgage, was denied any remedy to obtain possession given to a purchaser on a writ of venditioni exponas. In Pentland *v.* Kelly (6 Watts & Serg. 483), it was held that a levari facias on a judgment in case of a mechanic's lien, was a substitute for a fi. fa., inquisition and venditioni, and, therefore, was an execution within the provisions of the 6th section of the Act of 13th October, 1840, relating to the appointment of a sequestrator. We think the true intent and just contruction of section 105 applies it to a purchaser at sheriff's sale, under a levari facias. This construction is best calculated to effectuate the intention of the Legislature, and give just symmetry to the Acts defining the rights of purchasers at sheriffs' sales.

The Act of 24th May, 1878, gives to one Justice of the Peace or Alderman, all the power which the Act of 1836 gave to two. It is not necessary to consider the other question in the case. The learned Judge erred in granting and in continuing the injunction.

Decree reversed and bill dismissed at the costs of the appellee.

Opinion by MERCUR, J.

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Jan. '80. Jan. 3, 1881.

Kerper et al. v. Booth.

Landlord and tenant—Judicial sale of lease—Covenants of original lessees, when not discharged by,—Assignment—Surrender and acceptance, acts of landlord not amounting to.

A. leased premises to B. from Dec. 7, 1872, to Dec. 7, 1877, B. covenanting not to underlet without the written permission of the landlord. B.'s interest was sold at a judicial sale on June 24, 1876, and passed into the hands of C. On June 15, 1877, A. leased the premises to C. for a term of years, beginning Dec. 8, 1877, and in August of the same year received a promissory note from C., which, if paid, was to be credited on account of rent of the premises then due. The note was not paid at maturity.

Held, that A., the landlord, had done nothing which released the original lessee from his liability on his covenant to pay rent.

Error to the Common Pleas No. 1, of Philadelphia County.

Attachment sur judgment by James R. Booth against John B. Parker, defendant, and Josiah Kerper and Robert Creswell, executors of Jacob Peters, John G. Taylor, Henry W. Kanaga, and Joseph M. Mortimer, garnishees.

Returned "Attached" as to Josiah Kerper and Robert Creswell, and "Nihil habet" as to the defendant and as to Henry W. Kanaga and Joseph M. Mortimer, garnishees.

The garnishees pleaded "nulla bona."

On the trial, before BIDDLE, J., the following facts appeared:—

On March 25, 1873, John B. Parker leased to Henry W. Kanaga, Jacob Peters, and Joseph M. Mortimer, the Grand Central Theatre, in the city of Philadelphia, for the term of five years, from Dec. 7, 1872, to Dec. 7, 1877, at the rental of $8000 per annum for the first year, and $9000 per annum for the remaining four years, payable quarterly. The lessees covenanted, *inter alia*, not to underlet without the written consent of the lessor, who, at the date of the lease, was the owner of the theatre.

Subsequently the firm of J. M. Mortimer & Co., of which the lessees constituted the members, became embarrassed, and proceedings were instituted by Jacob Peters and Henry W. Kanaga against Joseph M. Mortimer in June, 1875, for the appointment of a receiver. A receiver was appointed, who, under order of Court, on June 24, 1876, exposed to sale the assets of the firm of J. M. Mortimer & Co., including, *inter alia*, the unexpired term of above lease, which was bought by Henry W. Kanaga. In February, 1877, John G. Taylor purchased of Kanaga his interest in the said lease. On June 15, 1877, Parker leased the premises to Taylor for a period of five years, from Dec. 8, 1877. In August of the same year, Parker received Taylor's note to his order for $1500, which, according to Parker's testimony, was, if paid, to be credited on account of the rent of the theatre. It was not paid at maturity. Parker endorsed the note, had it discounted, and received the proceeds. There was due for rent, Dec. 7, 1877, the sum of $3150, of which $900 was the balance due on the quarter's rent of Sept. 7, 1877. This amount of $3150 was claimed by the plaintiff, a judgment-creditor of Parker.

It was in evidence that Jacob Peters died July 8, 1876, and that no demands for rent had been made of his executors up to the time of filing their accounts.

The Court, in the general charge, said: "There is no evidence in this case of such an acceptance of Mr. Kanaga or Mr. Taylor, as would release the original lessees, and no credit is to be allowed for the amount of the $1500 note. This leaves nothing for you but to find for the plaintiff the full amount of rent claimed."

Verdict for the plaintiff and judgment thereon.

The garnishees took this writ, assigning for error the charge of the Court, cited above.

David W. Sellers, for plaintiffs in error.

A release of the covenant to pay rent arises by implication, for here there was exclusive possession by the judicial vendee paramount to the original tenants, which would amount to a surrender of the former tenants, and there was an acceptance by the landlord. The lease provided that "there should be no underletting without the lessor's written consent." The attornment of the vendee, who entered by a title paramount to the lessees by operation of law, works a surrender. A surrender may take place informally, and while the lease is under judicial levy.

Greider's Appeal, 5 Barr, 422.

The cases cited on the other side are not those of paramount tenancy by judicial sale.

The charge of the Court was too peremptory.

Charles H. Downing, for the defendant in error.

A release of a covenant cannot arise by implication. And even if it could, the evidence rebuts the presumption of a release. It is not within the power of a Court to destroy the vested rights of one not a party to the decree. Much less has a receiver power to destroy the covenants of a lease or any right of action thereunder. A lessee is not discharged from his covenant to pay rent by the lessor's recognizing an assignee as tenant, and accepting rent from him.

Frank *v.* Maguire, 6 Wr. 77.
Ghegan *v.* Young, 11 Harris, 18.
Dewey *v.* Dupuy, 2 W. & S. 553.

A tenant who assigns his term continues liable for rent as long as his assignee holds over.

Fulmer *v.* Cressman, 4 Leg. & Ins. Rep. 116.

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Greider's Appeal (5 Barr, 422), cited on the other side, is inapplicable, because the question there was, whether after a levy and before a sale, a surrender could be made, and if accepted by the landlord, whether his claim for rent, accrued prior to the levy, was discharged.

January 17, 1881. THE COURT. The taking by Parker from Taylor, the assignee of the lease, of a promissory note, which, when paid, was to be credited to the rent, was no release of the liability of the original lessees on their covenants. The note was not paid at maturity. Mr. Parker endorsed it, and is still liable on his endorsement. The instruction by the learned Judge to the jury was therefore clearly right.

PER CURIAM. Judgment affirmed.

Jan. '80, 102. Jan. 3, 1881.

McCully's Appeal.

Adoption — Indenture of apprenticeship with clauses of adoption — Construction of — Act of April 2, 1872 (P. L. 31) — Construction of — Administration — Married women — Power to adopt — Defective acknowledgment of deed.

The Acts of Assembly relating to the adoption of children, while conferring the right to inherit, do not create relationship, and therefore the adopted child does not acquire the right to administration of the estate of the parent under the Act of March 15, 1832, Sect. 22 (P. L. 140).

An indenture of apprenticeship for fourteen years, in the usual form, between A., an apprentice, and B., and C. his wife, contained the following clause: "The full intent and meaning of this indenture is that the said apprentice is to be the adopted child of the said B. and his wife, and to be brought up and educated as their own child." The indenture was dated May 22, 1848, was signed and sealed by A., and by both B. and C. his wife, and was acknowledged before an alderman by all the parties, but without any separate acknowledgment of the wife. The apprentice served her term, and continued to live with B. and C. during their joint lives and the life of the survivor, C., who died on August 5, 1879. On August 11, 1879, the indenture of apprenticeship was placed on record:

Held, that the indenture must be construed to limit the period of the adoption in any event to the lifetime of B. and C., that it conferred upon A. no present or future rights whatever of inheritance to their estate, and that, therefore, A. was not entitled to letters of administration on C.'s estate.

A married woman is incapable of binding herself by deed so as to confer a future right of inheritance in favor of an adopted child. Even if she were so capable, the absence of a proper separate acknowledgment would be fatal to the validity of such an instrument. Nor does the Act of 1872 (P. L. 31), give any validity to such a deed. No deed invalid at common law is within its operation.

Appeal of Amanda McCully from a decree of the Orphans' Court of Philadelphia County reversing the decision of the Register of Wills of said County, and vacating the letters of administration granted to her upon the estate of Mary Ann McCully, deceased.

The facts of this case, together with the opinion of the Court below by PENROSE, J., are fully reported in McCully's Estate, 8 WEEKLY NOTES, 14, *q. v.*

Amanda McCully took this appeal, assigning for error the decree of the Court vacating the letters of administration granted to her.

Edward R. Worrell, for the appellant.

The deed in question answers fully the requisites of a common law deed. It is "a writing sealed and delivered by the parties." The terms of the Act of 1872 are fully complied with, for the execution of the deed was proved under the certificate of the alderman, it was recorded in the proper office, and a duly certified copy was presented to the register. To say that there was no separate acknowledgment of Mrs. McCully is not an objection, for no separate acknowledgment was necessary here, because it was not a conveyance of real estate or an interest therein. The Act of April 2, 1872, is retroactive.

Ballard *v.* Ward, 7 WEEKLY NOTES, 254.

The clear intent of the deed was the adoption of the child, and the deed is not avoided because there were covenants which a married woman is disabled from making. The indenture should be construed with regard to the relation of unity of husband and wife, and as an adopted child owes duties to each, it should have the rights of a child of each.

David W. Sellers, for the appellee.

What was the common law form of a deed of adoption I am at a loss to know, for it never was in the power of an individual by the common law of England or this State to adopt the child of another as his own.

Ballard *v.* Ward, 7 WEEKLY NOTES, 254.

Even if this were the proper form of deed, I suggest that it should have been presently recorded, or at any rate during the lifetime of the master or mistress. It is fatal to this deed that it was recorded thirty-one years after its execution, and after the death of the other parties to it.

January 17, 1881. THE COURT. This decree is affirmed upon the opinion of the learned Judge of the Court below.

Decree affirmed and appeal dismissed, at the costs of the appellant.

PER CURIAM.

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Common Pleas—Equity.

C. P. No. 4. May 7, 1881.

Miller's Estate.

Trustees—Dismissal of—Citation—Practice—Notice to trustee of unknown residence—Act of June 14, 1836, § 33.

Sur petition for citation.

The petition of Eliza Miller averred: That one Eliza Sterling was trustee for a certain bank deposit and that for reasons stated, the trustee was unfit for the discharge of the duties of her office. The petition therefore prayed that a citation should issue commanding her to show cause why she should not be dismissed, and a certain other person be appointed in her stead.

Daniel Holsman, for the petitioner.

The residence of the present trustee is unknown, and diligent inquiry has failed to reveal it. If the Court will at once order publication of the contents of the petition and rule to show cause, it will obviate unnecessary delay.

THE COURT. The Act of 14 June, 1836, § 33 (Purd. Dig. 1419), provides that the manner of proceeding to obtain the appearance of trustees in the Courts of Common Pleas shall be the same as that provided for in the Orphans' Court. The Act of 29 March, 1832, § 57 (Purd. Dig. 1106), provides for a citation, *alias* citation and publication. This is the method of procedure in the Orphans' Court, which is made that of the Common Pleas by the Act of 1836. Let the citation issue, returnable in ten days.

Opinion by THAYER, P. J.

Common Pleas—Law.

C. P. No. 3. March 12, 1881.

Richardson et al. v. Brunswick.

Practice—Sheriff's interpleader—There being several executions equally entitled to the fund arising from the goods levied upon, the claimant may give a bond in double the value of the goods for the benefit of all the plaintiffs, and need not enter a bond in each case.

Sur rule to show cause why claimant's bond in an interpleader should not be withdrawn and another substituted, etc.

The sheriff on Sept. 25, 1880, received nine writs of fi. fa. against the above named defendant, at the suit of various plaintiffs, which writs were all timed alike, viz., one minute past 2 o'clock P. M. In October, the sheriff, understanding that the attorney for the plaintiffs meant to stay all the other writs, took a rule for an interpleader on the fi. fa., issued in the case of White *v.* Brunswick, the only one of the nine which he understood was not to be stayed. The rule for an interpleader was made absolute, and the claimant filed his bond in double the amount of that judgment. Subsequently the sheriff took rules for interpleaders in the other eight cases. Counsel for claimant then took the present rule on the various plaintiffs to show cause why he should not have leave to withdraw the bond filed by him in the case of White *v.* Brunswick, and also why the narr., plea, and replication filed by him in said case should not be stricken from the record, the said claimant to file another bond and narr., plea and replication, for the use of and against all the said plaintiffs (the rules for sheriff's interpleaders now pending in the other eight cases to be made absolute), the said bond to be in double the value of the goods levied upon under the said nine writs of fi. fa.

The depositions taken, showed that the goods levied upon were worth about $2000.

Mayer Sulzberger, for claimant.

W. Gorman, for plaintiffs.

R. C. Winship, for sheriff.

THE COURT. Rule absolute, and new bond in sum of $4000 to be given to the joint and several use of all the plaintiffs in fi. fas.

C. P. No. 4. May 7, 1881.

Klages' Petition.

Ground-rent—Extinguishment of—When executors of grantor may not extinguish—Construction of Act of Feb. 5, 1821, § 1.

Sur petition for order on executors to extinguish a redeemable ground-rent. The petition of Fred. Klages averred: That one Tice became the owner of a redeemable ground-rent issuing out of the petitioner's lands, and on his death devised it to his widow for life, with remainder as follows: "The principal to be divided by my grandchildren alike as they become of age;" that the four sons of Tice, who were his executors, acted as trustees in collecting and paying over the annual amount of the ground-rent; and that no trustees were named in the will; that the petitioner was desirous of paying off the ground-rent, but that there was no person duly and legally empowered and authorized to release and extinguish it. The petitioner prayed for an order on Tice's executors to release and extin-

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guish the ground-rent upon receiving the principal and arrearages.

Isaac D. Yocum, for the petitioner.

This application is under the Act of February 5, 1821, § 1 (Purd. Dig. 748). It is the only method which the owner of the premises can pursue in order to pay off the ground-rent, for the remaindermen are yet unborn. Their future rights will be fully protected by the entry of security by the executors in compliance with the Act.

THE COURT. Unless the executors are to receive this redemption-money to pay the debts of the decedent, they can have nothing to do with it. (Conard's Appeal, 9 C. 47.) It is not alleged that it is so needed; and as the executors are not the owners of the ground-rent, they are not authorized by the Act of February 5, 1821, to extinguish it.

Petition dismissed.

Opinion by THAYER, P. J.

C. P. No. 4. March 15, 1881.

Spare v. Walz.

Practice—Pleading—Mechanic's claim—A plea by defendant named as owner in the claim, that he is not the owner, is a nullity and will be stricken off.

Sur demurrer to defendant's plea.

Scire facias sur mechanic's claim by Spare, against Walz, owner, etc., and Foreman, contractor. The defendant Walz pleaded non assumpsit, nil debet, and specially that he was not at any time the owner of the lot or piece of ground mentioned in the mechanic's claim and writ, or of any part thereof. The plaintiff demurred, assigning as ground for the demurrer: That the question thus raised was irrelevant to the issue, that a question of the defendant's title or interest in the land against which the claim was filed could only be tried in ejectment, and that, as judgment for the plaintiff would only bind the defendant's interest, if he had no interest nothing would be bound.

J. Quincy Hunsicker, for the demurrer, cited—
Woodward *v.* Wilson, 18 Sm. 208.
Finley's Appeal, 17 Id. 453.
Leiby *v.* Wilson, 4 Wright, 63.
Forrester *v.* Preston, 2 Pitts. 298.
Christine *v.* Manderson, 2 Barr, 364.

Edward S. Campbell, contra.

The Acts of Assembly make it necessary to set out the *true* ownership both in the lien and sci. fa.

Carey *v.* Wintersteen, 10 Sm. 395.

In Woodward *v.* Wilson, cited by plaintiff, the defendant, in his affidavit of defence alleging his wife's title to the ground, admitted that he had contracted for the building for his own benefit and without the knowledge of his wife. No such fraud appears in the pleadings in this case.

April 2, 1881. THE COURT. To a scire facias on a mechanic's claim the person named as owner has pleaded that he was not owner. Is this a good plea?

The Act of 1836 requires the claimant to set out the name of the owner or reputed owner and of the contractor, where the contract of the claimant was made with a contractor. The object of this is, of course, to bring into Court the parties most interested in defending against the claim. But if a mistake is made in not naming the real owner, this only prejudices the claimant. Of what consequence is it to a person who is not owner, or to the real owner who is omitted, that one who is not owner is named as such? The proceeding is entirely *in rem*, and a sale will pass only the title of him who is named as owner. If a person named as owner may take issue on that fact, then an issue which has nothing to do with this proceeding is substituted for the real issue to be tried. Christine *v.* Manderson (2 Barr, 363) was decided under the Act of 1808, which required the scire facias to be issued against the debtor and *owner*, and it was there held that it was no defence that the wrong person was named as owner, because the real owner might defend in an action of ejectment by the purchaser at sheriff's sale, upon the same grounds which he might have set up as a defence to the scire facias if he had been made a party. The same point was ruled in a case arising under the Act of 1836, in Woodward *v.* Wilson (18 Smith, 208), where a husband endeavored to set up to a scire facias in which he was named as owner, a defence that he was not owner, but that the property belonged to his wife. But he was not permitted to do so, for the reason that "the judgment against him could only be levied of his own estate or title." The reasoning in Finley's Appeal (17 Smith, 453) is to the same effect; and so is Van Billiard's Administrators *v.* Nace (1 Grant's Cases, 233), where it was attempted to defeat the plaintiff by proof that administrators were erroneously made defendants instead of the devisees of a testator, but the attempt altogether failed, the Court holding that the recovery of a plaintiff in a scire facias upon a mechanic's claim does not at all depend upon the quantity of the defendant's interest in the land, the reason assigned being that "the plaintiff claims a lien on the defendant's interest whatever it is, and he can enforce it, when obtained, against nothing else." We entertain no doubt therefore that the pleas which are demurred to are bad pleas and are nullities, as they make no proper response to the plaintiff's

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case. The proper method of disposing of such pleas, as was pointed out by Sergeant, J., in Christine *v.* Manderson, is not to enter judgment upon them, but to strike them off.

Ordered that the pleas demurred to be stricken off.

Opinion by THAYER, P. J.

Orphans' Court.

March 23, 1881.

Graham's Estate.

Note given by decedent for purchase of a patent right—Act of April 12, 1872—Where a note is taken for a debt, the presumption is that it was taken as a conditional payment, and only in satisfaction, if and when the debt is paid—Where a security accepted in satisfaction of a debt proves to have been void ab initio, the original debt remains in force.

Sur exceptions to adjudication.

The following are the facts as they appeared before the Auditing Judge:—

John Graham, the decedent, purchased a patent right, for which he gave his promissory note for $1500. This note being overdue and unpaid, the payee thereof, at the audit of the executor's account, claimed this amount, less certain deductions which were agreed upon, and produced the note.

For the accountant it was urged, that (1) this note was given in full satisfaction of the claim, and to prove it a letter was put in evidence from claimant to the accountant, the material expressions in which are quoted in the opinion of the Court, *infra*, and (2) that the note was void in its inception, the words "given for a patent right" not being written or printed on the face as directed by Act April 12, 1872 (Purd. Dig. 1173, pl. 3 & 4).

The Auditing Judge disallowed the claim, and exceptions were accordingly filed in the claimant's behalf.

William Gordon and *Geo. L. Crawford*, for the claimant.

The doctrine in Pennsylvania is that a promissory note is not taken in full payment and satisfaction of a debt, but as collateral security only, particularly where the note of a third party is not given.

There is no evidence to show a contrary understanding between decedent and claimant contained in the letter to the accountant.

The purpose and spirit of the Act of 1872 was to protect innocent transferees. In this case the note did not go out of the hands of the original payee, who is consequently not within its contemplation.

C. L. Pancoast and *A. Lewis Smith*, contra.

This note was taken in full satisfaction of the claim, and, being void, the original debt does not remain due.

April 2, 1881. THE COURT. We do not think that the exceptant's statement, in his letter to the accountant, that the note of decedent for $1500 which he held had been "given in payment" for the patent right sold by him, can fairly be regarded as an admission that it had been accepted in satisfaction and as an absolute discharge of the original debt. The letter was written in reply to one from the accountant, as administrator, asking for information as to the particulars of his business transactions with the decedent, and the words are used, not as a lawyer might use them, but colloquially, and in the sense of "for," or "in consideration of."

It is well settled that even where the note of a third party is received by a creditor from his debtor, the presumption is that it was taken as conditional payment and as satisfaction of the debt *if* and *when* paid; and nothing short of an actual agreement, or evidence from which a positive inference can be made, will make such a transaction a discharge of the original cause of action. (McIntyre *v.* Kennedy *et al.*, 5 Casey, 448.) The subject is very elaborately considered in this case by Judge WOODWARD, and many authorities are cited in support of his position. It had been argued there that, as in the case stated, it was set forth that certain checks had been taken "in payment," such must be assumed as the fact, and that there could, in consequence, be no recovery upon the original consideration. To this Judge WOODWARD answers: "In the narrative of the transaction, the case stated speaks of the checks being *paid* to the plaintiff; but there is not a word in it which implies that he had acknowledged them as *satisfaction* of his debt, or even gave a receipt for them, or qualified the mere tradition of them by any express or peculiar terms. Had there been anything of this sort—a receipt in full, if you please—the authorities cited show it would have been only conditional payment. . . . But of receipt, acknowledgment or agreement there was none: the mere acceptance of the check was the only payment the special verdict finds. Payment—but payment in checks."

So, also, in Perit *v.* Pittfield (5 Rawle, 166), it was held where the debtor had assigned to his

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creditor certain securities, etc., "to have and to hold for the *payment* of the debt," that the transfer operated not as an extinguishment, but simply as a collateral security.

In McIntyre *v.* Kennedy, the term "paid," or "payment," was used in a formal instrument prepared by counsel, and in Perit *v.* Pittfield, in a paper signed and sealed by the debtor and creditor, while in the case before us it was used only in an informal letter written under the circumstances which have been mentioned.

Of course, where, as here, the security given is simply the debtor's own note, the presumption that it was not to be in satisfaction of the debt is much stronger, and the most explicit and unequivocal evidence of an agreement to accept it as such will be required. (See Addison on Contracts, *1099.)

But if it be conceded that the words are to be taken in their strongest sense, still the creditor is not precluded from recovery. For where a note or security which has been accepted in satisfaction of a debt, proves to have been void *ab initio*, "it is to be considered as if no bill had been given at all, and that the original debt remained in force." (Puckford *v.* Maxwell, 6 Term Reports, 52; Ramsdale *v.* Horton, 3 Barr, 330; Driesbach *v.* Keller, 2 Barr, 77; Sheppard *v.* Hamilton, 29 Barb. 156.)

In this case the claimant, who is a citizen of Massachusetts, acting in perfect good faith, received the decedent's note in consideration of the sale of a valuable patent right. Neither party appears to have been aware of the Act of Assembly which requires such a note to have the fact that it was given for a patent right written or printed upon its face. That the claimant was not, seems clear from the fact that he did not, as he might have done, negotiate it, in which case the holder without notice could have recovered upon it. (Haskell *v.* Jones, 5 Norris, 173.) It is admitted, however, that his ignorance of the law cannot give validity to the note in his hands; but being thus void in its inception, its acceptance, even in satisfaction, cannot, under the authorities cited, be available as a defence to a claim upon the original consideration.

It sufficiently appears from the evidence on the part of the estate, of which the letters of the claimant were a necessary part, that the consideration to be paid for the patent right was the sum for which the note was given. The claim was established, therefore, without the aid of the note, and the amount should have been allowed, less the credits admitted by the claimant.

Exceptions sustained and account recommitted for further proceedings in conformity with this opinion.

Opinion by PENROSE, J.

U. S. District Court.

Feb. 7, 1881.

United States v. Central National Bank.

Forged indorsement—Checks on United States Treasury—Negligence of government in discovering and giving notice of forgery.

Sur rule for judgment *non obstante veredicto*, on point reserved.

Assumpsit, by the United States against the Central National Bank of Philadelphia, to recover the amount of a check, viz.:—

No. 6640. WASHINGTON, March 24, 1868.

Assistant Treasurer of the United States pay to the order of Jos. Barr one hundred dollars.

$100. C. HOLMES, *Paymaster, U. S. A.*

Endorsed. JOSEPH BARR, JAS. BARR, JAMES M. SELLERS.

On the trial, it appeared in evidence that the check was presented and paid in due course by the Assistant Treasurer to the defendant, holder thereof, and that the indorsement of the payee was forged. The United States did not receive notice of the forgery until some time between May 27, 1879, and July 26, 1879. No notice of the forgery was given to the defendant prior to the issuing of the writ in this case on July 31, 1879. By direction of the Court, a verdict was rendered for the plaintiff, subject to the points of law reserved, viz., 'whether the United States were bound to give notice to the defendant of the forged indorsement within a reasonable time after the check came into their hands, and was paid by them, and whether their failure to give such notice and make claim on the defendant amounted to such negligence as would bar a recovery"

Defendant moved for judgment *non obstante veredicto*. MCKENNAN, Circ. J., was present at the argument of the rule.

John K. Valentine, U. S. District Attorney, for plaintiff.

Edward L. Perkins, for defendant.

Feb. 7, 1881. THE COURT. Judgment must be entered for the defendant on the reserved points. The case is ruled by the United States *v.* Jay Cooke & Co., decided in this Court in 1872 (9 Phila. Reps. 468). I do not find any case inconsistent with this, unless it be the United States *v.* The Second National Bank of Jersey City, decided in the New Jersey District in 1872. That case involved the point. The question does not appear to have been pressed, however, by counsel, or considered by the Court. No good reason can be assigned for relieving the government, when dealing with commercial paper, from observance of the same rules respecting vigilance, that are enforced against individuals. That this view is entertained by the Supreme Court is plainly indicated by the case of Cooke *v.* United States (1 Otto, 397).

Rule for judgment for defendant *non obstante veredicto* made absolute.

Opinion by BUTLER, J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, MAY 26, 1881.* [No. 6.

Supreme Court.

July '81, 9. May 13, 1881.

Appeal of Franklin B. Gowen et al.

Corporations—Philadelphia and Reading Railroad Co.—Charter of—Construction of provisions of Sects. 4, 5, and 21 relative to meetings of stockholders—Majority of stockholders—When not necessary for election of officers.

By section 4 of the charter of the Philadelphia and Reading R. R. Co. it is provided that the stockholders shall meet on the second Monday of January in every year, at such places as may be fixed upon by the by-laws, of which notice shall be given at least twenty days previously by the secretary, and choose by a majority of the voters present the officers for the ensuing year, who shall continue in office for one year until others are chosen.

By section 5 the manner of conducting the election of officers is set forth, and it is further provided that if at any time an election shall not be made, the corporation shall not be dissolved, but that the old officers shall hold over, and that it shall be lawful to hold a meeting for the election of officers on any day thereafter, the president and secretary giving at least ten days' previous notice thereof.

By section 21 it is provided that special meetings may be called by order of the president and managers, or by order of the president at the request of the holders of one-fourth part of the stock, of which meetings twenty days' notice must be given, specifying the object thereof, and at which meetings no business can be transacted unless a majority of the stockholders are present in person or by proxy.

By the by-laws it is provided that the board of managers shall have all the power and authority granted by law to the company, except in such matters as may be specially excepted by the by-laws.

By reason of a defect in the notice given by the secretary of the annual or charter day-meeting for the year 1881, no meeting nor election of officers took place on that day. Subsequently on January 29, 1881, the board of managers by resolution called a meeting which they termed "special" on March 14, 1881, to receive the annual report, take such action in reference to the affairs of the company as might seem advisable, and elect officers for the ensuing year. Notice of this meeting was duly published at once, signed by the secretary. Upon the day appointed the meeting was held, and an election took place for officers, at which election a majority of the votes of all the stockholders was not cast:

Held (affirming the decree of the Court below), that the meeting of March 14, 1881, was held under and by virtue of the fifth and not by virtue of the twenty-first section of the charter; that, therefore, it was not necessary that a majority in interest of the stockholders should be present at such meeting in order to validate its proceedings, and that those persons who received a majority of the votes that were then cast were duly and legally elected officers of the company for the ensuing year.

Per MERCUR, J. The manifest intent of the fifth section of the charter is to provide a remedy in case of a failure to elect any or all of the officers at any time or from any cause, no matter how it may have happened, and whether or not a meeting had previously been held.

SHARSWOOD, C. J., TRUNKEY, J., and STERRETT, J., dissent.

Appeal from a decree of the Common Pleas No. 2, of Philadelphia County.

Bill in Equity, filed by Robert McCalmont *et al.*, trading as McCalmont Bros. & Co., against the Philadelphia and Reading Railroad Co., and Franklin B. Gowen *et al.*, setting forth, *inter alia*, as follows: That the complainants were stockholders in the said railroad company defendant. That owing to a failure on the part of the officers of the company defendant to give proper notice of the annual meeting required by the charter to be held upon the second Monday of January, 1881, no election for officers of the said company was held upon that day, by reason whereof the defendant Gowen, the then president, and the other defendants, the then officers of the said company, held over and continued to exercise the functions of their several offices. That at a meeting of the board of managers, held January 29, 1881, the board passed a resolution that a meeting of stockholders should be held on Monday, March 14, 1881, at 12 M., and thereby directed the secretary to advertise the meeting in the following form:—

"PHILADELPHIA AND READING RAILROAD COMPANY,
"GENERAL OFFICE, 227 SOUTH FOURTH STREET,
"PHILADELPHIA, January 29, 1881.

"The Board of Managers of the Philadelphia and Reading Railroad Company has convened a special meeting of the stockholders, to be held on Monday, the fourteenth day of March, 1881, at twelve o'clock M., in the Assembly Buildings, at the southwest corner of Tenth and Chestnut Streets, in the city of Philadelphia, to hear the annual report of the President and Managers, to take such action in reference to the affairs of the company as may seem advisable, and to elect a President, six Managers, a Treasurer, and a Secretary. With a view to avoiding all doubt, it is advisable that proxies shall be dated within three months of the date of meeting.

"By order of the Board of Managers.

"D. J. BROWN,
"*Secretary.*"

That the complainants had reason to believe that an attempt would be made to prevent the holding of an election for officers of the company at the meeting on March 14, 1881, unless a majority in value of all the stockholders of the company should attend in person or by proxy. That the defendant Gowen held proxies for a large number of shares, many of which were not properly registered to entitle them to be voted upon, and that it was very important for the inter-

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est of all persons concerned in the future welfare of the company that all the proceedings of the said meeting should be conducted in a legal and orderly manner.

The complainants therefore prayed, *inter alia*, that the persons who should act as judges at the said election on March 14, 1881, should be directed to report to the Court the list of voters and the votes offered at said election, giving in each case the reasons of the judges for receiving or rejecting any vote which should be objected to at said election, and that they should file with their report the ballots polled—together with the proxies, whenever such votes should be by proxy—and all protests and other papers that might be filed with them, for the examination, approval, or order of the Court in relation thereto. The bill also prayed for a special injunction to restrain the said Gowen from voting upon the proxies of said stockholders holding shares not properly registered, and for other relief.

Upon hearing of the motion for an injunction, it was agreed by all the parties that George M. Dallas, Esq., should be appointed master to preside at and supervise the proceedings at said meeting, and that William L. Mactier and John Walker, Jr., should act as judges at said election. The Court thereupon entered a decree, appointing Geo. M. Dallas, Esq., master, and Messrs. Mactier and Walker judges, and directing them to report to the Court the proceedings of the meeting, and the separate counts of the votes, as therein particularly directed, and other matters pertaining thereto.

The master filed his report March 21, 1881, whereby it appeared that the whole number of stockholders appearing upon the registry books of the company on the day of the meeting represented 687,643 shares; that stockholders were present at the meeting in person or by proxy, duly registered on the day of meeting, representing 292,053 shares; that the stockholders who had been registered for three calendar months preceding the day of meeting represented 273,106 shares; that the judges received and counted as votes of stockholders duly registered as such at the time of the election, votes upon 211,077 shares; and that the separate count of the votes of such stockholders as had been registered for three calendar months previous to the time of the election resulted in a total of such votes upon 208,287 shares; of which last-mentioned votes Frank S. Bond, for President, received 208,225, and F. B. Gowen, for President, received 62; that George F. Tyler and others, for Managers, received 208,225; that Edward L. Kinsley, for Secretary, received 208,225; and that Samuel Bradford, for Treasurer, received 208,237.

The master further reported that a letter was read at the meeting from Mr. Gowen dated March 14, 1881, stating that he held proxies representing 372,853 shares, constituting a clear majority of all the *bona fide* holders of stock, a number of which had not been registered for three months, and that as no decision had been announced by the Court upon the question of the effect of non registry for three months, he abstained from attending the meeting.

The defendants, Franklin B. Gowen *et al.*, filed their answer March 24, 1881, setting forth, *inter alia*, that the annual meeting of stockholders required by the charter to be held upon the second Monday in January had not been held, through an inadvertence of the secretary *pro tem.* in advertising the meeting to be held at an unauthorized place; that the meeting of March 14, 1881, had been called by the Board of Managers and advertised as a "special meeting," under section 21 of the charter; that they were advised that a majority in value of all the stockholders constituted a quorum necessary for the transaction of any business at that meeting, and that such quorum was not present. That the defendant Gowen held proxies representing a majority in value of all the stockholders, authorizing him to vote at said meeting; that as many of said shares had not been registered within three months of the meeting, said Gowen feared that if it should be decided that they were not entitled to be voted upon, a minority might be enabled (if a quorum were present) to elect a ticket opposed to the wishes and policy of a majority, and that he therefore absented himself, and was informed that others had done likewise, in order to prevent the obtaining a quorum at said meeting, and thereby prevent the possibility of an election, thus enabling the old officers to hold over, thereby giving effect to the real wishes of a large majority of the stockholders.

The material clauses of the charter upon the construction of which the questions involved in this case depended were the following:—

"SECTION 4. That the stockholders shall meet on the second Monday of January, in every year, at such places as may be fixed upon by the by-laws, of which notice shall be given at least twenty days previously by the secretary in the newspapers before mentioned, and choose by a majority of the voters present the officers for the ensuing year, as mentioned in the third section of this Act, who shall continue in office for one year until others are chosen, and at such other time as they may be summoned by the managers in such manner and form as shall be prescribed by the by-laws, at which annual or special meeting they shall have full power and authority to make, alter, or repeal by a majority of the votes in the manner aforesaid, all such by-laws, rules, orders, and regulations as aforesaid, and to do and perform every other corporate act."

"SECTION 5. That the election of officers provided for in the third section of this Act shall be conducted in the following manner: That is to say, the managers for the time being shall appoint two of the stockholders, not being managers, to be judges of the said election, and to

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conduct the same, after having taken and subscribed an oath or affirmation before an alderman or justice of the peace, well and truly and according to law, to conduct such election to the best of their knowledge and abilities; and the said judges shall decide upon the qualifications of voters, and when the election is closed, shall count the votes and declare who has been elected, and if it shall at any time happen that an election of president, managers, treasurer, and secretary, or other officers shall not be made, the corporation shall not for that cause be dissolved, but it shall be lawful to hold and make such election of president, managers, secretary, or other officers, on any day thereafter, by giving at least ten days' notice by the president or secretary, in the newspapers before mentioned, of the time and place of holding the said election. And the president, managers, treasurer, secretary, and other officers of the preceding year shall, in that case, continue to act and be invested with all the powers belonging to their respective situations, until an election shall take place."

"SECTION 21. And be it further enacted by the authority aforesaid, That at each annual meeting of the stockholders, the president and managers of the preceding year shall exhibit to them a complete statement of the affairs and proceedings of the company for such year, and that special meetings of the stockholders may be called by order of the president and managers, or by the president at the request of the stockholders holding one-fourth the amount of the capital stock, on like notice as that required for annual meetings, specifying, however, the object of the meeting; but no business shall be transacted at such meetings except that for which it shall have been called, nor unless a majority in value of the stockholders shall attend in person or by proxy."

The only pertinent sections of the by-laws are as follows:—

"SECTION 1. First, the meetings of the company shall be held at the company's office, in Philadelphia, unless specially convened elsewhere by the board of managers."

SECTION 5. The board of managers shall have all the powers and authority granted by law to the company, except in such matters as may be specially excepted by the by-laws, and they shall have power to devise and to carry into execution any agreements and contracts which they may consider calculated to promote the interests of the company."

After argument on bill, answer, and Master's report, the Court (HARE, P. J.), on April 9, 1881 delivered the following opinion:—

The single question in this case is, did the election for president and managers of the Reading Railroad Company, which occurred on the 14th of March, take place under the fourth and fifth sections of the charter, or was it held under the twenty-first section? It is conceded that the qualifications for the exercise of the right of suffrage were the same in either aspect, to wit: That the voters should have been registered as stockholders for at least three months, that their votes should be cast in person or by a "proxy" given within three months of the day of the election; and finally, that the choice should be made by a majority of the voters present in person or by "proxy."

The difference is that while agreeably to the twenty-first section, "No business shall be transacted . . . unless a majority in value of the stockholders shall attend in person or by proxy," no such condition appears in the fourth and fifth sections, which, on the contrary, treat the election of the officers who are to represent the corporation, and through whom alone it can exercise its powers, as a duty which the stockholders owe to themselves and to the community, and which may consequently be performed by those who are present, whether they are or are not a majority of the whole number of persons interested. Such at least is the obvious meaning, if the fifth section of the charter is to be regarded as intended to supplement the fourth section, and provide for a failure to fulfill the obligation which that prescribes. It is, however, contended by the counsel of the present board of managers, that the fifth section should be read, not in the order in which it appears in the instrument, but in connection with the twenty-first section, and that they must be regarded as parts of one whole —the former indicating the end in view, and the latter supplying the machinery by which it is to be accomplished.

The question thus presented was twice argued by counsel of known ability, who ransacked every corner of the instrument in the hope of finding something that would support their respective views, but the result was simply to prove that the meaning of the Legislature must, as it regards the point actually in dispute, be sought, in the language of the sections to which I have already referred, and that they are the only ones which prescribe the manner in which the meetings of the Reading Railroad are to be conducted, and what are the requisites of a legal choice.

Turning, therefore, to the fourth section as prior in place, and in the natural sequence of events, we find that it speaks with no ambiguous voice. "The stockholders," so run the words, "shall meet on the second Monday of January in every year, at such places as may be fixed upon by the by-laws, of which notice shall be given at least twenty days previous by the secretary in the newspapers before mentioned and choose by the majority of votes present, officers for the ensuing year, as mentioned in the third section of this Act, who shall continue in office for one year, and until others are chosen; and at such other time as they may be summoned by the managers, in such manner and form as shall be prescribed by the by-laws, at which annual or special meeting they shall have full power and authority to make, alter, or repeal, by a majority of the votes, in the manner aforesaid, all such by-laws, rules, orders, and regulations as aforesaid, and to do and perform every other corporate act." The qualifications for the exercise of the right of suffrage

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are then prescribed and the conditions on which votes may be cast by proxy. It may be added that the stockholders never made a by-law authorizing the managers to call the "special" meetings contemplated in this section, but that the first by-law provides that "the meetings of the company shall be held at the company's office in Philadelphia, unless specially convened elsewhere by the board of managers."

The language above cited is too clear for doubt. It is made imperative on the stockholders to meet on the second Monday of January in every year, and choose a president and board of managers, and the means are prescribed for carrying this command into effect. The charter does not contemplate a call by the managers, or indeed by any one, but that the stockholders will attend at the appointed time, and at a place to be designated by the by-laws, "of which notice is to be given by the Secretary." The line of duty was thus so clearly drawn that all might follow, and that the law might afford redress in the event of neglect.

If we now examine the fifth section, it will be found in harmony, both as regards thought and expression, with the fourth. Experience had abundantly shown, and it would be obvious to every reflecting mind, that however carefully the charter was drawn, there might still be a failure to elect. The stockholders might not be duly notified, or might be prevented from assembling by some accidental cause, or the meeting might break up without accomplishing its object. Unless some provision was made for such a result the consequences would be serious and might involve a loss of the franchise. The common law regarded a corporation as an artificial body, which would, like the natural body, become extinct on the failure of the organs requisite for the performance of its functions, or at the least, be subject to dissolution at the instance of the Attorney-General.

The fifth section accordingly provides, in conformity with the precedents in England and the United States, that if it shall happen that an election of president, managers, treasurer, secretary, or other officer shall not be made, the corporation shall not for that cause be dissolved, but it shall be lawful to hold and make such election of president, managers, secretary, treasurer or other officer, on any day thereafter, by giving at least ten days' notice, signed by the president or secretary, in the newspapers before mentioned, of the time and place of holding such election; and the president, managers, treasurer, secretary and other officers of the preceding year shall in that case continue to act, and be invested with all the powers belonging to their respective situations until an election shall take place.

The language is so closely analogous to that of the fourth section as to show not only that the object is the same in both, but that it is to be effected by like means. The meeting is to take place not in obedience to a call, but for the discharge of a duty which is not less imperative because it has been deferred, and notice is to be given in order to afford an opportunity for the simultaneous action which would be impracticable if the stockholders were not informed of the time and place at which they were expected to attend.

There is a command, but it is the command of the law, and the president and secretary are simply the instruments through which it is announced. True, they have a discretion as to when and where, because the Legislature could not foresee the various contingencies that might arise, but it is a discretion confined within narrow bounds, and that may, as the recent opinion of Judge ALLISON indicates, be controlled by the Courts if it is misused. If they acted with fidelity and promptitude, the meeting would presumably take place within a few days or weeks, and a president and board of managers would be chosen in due course. If, on the other hand, the notice was not given within a reasonable time; if the day which was named were too remote, or the place inaccessible; or if the president and secretary disagreed and designated different times and places, there would be a manifest disregard of official duty, which might, agreeably to the decision above referred to, be corrected by a bill in equity or mandamus.

The remaining section to be considered is the twenty-first. Omitting the first clause, which has no bearing on the case in hand, this reads as follows: "Special meetings of the stockholders may be called by order of the president and managers, or by the president, at the request of the stockholders holding one-fourth the amount of the capital stock, on like notice as that required for annual meetings, specifying, moreover, the object of the meeting, but no business shall be transacted at such meetings except that for which it shall have been called, nor unless a majority in value of the stockholders shall attend in person or by proxy."

The motive for the introduction of this section is easily discernible. Provision had been made in the fourth and fifth sections for the election of a president and board of managers, whose powers would be adequate for all ordinary purposes. Questions might, nevertheless, conceivably arise requiring an authority from the stockholders, and the board was accordingly authorized to call special meetings for such emergencies; but it was at the same time provided, in order to guard against surprise and secure a full attendance, that a majority of the

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stockholders should be requisite to constitute a quorum for the transaction of business.

The object of the twenty-first section and the rules which it prescribes are, therefore, obviously different from those of the fourth and fifth sections. Agreeably to the one, all the registered stockholders are entitled to vote; agreeably to the other, only those stockholders who have been registered for three months. A quorum is essential under the twenty-first section, but there is no such provision in the fourth and fifth sections. A meeting may be convened under the last-named section on ten days' notice, but at least twenty days must elapse before the stockholders can assemble under the twenty-first section.

It is, notwithstanding, contended by the respondents' counsel, that the twenty-first section governs the fifth section, and precludes the right to elect, unless a majority in value of the stockholders are present in person or by proxy; or, in other words, their contention is, that, although the right to elect is in the stockholders who have been registered for three months, and a majority of such persons attend and desire to exercise it, other persons who are not so qualified may prevent an election by absenting themselves. Such a power may well exist, as regards the meeting called for the transaction of business under section 21, but is altogether at variance with the purpose disclosed in the preceding sections. It is conceded that a single stockholder may elect at the annual meeting, although the rest remain away; and there is no sufficient reason for supposing that the Legislature meant that there should be a different rule for meetings held under the fifth section, which, as I have endeavored to show, are supplementary, and designed to fill a void arising from a failure of the annual election.

We are, therefore, of opinion that the persons returned by the master as having received a majority of the votes cast on the 14th of March by stockholders whose names had appeared on the books for at least three months, are the duly elected president and managers of the Reading Railroad Company.

The following decree was subsequently entered:—

And now, to wit, April 13th, A. D. 1881, this cause coming on, and the parties appearing and being heard, and it appearing from the report of George M. Dallas, Esq., the master heretofore appointed in the case to conduct the election for president, managers, treasurer, and secretary of the Philadelphia and Reading Railroad Company, held at the Assembly Buildings, in the city of Philadelphia, on the fourteenth day of March, A. D. 1881, and of William L. Mactier and John Walker, Jr., judges of said election, that the said election was duly and lawfully held, and that Frank S. Bond received for the office of president a majority of all the legal votes cast at the said election, and that George F. Tyler *et al.* respectively, received for the office of managers a majority of all the legal votes cast at the said election, and that Samuel Bradford received for the office of treasurer a majority of all the legal votes cast at the said election, and that Edgar L. Kinsley received for the office of secretary a majority of all the legal votes cast at the said election; it is adjudged and decreed that at the said election Frank S. Bond was duly elected president of the Philadelphia and Reading Railroad Company; that George F. Tyler *et al.* were duly elected managers of the Philadelphia and Reading Railroad Company; that Samuel Bradford was duly elected treasurer of the Philadelphia and Reading Railroad Company; and that Edgar L. Kinsley was duly elected secretary of the Philadelphia and Reading Railroad Company. And it is further ordered that the clerk of this Court furnish an authenticated copy of this decree to George M. Dallas, Esq., master; and thereupon the said George M. Dallas, Esq., as presiding officer at said election, certify to Frank S. Bond his election as president of the Philadelphia and Reading Railroad Company; to George F. Tyler *et al.* their election as managers of the Philadelphia and Reading Railroad Company; to Samuel Bradford his election as treasurer of the Philadelphia and Reading Railroad Company; and to Edgar L. Kinsley his election as secretary of the Philadelphia and Reading Railroad Company.

The respondents, Franklin B. Gowen *et al.*, thereupon took this appeal, assigning for error the above decree.

John G. Johnson and *James E. Gowen*, for the complainants.

The vital question for decision is—whether or not it was essential that a majority in value of all the stock should be represented at the meeting of March 14, 1881, to make a valid election of officers, or whether a majority in interest of the stockholders actually present or duly represented (being less than a quorum) was sufficient.

This question depends upon whether the meeting was a special meeting held in pursuance of section twenty-one of the charter, or whether it was a meeting lawfully held under the provisions of the second clause of section 5 of the charter. We contend that a meeting of the character authorized by section 5 to be held upon "at least ten days' notice, signed by the president or secretary," can only be held after the stockholders have regularly met at an annual meeting upon the charter-day and have failed, from any cause, to elect one, or more, or all of the officers, in which case the *stockholders* may, under section 5, decide upon holding such sub-

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sequent "special-general" meeting for the purpose of electing such officers. The board of managers have no right to call such a meeting. It cannot be supposed that the Legislature contemplated a failure to hold the annual meeting on the charter-day, and then authorized the officers to call a subsequent meeting of the character of an annual meeting, at their convenience, upon a subsequent day, on only ten days' notice, at which a majority of those present could elect. Section 21, however, provides that *special* meetings of the stockholders may be called by order of the president and *managers* upon like notice as that required for annual meetings (twenty days) for the transaction of special business, to be specified in the notice, at which a majority in value of the stockholders, attending in person or by proxy, shall be necessary to constitute a quorum. The *board of managers*, by resolution passed at their meeting on January 29, 1881, appointed a special meeting for the election of officers to be held on March 14, 1881, and in the notice which they directed the secretary to advertise, it is expressly called a "*special* meeting, convened by the board of managers." This was intended to be, and was a special meeting, on twenty days' notice, in pursuance of section 21 of the charter, at which a majority of all the stock was necessary for a quorum.

The Court below erred, we submit, in assuming (1) that the meeting provided for in section 5 could legally be held whenever there had been a failure to elect officers on the charter day, whether an annual meeting had been held on that day or not. (2) In assuming that the meeting of March 14, was called and held in pursuance of section 5. (3) In deciding that a quorum of a majority in value of all the stock was not essential for the transaction of business at that meeting, and that the ticket represented by the complainants was lawfully elected by a majority of those present, being less than a quorum. To sustain this view the Court was driven to find, what was not even averred in the bill, that the meeting was called by the *secretary*, in the discharge of an "imperative duty" commanded by the charter, the time being fixed in the exercise of his discretion; whereas, in fact, the meeting was convened and the time and place fixed by a resolution of the board of managers who directed the secretary to advertise twenty days' notice. The charter commands that the annual meeting *shall* be held on a stated day, but that *it shall be lawful* (thus leaving it optional with the stockholders) to hold a subsequent or adjourned meeting, on ten days' notice, to be signed by the president or secretary.

No such meeting was ever called. The secretary's name was appended to the published notice in pursuance of the direction of the board, and simply in attestation of the fact that the meeting was called "by order of the board of managers." He exercised no discretion. Even if he had the power, in his discretion, to call a meeting, under section 5 (which we do not admit), *he did not do so*, and the Court cannot retrospectively impute to him an exercise of discretion, in order to sustain the validity of the meeting of March 14, as one of the peculiar character provided for by section 5, when it was, in fact and in law, a meeting of an entirely distinct character, provided for by section 21 of the charter.

There may be grave doubt as to the jurisdiction of a court of equity to supervise and decide upon the validity of a corporate election, under the circumstances of this case, but while we do not admit that it exists, we do not deny the jurisdiction, and we are willing to submit ourselves to the decision of the Court.

John C. Bullitt and *Ashbel Green* (with whom was *Richard C. Dale*), for the appellees.

Jurisdiction in equity is given to the Common Pleas by the Act of June 16, 1836, so far as relates to "the supervision and control of all corporations other than those of a municipal character," which covers this case.

It is now settled law in Pennsylvania that a corporation does not die because of a failure to elect officers on the charter election day. The right of election is inherent in the stockholders, and the only question is, in case of failure to elect on the annual day, How shall the election be made so that all stockholders, present or absent, shall be bound?

The charter here provides for five kinds of meetings: (1) The original meeting of subscribers for organization. (2 and 3) Section 4 provides for two kinds of meetings. (*a*) The regular annual meeting, to be held on the second Monday of January in each year. (*b*) Special meetings to be held at such times as may be prescribed by the by-laws. As the by-laws are silent upon this subject, no such meetings have ever been held, and this charter provision is inoperative. Section 4 also prescribes that at such annual and special meetings a majority of the votes "shall be sufficient to do any corporate act"; it also provides for the qualification of registration three months prior to the election, and as to the mode of voting. (4) Section 5 provides for a fourth kind of meeting, which can only be held for the election of officers in case it should "at any time happen" that an election of any officer, or officers, should fail to be made on the charter day. Such meeting may be held on any day thereafter, by giving at least ten days' notice, signed by the president or secretary. It is not disputed that at such meeting a majority of the *votes present* is sufficient to elect, as in the

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case of the annual meeting. (5) Section 21 authorizes special meetings to be called by order of the president and managers, on like notice as that required for annual meetings, for the transaction of special business specified in the notice. At these meetings a majority in value of all the stockholders must attend or be represented by proxy.

Our position is, that section 21 of the charter has no application to the meeting held on March 14, 1881, but that it was a meeting lawfully called, and held under the provision contained in section 5 of the charter. The language of that section and its object are plain. If there was any failure to elect officers upon the charter day, whether caused by negligence of the officers or by any other cause, the stockholders were given a prompt and easy way of holding another meeting to elect new officers.

[SHARSWOOD, C. J. Who do you say can call the subsequent meeting under section 5?]

The call should be signed by the "president *or* secretary," but the place, if elsewhere than at the company's office, must be fixed by the board of managers.

[SHARSWOOD, C. J. Who can fix the time?]

Either the president or secretary.

[SHARSWOOD, C. J. Suppose they should differ?]

A Court of Equity might help us in that case, but the question has never arisen.

The scheme of this charter is similar to nearly all the other railroad charters in Pennsylvania, except that this alone contains the provisions in section twenty-one. The provision in section 5 for a subsequent election meeting must be read in connection with that in section 4 for the annual meeting. That it does not derive support from section twenty-one is clearly shown by its position, and by the absence of section twenty-one in other charters which contain sections 4 and 5. The words "it shall be lawful," in section 5, confer not only a privilege but a duty, and are imperative. The managers fixed the place for the meeting, and when the secretary adopted their action and called a meeting for March 14, by their joint authority, every requisite for a meeting under section 5 was complied with.

Moreover, we contend that the board of managers had full power to order and fix the time and place of a meeting under the fifth section. Section 2 of the charter gives to the corporation the power to ordain "such by-laws, ordinances, and regulations as shall appear necessary and convenient for the government of said corporation, and generally to do all and singular the matters and things which to them it shall lawfully appertain to do for the well-being of the said corporation, and the due managing and ordering the affairs of the same." By-law 5 provides: "The board of managers shall have all the powers and authority granted by law to the company, except in such matters as may be specially excepted by the by-laws." There is no exception in the by-laws restraining the board from calling such meeting.

If the other side are correct in their position that a subsequent election meeting under section 5 can only be held after the stockholders have met at the annual meeting and failed to elect, then there never could be such a subsequent meeting, if, from accident or design, the annual meeting was not held. And designing officers could always prevent the holding of an annual meeting by omitting to give proper notice. A mandamus could not be issued before the expiration of the time allowed them to give notice, and after the expiration it would be too late. The construction of section 5 contended for by the other side, requires us to read into it a condition which is not there, and which, if there, would defeat its plain object.

May 23, 1881. THE COURT. This contention is whether the election of officers of the Philadelphia and Reading Railroad Company, made on the 14th March, 1881, is invalid by reason that less than a majority of the stockholders attended the meeting in person or by proxy. This must be determined by an examination and consideration of the charter of the company. A clear understanding of the case requires a pretty full reference to some of its provisions. The original Act of incorporation contains twenty-five sections, and was enacted on the 4th of April, 1833. The sections which refer to the election of officers are few. Section 3 provides that the commissioners named in the Act shall call a meeting of the subscribers to the stock to effect an organization of the company and to choose one president and six managers, a treasurer, secretary, and such other officers as shall be deemed necessary, and that the president and managers so chosen shall conduct the business of the company until the second Monday of January then next, and until like officers shall be chosen. Section 4 declares that the stockholders shall meet on the second Monday of January in every year, at such places as may be fixed upon by the by-laws, of which notice shall be given at least twenty days previous by the secretary, in the newspapers before mentioned, and choose by the majority of votes present, officers for the ensuing year, as mentioned in the third section of this Act, who shall continue in office for one year and until others are chosen, and at such other time as they may be summoned by the managers, in such manner and form as shall be prescribed by the by-laws,

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at which annual or special meeting they shall have full power and authority to make, alter, or repeal by a majority of the votes, in the manner aforesaid, all such by-laws, rules, orders, and regulations as aforesaid, and to do and perform every other corporate act. Section 5 declares: "If it shall at any time happen that an election of president, managers, treasurer, secretary, or other officers shall not be made, the corporation shall not, for that cause, be dissolved, but it shall be lawful to hold and make such election of president, managers, secretary, treasurer, or other officers on any day thereafter by giving at least ten days' notice, signed by the president or secretary, in the newspapers before mentioned, of the time and place of holding the said election, and the president, managers, treasurer, secretary, and other officers of the preceding year shall, in that case, continue to act and be invested with all the power belonging to their respective situations until an election shall take place. Thus the fourth section fixes a time for the annual election of all officers of the company, and expressly declares they shall be chosen by a majority of votes present. The fifth section recognizes the fact that for some accidental cause an election might not be made on the day named therefor, the stockholders might neglect to meet, or if they met, fail to elect. If for either of these reasons, or for any other cause, an election was not then made, this section was designed to guard against injurious consequences following therefrom, and to give the stockholders an early opportunity to elect officers. Hence it authorized an election to be held on ten days' notice, signed by either the president or secretary. It does not specify the number or proportion of votes necessary to elect, or the qualification of voters, nor the time the proxies shall have been executed. As all these had been distinctly stated in the preceding section, it would have been a useless repetition. It cannot with any plausibility be assumed that it would require more votes to elect then than on a previous day, nor does it repeat by whom the time for this election shall be fixed. The previous section authorized the stockholders to meet "at such other time" after the day named for the annual election as they might be summoned by the managers, in such manner and form as shall be prescribed by the by-laws. It does not appear that any by-law was adopted specially applicable thereto; but the first by-law provides that the place of meeting of the company shall be at the company's office in Philadelphia, unless specially convened elsewhere by the managers. The fifth by-law declares the board of managers shall have all the power and authority granted by law to the company, except in such matters as may be specially excepted by the by-laws. No by-law takes from the managers any right to fix the time for the election specified in the fifth section. It must be conceded that all the stockholders of the company assembled together would have an undoubted right to fix the time and place for this election; it must, therefore, follow that this by-law, together with the special power given by the fourth section and the general powers of the managers, fully authorized them to call this meeting on the contingency mentioned in the fifth section.

No election of officers was made on the second Monday of January, 1881, nor was any meeting of stockholders then held; the election of officers was made on the 14th of March, by a majority of the votes of stockholders assembled, in pursuance of a resolution of the board of managers, of which notice, signed by the secretary, was duly given. It is contended by the appellants that the fifth section applies only in case a meeting was held on the day specified in the charter, and a failure to then perfect an election, that one or more, but not all the officers, must have been elected. This construction is claimed to be shown by the fact that in a part of the section the names of the officers not elected and to be elected are stated disjunctively. This narrow interpretation ignores another part of the section, which states conjunctively all the officers of the preceding year, and that they shall continue to act until the election shall take place, as then all the officers of the corporation may hold over until an election shall be made. It follows that this section may be called into exercise and take effect if no one of the officers has been chosen. The better view, however, is to look at the purpose of the section. Its manifest intent is to provide a remedy in case of a failure to elect any or all of the officers at any time or from any cause, no matter how it may have happened, and whether or not a meeting has previously been held. The curative power of the section is as broad as the existing defect. It is intended to furnish a full remedy. It is further argued that section 5 must not be considered in connection with section 4, but be deemed an adjunct to section 21, and, therefore, an election on the 14th of March could be held under the latter section only. This seems to us a forced and unnatural construction of the statute. The fourth and fifth sections relate to the same subject-matter —that is, the election of officers. The one fixes a time for the regular annual election; the other authorizes the designation of a later day. In case of a failure to elect on the former, section 21 makes no provision in regard to an election at any time or under any circumstances, nor any reference thereto. It appears to relate only to the general business of the company. A meeting under it can only be by order of the presi-

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dent and managers, or by the president, at the request of the stockholders representing one-fourth the amount of capital stock, on twenty days' notice.

Section 5 requires only ten days' notice, to be signed by either the president or the secretary, and does not require that any specific proportion of the stockholders shall unite in requesting the meeting to be called.

Section 21 declares no business shall be transacted other than that for which the meeting was called; nor unless a majority in value of the stockholders shall attend in person or by proxy.

Both the former sections, which do provide for the election of officers, intend that all the powers thereby given may be exercised by a majority of all the votes present. In the exposition of a statute the intention of the law-makers is to be deduced from a view of the whole and every part of the statute, taken and examined together. So considered, we cannot see that the conclusion at which we have arrived as to the intent of this statute admits of any reasonable doubt. Every object and purpose of the twenty-first section, including the manner of calling its provisions into action and making them of binding force, are dissimilar from all provisions in previous sections providing for elections. It is impossible for section twenty-one to be so blended with section five as to make them harmonize in all their parts. Due effect can be given to both by permitting each to remain as the law-makers placed them—not only removed from each other, but, still further, wholly disconnected in object and purpose. The regular term of the officers chosen for the preceding year had expired; the right of the stockholders to require an election to be held should not be unnecessarily trammeled. If the view taken by the appellants be correct, the stockholders representing a majority of the stock could have prevented one until the next annual election. The officers elected for one year could hold for two years. When, then, can effect ever be given to the fifth section against the wish of the majority? At the annual election it does not apply. At any other time the majority can prevent it being exercised. Instead of going to the clear language of the statute, that an election may be held at any time, when it happens one has not been made. This view practically interpolates the words, "This section shall have no effect if the stockholders representing a majority in value of the stock refuse their assent thereto." The illogical and mischievous consequences of such a construction are too manifest to need argument.

The answer of the appellants frankly and distinctly admits that Mr. Gowen, who, they believe, held the proxies of a majority in value of the stockholders of the company, remained away from the meeting on the 14th of March, with the view and for the purpose of preventing a change in the management of the company. To give the effect intended by such action, from such motives, would be a perversion of the whole spirit of the Act, and unjustly prevent other stockholders from voting to change the officers of the company. Those who voluntarily absent themselves from a meeting duly called for an election must recognize the validity of the election regularly made by those who do attend. Such absentees present no ground for relief from their misfortune or their folly. The learned Judge was, therefore, clearly right in holding the election held on the 14th of March to be valid. Decree affirmed and appeal dismissed at the cost of the appellants.

Opinion by MERCUR, J.

Dissenting opinion by TRUNKEY, J., in which SHARSWOOD, C. J., and STERRETT, J., concurred.

The charter of the Philadelphia and Reading Railroad Company, in section 3 provides for the organization of the company and the election of a president, six managers, a treasurer, secretary, and such other officers as shall be deemed necessary, who shall serve until the second Monday of January then next, and until like officers shall be chosen.

Section 4 provides "That the stockholders shall meet on the second Monday of January in every year, at such place as may be fixed upon by the by-laws . . . and choose by the majority of votes present officers for the ensuing year . . . who shall continue in office for one year and until others are chosen, and at such other times as they may be summoned by the managers, in such manner and form as shall be prescribed by the by-laws, at which annual or special meeting they shall have full power and authority to make, alter, or repeal, by a majority of the votes in the manner aforesaid, all such by-laws, rules, orders, and regulations as aforesaid, and to do and perform every other corporate act."

Section 5 directs the manner of conducting the election, and contains this clause: "And if it shall at any time happen that an election of president, managers, treasurer or other officer shall not be made, the corporation shall not for that cause be dissolved, but it shall be lawful to hold and make such election of president, managers, treasurer, or other officers on any day thereafter, by giving at least ten days' notice, signed by the president or secretary, in the newspapers before mentioned, of the time and place of holding said election."

Section 21 provides "that special meetings of the stockholders may be called by order of the

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president and managers, or by order of the president, at the request of the stockholders holding one-fourth the amount of the capital stock, on like notice as that required for annual meetings, specifying, moreover, the object of the meeting; but no business shall be transacted at such meetings except that for which it shall have been called, nor unless a majority in value of the stockholders shall attend in person or by proxy."

Numerous sections of the charter and of the by-laws relate to the duties and powers of the president and managers, but nowhere are they clothed with authority to call a meeting of the stockholders, except in the twenty-first section aforesaid.

The provision in that section is ample for all occasions when the stockholders should be convened. One-fourth of them in value may request the president to call a meeting, which request is equivalent to a command; but whether called by him at such request or by the president and managers of their own will, not less than a majority in value of the stockholders can transact business at such meeting. This safe rule of action is in the charter, and has all along been satisfactory to the stockholders. They have not passed a by-law under the fourth section, so as to authorize the managers to call special meetings as therein provided, which could do and perform any corporate act, though but a small portion of the stockholders in number and value should be present. Where the charter expresses when and how special meetings of the stockholders shall and may be called by the officers, there is no implication that the officers may convene them in any other way than is expressed.

The fourth section fixes the annual meeting of the stockholders, their powers, and the number and qualifications of votes. Section 5 directs the manner of conducting the election of officers, and provides that if it shall happen at any time that an election of the officers, or any of them shall not be made, it shall be lawful to hold such election on any day thereafter, by giving at least ten days' notice. The language of this section contemplates that an adjournment may be necessary. It implies that the body which adjourns shall name the time. This assembly, having the electoral, legislative, and all other corporate powers at the annual meeting, is the sole judge of the necessity for an adjournment, and the adjourned meeting is a continuation of the annual; there cannot be two annual meetings. In all cases of meetings of the stockholders the charter directs at least twenty days' previous notice, except in this, where ten days' notice is good as respects present or absent stockholders. The annual meeting is not called by any one; it is provided in the charter, and, by giving a short notice, may hold an adjourned meeting. The secretary is required to publish the prescribed notice preceding the annual meeting, and the president or secretary shall sign the notice directed in the fifth section. From the words and context I think it clear that the assembly on failure to elect officers, or finish its other business, may adjourn to a day certain.

The charter does not contemplate the neglect of the stockholders to hold the meeting on the second Monday of January of every year. That meeting is deemed as certain to take place as the meetings of citizens on the days appointed by law for the holding of elections for State and municipal officers. A by-law fixes the place of meeting, unless specially changed by the managers. In the absence of notice every stockholder knows, or may know, when and where the meeting will be by looking at the charter and by-law. With such certainty as to time and place, notice for twenty days is directed to be previously given; yet, where no meeting has been held at all, the fifth section is construed to authorize the president or secretary to appoint a meeting and give notice for only ten days. By this construction, when the time of the annual meeting is known to every elector the longer notice is required, and when unknown, the shorter. Is that reasonable or just? The simple duty is imposed upon the president or secretary to sign the notice —no other—and construction enlarges that duty into a power, given only in the twenty-first section, to the officers therein named. This construction appears to me wholly unwarranted. I have supposed that when a charter provides the mode of doing a thing, and names the persons who shall do it, that settled rules prohibit an interpretation that it may be done in a different way by other persons.

If no assembly shall have been held on the charter day, no power is given in sections four and five to the stockholders, or any officer or officers of the company, to call a meeting on another day. In my opinion, this part of section five referred to, has reference only to a failure to elect when the annual meeting is held. It is said "that such a construction necessitates the reading into the section of words not only not written there, but which, if written in, would render the section unavailing in the very case most likely to be needed." But the other construction which has been adopted, necessitates that kind of reading, and also the giving of powers to a president or secretary which are withheld by the charter—powers expressly given to certain officers, subject to conditions, by section twenty-one. The clause referred to in section five is availing whenever the annual meeting is unable to finish its business on the day appointed, and, as it appears to me, was not intended to avail when that meeting is not held.

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If not held a given number of stockholders may compel the calling of a special meeting, or a special meeting may be called by the president and managers, and in that provision is secured to the stockholders the right to elect officers. True, at such meeting a minority can neither elect officers nor repeal by-laws and enact others, yet a majority may do and perform any corporate act for which the meeting was called. When so full provision is made, there is little danger of officers perpetuating their power against the will of a majority of the stockholders. It is doubtless the intendment of the charter to conserve the stockholders' rights against selfish officers or a scheming minority. To that end power is vested in the president and managers to call a special meeting whenever they deem it expedient in one-fourth the stockholders to force the call, and the safeguard over such meeting protects the interest of all in providing that no business except that named in the call shall be transacted, nor unless a majority be present in person or by proxy.

The resolutions of the managers and the notice signed by the secretary evidence a call for the special meeting on March 14, 1881, under the twenty-first section. Had a majority desired to elect new officers or to formally re-elect the incumbents nothing stood in the way. But if the majority were satisfied, and for that reason did not attend, the minority of stockholders were as harmless as if actually out-voted. As I view the charter and by-laws I am impelled to the conclusion that there is as little reason for declaring those persons voted for by the minority duly elected officers as there would be, had there been a majority of lawful votes cast against them.

This charter contains full provisions respecting the officers and their election, as well as those relating to the rights and powers of the stockholders, and its terms are controlling. It declares that the corporation shall not be dissolved on failure to elect officers on the charter day, and that the officers of the preceding year shall continue to act until an election shall take place. The officers "shall continue in office for one year, and until others are chosen." There is no impending danger of dissolution of the corporation for want of officers if the election of March 14, 1881, was void, and no forced constructions are necessary to avoid such catastrophe. Here statutes or adjudications made for or in cases where the charters failed to provide against the consequences of neglect to elect officers are inapplicable.

The parties agree that the only question for the consideration of the Court is, whether the election of March 14, 1881, was held under the twenty-first section of the company's charter, and, therefore, invalid unless a majority in value of the stockholders attended. I have indicated some reasons for my conviction that the stockholders, or such of them as may choose to assemble, cannot be prevented from holding their annual meeting on the day and at the place named in the charter and by-laws by the secretary's neglect to give the previous notice directed, and, in the absence of that notice, the place is fixed by the by-laws; that, having then and there convened, if for any cause they cannot lawfully proceed with the business, they may adjourn to a day certain, and have process of the Courts to compel the officers to do the things prescribed for the holding of said meeting; that, if no meeting be held on the charter day, thereafter a special meeting only can be called; that the secretary has no power to call a meeting under any circumstances; that the president and managers have no such power, except as provided by said twenty-first section, and that the special meeting for said election was called and held under that section. I am not persuaded that the meeting called by order of the president and managers, under the very terms of the twenty-first section, was, in fact, an annual meeting, held under the fourth and fifth sections.

With great respect for the judgment of the Court below and of the majority of this Court, and sensible that this final decree settles that I am altogether mistaken, yet to me it seems that the provisions of the charter touching the questions at issue are turned upside down, and therefore, I dissent.

Jan. '81, 169. February 23, 1881.

Hogg v. Longstreth.

Assumpsit — Implied assumpsit — Mortgages — Taxes upon property subject to — Relative liability of the mortgagee and terre tenant to pay taxes — Right of the mortgagee purchasing at sheriff's sale to protect his interest, to recover from terre-tenant taxes paid in relief of his property — Duty of terre-tenant to protect the mortgage security.

Although the law will not raise an assumpsit in consequence of the mere voluntary payment by one of the debt of another, yet if one person is compelled to pay another's debt in consequence of the latter's omission so to do, the law infers that the latter requested the former to make the payment for him, and the former may entertain assumpsit against the latter for the amount so paid.

A terre-tenant in possession of lands subject to a mortgage is personally liable for the taxes levied on the lands while he is seised thereof, and has no right to create or suffer any incumbrance that will take preference of the mortgage. Hence where such terre-tenant allows taxes to fall in arrear during his occupancy, claims upon some of which are reduced to judgment, and afterwards the

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mortgagee proceeds upon his mortgage and buys in the mortgaged property at sheriff's sale to protect his interest, the fund realized at such sale being insufficient to pay the amount of the taxes in arrear, and afterwards such purchaser in relief of his property and by reason of fear of sale thereof under levari facias and distraint of his goods thereon, pays the amount of the taxes so allowed to fall into arrears by the terre-tenant; in an action by such purchaser against the terre-tenant to recover the amount of the taxes so paid:

Held, that this was a clear case for the application of the principle contained in the first clause of this syllabus, and that the plaintiff was therefore entitled to recover.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by William Hogg, Jr., against John Longstreth to recover the amount of certain taxes paid by the plaintiff, which had been levied upon certain real property in the city of Philadelphia; the said real property being encumbered by certain mortgages executed to the plaintiff as mortgagee, and the defendant being the terre-tenant subject to the said mortgages.

The following material facts appeared upon the trial below. In the year 1872, one Henry Myers executed to the plaintiff, Hogg, three mortgages, each to secure the sum of $1775, upon three several lots of ground, situate in East York Street, in the city of Philadelphia, numbered respectively 213, 223, 225, in the said street, which three lots were subsequently conveyed by the said Myers, and by sundry mesne conveyances became vested on February 6, 1874, in the said John Longstreth, the defendant, in fee, subject respectively to the payment to the plaintiff of the aforesaid three mortgages, at the expiration of six years from the date of the same. The said Longstreth remained in possession of the said three lots from the year 1874 to the year 1879.

In the month of April, 1879, the plaintiff, William Hogg, Jr., issued writs of scire facias upon the three mortgages respectively, against Henry Myers, with notice to John Longstreth terre-tenant, upon which writs judgments were obtained, and executions were issued. The properties were sold by the Sheriff on June 7, 1879, to Hogg, one of them for the price or sum of $150, and the others for the sum of $50 each. A deed poll for the same was afterwards duly executed to Hogg by the Sheriff.

In the mean time, Longstreth having failed to pay the taxes levied upon the premises while he was seised thereof, claims had been filed in December, 1877, by the city of Philadelphia against the three lots respectively, for taxes due in the years 1874, 1875, and 1876. Writs of scire facias were issued and judgment obtained in each suit for the amount of the taxes of 1874, 1875, and 1876. Writs of levari facias were issued in June, 1879, whereupon the plaintiff, William Hogg, Jr., in order to prevent his property from being sold under these judgments, paid to the sheriff, upon June 21, 1879, the amounts respectively, aggregating $746. Also upon June 19, 1879, upon notice from the Collector of Delinquent Taxes that the taxes for the years 1877 and 1878 upon the said three lots were overdue and unpaid, and that unless the same were paid within thirty days, distraint would be made therefor, the plaintiff, William Hogg, Jr., paid the taxes for these two years, aggregating $345.47. The plaintiff brought this action to recover from the defendant the amount of taxes paid by him upon the aforesaid judgments, and also the amount of taxes paid by him to the Collector of Delinquent Taxes.

The plaintiff requested the Court, *inter alia*, to charge as follows: "*First*. The unpaid taxes of 1874, 1875, 1876, 1877, and 1878, on the three houses and lots, Nos. 213, 223, and 225 York Street, were a personal liability of the defendant, and the payment by the plaintiff of the judgment for the taxes of 1874, 1875, and 1876, to the Sheriff, after an execution was in his hands, and the payment of the taxes for 1877 and 1878, to the Collector of Delinquent Taxes, after the service of the notice of distraint, made the defendant liable to the plaintiff for the amount so paid."

The Court refused so to charge, and instructed the jury as follows: "Under the evidence in the case, I instruct you to find for the defendant."

Verdict and judgment for defendant. Plaintiff took this writ, assigning for error, *inter alia*, the refusal of plaintiff's first point and the charge of the Court above cited.

John Samuel, for the plaintiff in error.

The defendant in this case is liable in two aspects:—

First. Because the plaintiff paid involuntarily the personal liability of the defendant.

Second. Because of the duty and the implied assumpsit therefor, as assignee of the mortgagor, to the plaintiff as mortgagee.

1. As owner of the premises, he was personally liable for the payment of the taxes during his ownership.

Act of 2 February, 1854, sec. 11, P. L. 29.
Act of 24 March, 1870, sec. 2, P. L. 544.
Act of 16 April, 1879, P. L. 24.

The plaintiff paid this debt of the defendant involuntarily and under compulsion, and, therefore, he is entitled to recover the amount from him.

Caldwell *v.* Moore, 1 Jones, 58.
Shaeffer *v.* Greer, 6 Norris, 375.
Henry *v.* Horstick, 9 Watts, 414–416.
Shaw *v.* Quinn, 12 S. & R. 299.

2. The plaintiff was the mortgagee of the three houses and lots on York Street, and the defendant held them subject to the respective mortgages; his duties and obligations towards

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the mortgagee, in respect of the mortgaged premises, were precisely those of the mortgagor. It is an essential element of the contract of pledge or mortgage, that the value of the thing or property pledged shall not be diminished or depreciated by the pledgor or mortgagor.

1 Coote on Mort. 342.
1 Jones on Mort., sec. 684.
Farrant *v.* Lovel, 3 Atk. 723.
Robinson *v.* Litton, Id. 210.
Morris's Appeal, 7 Norris, 368.
Salmon *v.* Clagett, 3 Baend. Ch. 180.
Brady *v.* Waldron, 2 Johns. Ch. 148.

The mortgagor has no right to depreciate the security, even though, in its damaged condition, it is sufficient to pay the mortgage-debt. It is the right of the mortgagee to hold the mortgaged estate for the payment of his demand.

Bryson *v.* Chapin, 112 Mass. 238.

It is, therefore, the duty of the mortgagor to pay the taxes, and the same obligation rests upon the assignee of the mortgagor.

Gormley's Appeal, 3 Casey, 51.
1 Jones on Mort. sec. 680.
Gardiner *v.* Gerrish, 23 Maine, 46.
Fair *v.* Brown, 40 Iowa, 209.

It is because of this duty, that the mortgagee may pay taxes and add the amount thereof to his mortgage.

Brevoort *v.* Randolph, 7 How. Prac. 398.
Brown *v.* Simons, 44 N. H. 475.
Stanclift *v.* Norton, 11 Kansas, 218.

This duty creates an implied assumpsit, and clearly makes the defendant liable.

Defendant in error did not appear, and furnished no paper-book.

May 2, 1881. THE COURT. Henry Myers gave to the plaintiff three mortgages, dated May 31, 1872, each being on a separate lot in Philadelphia. Subsequently, Myers conveyed the lots to Kaign, Kaign conveyed to Taylor, and Taylor, by deed dated February 6, 1874, conveyed to Longstreth, the defendant; each conveyance being subject to said mortgages. In 1879, a scire facias was issued on each mortgage, against Myers with notice to Longstreth, as terretenant, and the judgments thereon aggregated nearly $6000. Hogg, the mortgagee, purchased the lots at sheriff's sale on his judgments. During the five years that Longstreth owned the lots, he neglected to pay the taxes. Judgment had been obtained for the taxes of the first three years. After his purchase at sheriff's sale, the mortgagee paid that judgment, and also the taxes for the remaining two years, the proceeds of sale having been insufficient to cover them, and he claims to recover the amount of said judgment and taxes in this suit.

There is no evidence that the defendant agreed to pay the mortgage-debt. Hence he was not personally liable therefor, and was under no obligation to the plaintiff arising out of a contract. As against all the world, except the mortgagee, he held the lots by absolute title, and he could divest the mortgagee's estate by paying the debt. The mortgagee was liable to be taxed for money at interest secured by the mortgages; the defendant, holding title under the mortgagor, was liable for the taxes on the land.

Being in possession, he was not only legally liable, but had no equity for the attempt to impose payment of the taxes on another person. By force of law the taxes were a personal charge against the defendant, as well as a lien on the real estate. This lien was not only entitled to preference over other liens, but would not be discharged by a judicial sale on any other lien, unless the proceeds were sufficient to pay it. Therefore, the plaintiff had no alternative but to pay the taxes owing by the defendant, or lose the land. Had the taxes been prosecuted to collection before the foreclosure of the mortgage, the plaintiff must have paid them, or have lost his security. A mortgagee in possession, holding a living pledge, may pay the taxes on the land, and treat the sum so paid as part of his debt, which he is entitled to receive out of the profits. When the mortgagor is in possession, and neglects to pay taxes which are a lien on the land, the mortgagee may pay them not only in reliance on the personal liability of the owner, but in reliance that the land is liable, and the lien will be deemed as transferred by the State to him in favor of the mortgage-debt. (Kortright *v.* Cady, 23 Barber, 490.) Where a mortgagee is under the necessity of satisfying an execution on a prior judgment, to preserve his security, he is held by right of substitution to stand in the place of the judgment creditor, and on sale of the land is entitled to receive the amount of the judgment out of the fund as well as the mortgage debt. The payment of the judgment is an act which the mortgagee was compelled to do for his own safety. (Silver Lake Bank *v.* North, 4 Johns. Ch. R. 370.) The principle of subrogation in such case, for purposes of lien and distribution, is familiar, and it often applies when there can be no recovery in a personal action.

It is a clearly established principle, that no assumpsit will be raised by the mere voluntary payment of the debt of another person; from such act a request and promise are not implied. Another principle is, that when the plaintiff is compelled to pay the defendant's debt, in consequence of his omission so to do, the law infers that he requested the plaintiff to make the payment for him. As when the plaintiff at the request of the defendant left a carriage on the defendant's premises, and the carriage was distrained for rent, it was held that the plaintiff,

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having paid the rent, could recover it. In such case and the like, it is not permitted to the defendant to defend on the ground that the payment was voluntary. In some cases when a plaintiff has voluntarily performed a duty which the defendant was under a strict legal liability to perform, he may recover the money expended, although there had been no express consent or request by the defendant to the plaintiff's act. As when a man, in the absence of the husband, incurs expense in burying the deceased wife in a manner suitable to the husband's condition.

There was a strict legal liability on the defendant to pay the taxes. And it was his duty. Prompt payment of taxes is to the public advantage. Attempts by him who owes and ought to pay them to evade payment, or shift the burden upon another, ought not to be encouraged. The defendant has shown nothing which in good conscience should relieve him. He wittingly became owner and held possession of the lots subject to the mortgages, and had as little right to create or suffer an incumbrance which would take preference of the mortgage as the mortgagor would have had, had he remained owner and in possession. The mortgagee was compelled to pay the taxes in relief of the land purchased for his debt, the land not raising a fund sufficient to pay both liens. We are of opinion this is a clear case for application of the principle, that he who is compelled to pay another's debt, because of his omission to do so, may recover on the ground that the law infers that the debtor requested such payment. The plaintiff's first point should have been affirmed.

Judgment reversed, and a venire facias de novo awarded.

Opinion by TRUNKEY, J.

Jan. '80, 108. March 4, 1881.

Huntzinger v. The Commonwealth.

Criminal law—Conspiracy—What constitutes—Act of 31 March, 1860, § 179 (P. L. 385)—Decree thereunder for restitution of property fraudulently obtained, when not authorized—All facts necessary to support the judgment must be set forth on the record.

A. and B., officers of a bank, were indicted for "conspiring to cheat and defraud C. of $24,000, by means of falsely and fraudulently representing to said C. that said bank was solvent, and thereby inducing him to deposit in said bank the said sum of $24,000, whereas the said A. and B. well knew that the bank was insolvent and unable to pay its liabilities:"

Held (reversing the judgment of the Court below), that a conviction on such indictment did not authorize a judgment of restitution under the 179th section of the Crimes Act of 1860.

Per TRUNKEY, J. The charge set forth in the indictment is conspiracy, and would have been sustained by proof of the conspiring merely, without any proof that the intent was carried out, and that the property intended to be fraudulently obtained was actually obtained by defendants. In order to warrant a judgment of restitution, the indictment must allege that the property was actually taken. The allegation of the crime alone would, in some cases, *e. g.* robbery, amount to an allegation of the taking, but, in cases such as forgery or conspiracy, it is different, as the taking is not an essential part of such crimes. In cases of this nature, a direct allegation thereof must be made in order that the record may be self-sustaining.

Where an *allocatur* for a writ of error in a criminal case is refused by the Supreme Court, this cannot be considered as an adjudication that error does not exist. Hence when such an *allocatur* is allowed subsequently and a writ of error taken in consequence, the action of the Court in the first instance presents no bar to a review of the case upon its merits.

Error to the Court of Quarter Sessions of Berks County.

Indictment against Jacob Huntzinger and J. Albert Huntzinger in the Quarter Sessions of Schuylkill County for conspiracy to cheat and defraud. The venue was subsequently changed to Berks County.

The indictment contained two counts. The first, charged that the defendants, being respectively President and Cashier of the Miners' Trust Co. Bank of Pottsville—

"did falsely and maliciously combine, conspire, confederate, and agree together to cheat and defraud Thomas F. Kerns of a large sum of money, to wit, the sum of twenty-four thousand dollars, by means of falsely and fraudulently representing to the said Thomas F. Kerns that the Miners' Trust Company Bank of Pottsville was solvent and able to pay all its liabilities, and thereby inducing him to deposit in the said The Miners' Trust Company Bank of Pottsville, the said sum of twenty-four thousand dollars, whereas in truth and in fact the said Jacob Huntzinger, president, as aforesaid, and the said J. Albert Huntzinger, cashier, as aforesaid, well knew, at the time the representations, as aforesaid, were made, that the said corporation was wholly insolvent and unable to pay its liabilities, to the great prejudice of the said Thomas F. Kerns, contrary to the form of the Act," etc.

The second count charged that the defendants—

"did falsely and maliciously combine, conspire, confederate, and agree together to cheat and defraud Thomas F. Kerns of a large sum of money, to wit, the sum of twenty-four thousand dollars, to the great prejudice of the said Thomas F. Kerns, contrary to the form of the Act," etc.

On the trial before HAGENMAN, P. J., the defendants, in view of the Act of March 31, 1860, § 179 (Purd. Dig. 371, pl. 299), which provides, *inter alia*, as follows:—

"On all convictions for robbery, burglary or larceny of any goods, chattels or other property, made the subject of larceny by the laws of this Commonwealth, or for otherwise unlawfully and fraudulently taking or obtaining the same, or of receiving such goods, chattels, or other property, knowing the same to be stolen, the defendant shall, in addition to the punishment heretofore prescribed for

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such offences, be adjudged to restore to the owner the property taken, or to pay the value of the same, or so much thereof as may not be restored,"

presented the following point:—

"That part of the sentence, in case of conviction under this indictment, must be that the defendants make restitution to the prosecutor. That it is the policy of the law to discourage criminal prosecutions to enforce redress for private injuries, but the true policy of the law is to require parties to seek redress in the civil courts for private wrongs." The record failed to show whether this point was affirmed or not.

The Court charged the jury, *inter alia*, as follows:—

"This indictment contains two counts. The first alleges not only that the defendants conspired to cheat and defraud the prosecutor, but that they fully executed the conspiracy by the false representations and pretences therein specially mentioned. . . . . But the Commonwealth ask for a conviction upon the first count of the indictment with a view to a judgment of restitution, if the defendants are found guilty. In order therefore to find the defendants guilty under this count, the jury must not only find that the defendants conspired to cheat and defraud Thomas F. Kerns, the prosecutor, but they must also find that the conspiracy thus formed was fully carried out, and that Kerns was actually defrauded of the moneys charged in the indictment."

Verdict, guilty on both counts. Sentence and judgment were subsequently entered as follows:—

"That you, Jacob Huntzinger and J. Albert Huntzinger, pay a fine of five hundred dollars ($500) to the Commonwealth for the use of the county of Berks; that you restore and pay to the prosecutor, Thomas F. Kerns, the property of which he was defrauded, to wit, the sum of twenty-four thousand dollars ($24,000), unless you have already done so; that you undergo imprisonment in the Berks County jail by separate and solitary confinement at labor for the period of two years to be computed from this day; that you pay the costs, and stand committed until this sentence is complied with."

A few days after the sentence, application was made to the Supreme Court for a special *allocatur* for a writ of error to remove the cause thither. This application was refused. Subsequently in vacation, however, the *allocatur* was allowed by PAXSON, J. Whereupon defendants took this writ, assigning for error, *inter alia*, that part of the sentence and judgment which ordered restitution to be made to the prosecutor.

G. F. Baer (with him *G. E. Farquhar* and *F. W. Hughes*), for plaintiffs in error.

Prior to the Act of 1860, sentence of restitution was confined to convictions for horse-stealing, simple and petty larceny, and robbery and burglary. No statute authorized it in cases of conspiracy, and no intention to extend it to conspiracy can be found in the Act of 1860 or in the remarks of the commissioners on the section in question. The section was designed to cover cases of larceny and crimes of a similar nature, where the gist of the offence is the fraudulent taking of another's goods. Conspiracy is radically different in its nature, as the offence which constitutes it lies not in the cheating and defrauding, but the combination and agreement to cheat. In conspiracy, the taking does not constitute the offence but is merely evidence thereof. The indictment clearly charges nothing but a conspiracy, and the jury have found the defendants guilty in manner and form as indicted. It has not been found that they *did* actually take the money. They were not indicted for this offence, and Kerns is left to his civil remedy, if he has been deprived of his property.

Moreover, there has been no ascertainment of the value of the property taken; the value alleged in an indictment is rarely or never the true value; and there must be a judicial ascertainment of the value in order to sustain a decree of restitution. This has been so held in other States.

Gilbert *v.* Steadman, 1 Root, 403.
Locke *v.* State, 32 New Hampshire, 106.
Sawyer *v.* People, 8 Illinois, 53.
Hildreth *v.* People, 32 Illinois, 36.

A. W. Schalk, District Attorney for Schuylkill County (with him *Wm. M. Goodman*, District Attorney for Berks County, *Wm. B. Mann*, *Lin Bartholomew*, *F. W. Bechtel*, *H. C. G. Reber*, and *Danl.* and *Jas. Ermentrout*), for the Commonwealth.

This case is *res adjudicata*, as this Court has unanimously refused an allocatur. Such an order is a final disposition of the case.

It was perfectly proper to charge in the indictment both the conspiracy and its execution, for it was all one transaction. One charge will often include another, as robbery includes assault and battery, and rape includes fornication and assault and battery.

[TRUNKEY, J. Does the indictment charge that the defendants got this money?]

The language of an indictment is to be understood according to its natural import.

Comm. *v.* Wentz, 1 Ashm. 272.
Collins *v.* Comm., 3 S. & R. 221, 226.

Accordingly, the plaintiffs in error argued below that the indictment charged an executed conspiracy, and that sentence of restitution must follow a conviction, and presented points to that effect. After helping to bring about this error (if it be one) they will not now be allowed to complain. The history of the legislation on this

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subject shows that the remedy prior to 1860 was insufficient in this class of cases, and that that Act was meant to extend it to all cases of unlawfully and fraudulently taking or obtaining or receiving the property of another. There can be no difficulty in this case about the value of the property taken, as the indictment alleged it, and the proof from defendant's own books showed conclusively that the amount was as alleged.

March 28, 1881. THE COURT. The indictment charges that Jacob Huntzinger, President, and J. Albert Huntzinger, Cashier of the Miners' Trust Company Bank, of Pottsville, a corporation, did conspire to cheat and defraud Thomas F. Kerns of twenty-four thousand dollars by means of falsely and fraudulently representing to said Kerns that said bank was solvent, and able to pay all its liabilities, and thereby inducing him to deposit in said bank the said sum of twenty-four thousand dollars, whereas the said Jacob and J. Albert, president and cashier as aforesaid, well knew said corporation was wholly insolvent, and unable to pay its liabilities. Of this conspiracy the defendants were convicted, and sentenced to imprisonment, to pay a fine, to pay the costs, and to restore or pay to Thomas F. Kerns twenty-four thousand dollars. The sole question is whether the indictment supports a judgment of restitution. It is not now and here gainsaid that the judgment in all other respects was right.

The offence of conspiracy was clearly and sharply set forth in each of the two counts in the indictment. Had Kerns not lost a dollar, on proof of the alleged conspiracy the defendants could have been as well convicted on the first as the second. In the first count only the means for accomplishment of their purpose are stated, namely, false and fraudulent representations to Kerns respecting the solvency of a corporate bank, thereby inducing him to deposit twenty-four thousand dollars in said bank. It is obvious that the Commonwealth intended to state only the means intended to be used by the conspirators. Direct averment is not made that Kerns did deposit said money, or that he lost the money. Certainly it cannot be inferred from anything in the indictment that the defendants themselves took or obtained the money, for it is a mere inference from the means they devised by which it may be said that the corporation got the money. If the part charging conspiracy be struck out, no crime or misdemeanor is stated in the indictment.

The conspiracy is complete when the parties have made the unlawful confederacy, and, therefore, it does not include another offence; as burglary is completed before other felony, which the burglar intended, is committed. Unless the crime besides the conspiracy, or the felony besides the burglary, be distinctly charged, there can be no conviction for anything but the alleged offence. These and like cases differ wholly from those where the greater include the less, or where by statute a person indicted for felony may be convicted of a misdemeanor. The Commonwealth could have preferred a count, charging the defendants with conspiracy, setting forth the means they used, and averring that with intent to cheat and defraud Kerns, they obtained from him twenty-four thousand dollars. But nothing more than conspiracy by the Huntzingers is pleaded. They are not charged with having taken or obtained the money from Kerns.

The 179th section of the Crimes Act of 1860 is very broad, requiring in almost every criminal offence, including in its perpetration the obtaining of money or other valuable thing, in addition to the prescribed punishment, that the defendant shall be adjudged to restore to the owner such money or property, or pay him the value thereof. But the indictment must show that property was taken or obtained. It does this, of course, in robbery, larceny, false pretences and other crimes, which are not committed unless property be taken. Forgery is named in said section of the statute, yet one may commit forgery and not succeed in obtaining money or goods of another. Burglary is also named, but it is burglary of property, not burglary with intent to steal or do other felony. Conspiracy to cheat and defraud is not named, and if it is embraced it must only be when it has been executed. In every case, to support a judgment of restitution, the indictment must show that the money or other thing was actually obtained and taken by the defendant. This is as essential as that the indictment must show an offence punishable by a fine or imprisonment to support a judgment that the defendant pay a fine or undergo imprisonment. The record must be self-sustaining. A judgment without indictment or for an offence not charged in the indictment must fall. Divers statutes impose increased punishment on second conviction for certain offences, but unless the former conviction be stated in the indictment, the Court cannot impose the increased punishment. (Rauch *v.* Commonwealth, 28 P. F. S. 490.) In that case, AGNEW, C. J., said: "On every principle of personal security and the due administration of justice, the fact which gives rightfulness to the greater punishment should appear in the record. To leave a Judge to determine outside of the record is to subject the defendant to an unconstitutional mode of trial." And this language is just as apposite, where judgment of restitution is claimed, if the indictment does not charge the taking or obtaining of the thing asked to be restored.

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It is scarcely necessary to remark that this case must be determined by the record. We are not unmindful of the argument on the part of the Commonwealth, but we fail to see how the points submitted by the defendants at the trial, and the charge of the Court can have other effect than to induce care in consideration of the point now presented.

Nor is the narrative of the conduct of the Huntzinger family a prop to the judgment. Nor has there been a previous adjudication by this Court. An allowance or refusal of a writ of error is not an adjudication that error does or does not exist. If it were, allowance would be equivalent to reversal, and refusal by the Court or a Judge in vacation, would be an affirmance without a hearing. When the record was presented, within a few days after the sentence, attention was directed to matters that took place at the trial, claimed by defendants as cause for entire reversal and another trial, and the clause of the judgment now assigned for error escaped consideration. When this clause was brought to the attention of Justice PAXSON in vacation, and he was convinced the question raised was of so much doubt that it ought to be argued before and considered by the Court, he properly allowed the writ.

The part of the judgment in these words, "that you (Jacob Huntzinger and J. Albert Huntzinger) restore and pay to the prosecutor, Thomas F. Kerns, the property of which he was defrauded, to wit, the sum of twenty-four thousand dollars ($24,000), unless you have already done so," is reversed.

Opinion by TRUNKEY, J.

Jan. '80, 79. April 1, 1881.

Appeals of Wilbur et al.

Errors and appeals—Practice—Decree confirming the report of master pro forma—Appeal therefrom—When not heard.

Where the Court below has entered a decree, *pro forma*, confirming the report of a master without hearing the cause or delivering an opinion, an appeal therefrom will not be entertained.

Appeals from the Common Pleas of Carbon County.

These appeals were taken from a decree of DREHER, P. J., confirming, *pro forma*, the decree recommended by the master (Samuel Robb, Esq.) in the case of Packer *et al. v.* Noble *et al.*

The causes coming on for argument, SHARSWOOD, C. J., expressed a doubt as to whether the Court had power to hear these appeals, there having been no consideration of the cause nor opinion filed by the Court below.

George W. Biddle (*Furman Sheppard* with him), for the appellants. The master's report ends with a decree which was confirmed by the Court below. The record therefore shows a judgment which can be reviewed here. This mode of procedure has been the practice at Nisi Prius, and has occurred on the equity side of our Common Pleas.

[SHARSWOOD, C. J. That is true, but it was only a matter of practice and not of right. We think we are entitled to the opinion of the Court below. Besides the New Constitution confines our original jurisdiction to certain specified cases, and to take the present cause up in this form would be entirely against the spirit of its provisions.]

B. H. Brewster, James H. Campbell, and *W. A. Porter,* for the appellees, concurred in the desire of the appellants to have the cause heard.

April 1, 1881. THE COURT. The decree, *pro forma*, in the Court below, is reversed, and the record is remitted, with directions to the Court below to read and decide upon the exceptions of the several appellants.

PER CURIAM.

Common Pleas—Law.

C. P. No. 2.

Holtzner v. Byrne.

Pleading—Plea of lis pendens a plea in abatement and not in bar.

Sur rule to strike off special plea.

Assumpsit, by Holtzner against Byrne.

Plaintiff filed his narr., and defendant pleaded the general issue. Afterwards, six weeks after the filing of the narr., defendant filed a special plea setting forth that on October 1st, 1877, the plaintiff brought suit in a magistrate's court "in a certain plea of debt, for not performing the very same identical promises" as those declared on in the present suit; that the hearing in the magistrate's court was continued for one week, but that no further proceedings had ever been taken.

Henry C. Titus, for the rule.

A former action pending can only be pleaded in abatement; and such a plea cannot be filed after a plea in bar, and will be stricken off if filed after the general issue.

Court Rule, 97.
Green *v.* Township, 6 Sm. 110.
Findlay *v.* Kleim, 12 Id. 112.
Reimer *v.* City, 5 WEEKLY NOTES, 449.

THE COURT. Rule absolute.

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C. P. No. 2. Feb. 9.

Dejonge v. Helmbold.

Principal and surety—A receipt of part of a claim from the surety only discharges the principal pro tanto even though the creditor agree to receive such payment in discharge of his claim against the surety.

Sur rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. to revive judgment.

The affidavit set forth that after judgment had been entered against the defendant, he sued out a writ of error and entered the requisite security; that the judgment was affirmed by the Supreme Court, and that he is—

"Informed and believes, and expects to be able to prove, that the plaintiff sued out the said recognizance, and issued execution against the said sureties, and has collected from them an amount which he has accepted in full of his claim against them."

Geo. L. Crawford, for the rule.

THE COURT. The receipt of part of the claim from a surety is a credit *pro tanto* but cannot operate as a discharge of the principal. The affidavit is also defective in not setting up how much the plaintiff received.

Rule absolute.

C. P. No. 2. March 16, 1881.

Potts v. Potts.

Divorce—Vacating decree—Proceedings to vacate a decree granted eighteen years before the proceedings to contest.

Petition to open and vacate a decree of divorce.

Emma Potts presented a petition to open and vacate a decree of divorce. The divorce was decreed April 11, 1863, and this petition was presented September 25, 1880. The docket entries showed that two subpœnas issued and that both were returned "N. E. I.," the second one being returned published *sec. leg.*

The petitioner averred that she, the respondent in the suit, was never served with any notice whatever of the suit. That she was induced to go to the West on "account of her health" by her husband and his friends, but that she was in the city repeatedly during the years 1862 and 1863, and that she was frequently visited by her husband in the West. She further averred that she never knew of the decree of divorce until within a short time of her presenting the petition, when she learned of it from the fact that some one else claimed the estate of her now deceased husband as his widow.

The petitioner was not called to testify to the facts set forth in her petition, but on being called by counsel against the application, she admitted that she had not lived with her husband since 1862, and that in 1873 she "married" Charles Waterhouse. She also admitted that in 1869 her late husband told her that he had married again.

Nichols, for the rule.

M. L. Kohler and Ray W. Jones, contra.

A decree of divorce can only be set aside upon the ground of fraud, and fraud is not to be presumed, but must be established by clear and positive evidence.

The greatest length of time after which a Court in Pennsylvania has entertained such a petition, is ten months, and in that case there was no second wife whose rights were to be considered.

Boyd's Appeal, 2 Wr. 241.

THE COURT. Whether or not the petitioner was really ignorant of the decree when it was made, she certainly knew of it eleven years before she made this application, and during that time, she had "married" another man. She comes here now not for redress against a fraud, but with an impudent claim for a share of the dead man's property.

Petition dismissed.

C. P. No. 2. March 18, 1881.

Jones v. The Manufacturers' Bank.

Foreign attachment—Equitable set-off—Insolvents—Right of a bank to set-off unmatured paper of an insolvent depositor against the balance due him on his deposits—Garnishee—When a garnishee is not chargeable with interest—Practice.

Sur rule for a new trial, and motion for judgment *non obstante veredicto*.

Foreign attachment, in which William W. Jones was plaintiff, James Fayer defendant, and the Manufacturers' Bank garnishee. Judgment was obtained against the defendant for $1260.62. The garnishees, in answer to the interrogatories, averred that they did not know James Fayer, and had had no business dealings with him. That they had an account with one "William Fayer, agent," and that on the date of the attachment, Dec. 22, 1879, there was due him $913.74. But that there were two notes which the bank had discounted for the said "William Fayer, agent," one of them for $255.90, due Jan. 6–9, 1880, and the other for $500.00, due Feb. 5–8, 1880, which it claimed to set off. Both of these notes were made by accommodation makers, and were indorsed "William Fayer, agent."

On the trial, before MITCHELL, J., it was

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shown that James Fayer was a resident of Liverpool, and that William Fayer, his son, was his agent. The facts set forth in the garnishee's answer were duly proved. Under the instruction of the Court the jury found for plaintiff, and assessed the damages at $977.70, of which $913.74 was for principal, and $63.96 interest.

The jury also found specially—

First. That William Fayer was agent for James Fayer, defendant, at the time of the attachment, December 22, 1879.

Second. That the bank, garnishee, did not know for whom its depositor, William Fayer, agent, was agent, either at the time of discounting notes, or at the time of the attachment.

Third. That William Fayer, doing business as William Fayer, agent, was insolvent at the time of the attachment.

Fourth. That the set-off of the bank upon the two notes, if the Court shall determine that it is to be made, amounts to $810.

The Court reserved the question, "whether, under the facts found, the bank was entitled to its set-off."

Counsel for the bank having, on a previous day, obtained a rule *nisi* for a new trial,

Frank P. Prichard (*Wm. H. Peace* with him), now showed cause.

The addition of the word "agent" to the depositor's name was notice that the depositor was agent for some one, and even though the bank did not know the name of the principal they cannot claim any rights against the agent other than such as they would have successfully maintained against the principal if known.

Bank *v.* Jones, 6 Wr. 536.

There was no allegation that James Fayer was insolvent, and the finding that "William Fayer, doing business as William Fayer, agent," was insolvent, amounts only to a finding that at the time of the attachment William Fayer, agent, was not in funds of his principal sufficient to meet his principal's liabilities. William Fayer, agent, was not the maker, but was merely the indorser of the notes; he did not, therefore, owe a debt to the bank payable in the future, but had merely incurred a contingent liability as surety for the makers of the notes.

Even if James Fayer had been the maker of the notes, and become insolvent, the bank would have had no lien or right of set-off as against the attaching creditor.

Bower *v.* For. & Col. Gas. Co., 22 Weekly Rep. 740.
Dougherty *v.* Bank, 9 WEEKLY NOTES, 1.
Spaulding *v.* Backus, 122 Mass. 553.
Parsons *v.* Root, 41 Conn. 161.
Edwards *v.* Delaplaine, 2 Harrington, 322.
Ingalls *v.* Dennett, 6 Greenl. 79.
Self *v.* Kirkland, 24 Ala, 275.

The right of set-off claimed by the bank has been refused in analogous cases.

Bosler *v.* Bank, 4 Barr. 32.
Farmers' & Mech.'s Bank's App. 12 Wr. 57.

Inasmuch as the bank has defended this suit for its own benefit, and in order to assert a claim upon the fund, it is chargeable with interest.

Singerly *v.* Woodward, 8 WEEKLY NOTES, 339.

Robert H. Neilson (*Henry C. Olmsted* with him), for the rule and motion.

Under no circumstances can an attaching creditor occupy a better position than his debtor.

Good *v.* Grant, 26 Sm. 52–56.

But it does not follow that he may occupy a position as good. James Fayer could not have this balance free from our set-off, because—

(1) The right of our dealing with an agent for a foreign or undisclosed principal to treat the agent as the principal debtor is undoubted.

Thomson *v.* Davenport, 2 Sm. Lea. Cas. (7th Am. ed.) 358–383.

(2) It is a custom of banks in discounting notes for their depositors to treat the deposit as security for the discount; and the jury having found that the deposit of "William Fayer, agent," is the money of James Fayer, we submit that there is an irresistible presumption that the discounts, which passed into the same account, and formed part of the balance in dispute, are the liabilities of James Fayer.

(3) The proposition that the liability of an indorser is a contingent liability is at variance with the authorities.

Chitty on Bills, ch. vi. *242.
Stephens *v.* The Monongahela Bank, 7 Norris, 158–163; s. c., 7 WEEKLY NOTES, 491–494.
Stewart *v.* Bank, 6 WEEKLY NOTES, 399.

And, though the reasoning of Mr. Justice TRUNKEY, in Dougherty *v.* Bank (*supra*), is contrary to the view which we maintain, the judgment of the Court is precisely similar to the one for which we are seeking. The cases in this and other States, in which a contrary conclusion has been reached, are either cases in which the doctrine of mutual credits does not apply, or cases of decedents' estates. These latter have been distinguished in—

Jordan *v.* Sharlock, 3 Norris, 366.

In regard to the charge of interest, it must be recollected that the depositor was "William Fayer, agent," and the defendant in this suit is James Fayer; it is therefore quite unreasonable to hold that we are in default until after a final judgment shall have been entered on the verdict in this case.

C. A. V.

March 22, 1881. THE COURT. Verdict reduced to $913.74 (being the amount found in the garnishee's hands without interest), and rule discharged.

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C. P. No. 4. March 14, 1881.

The Penn Mutual Life Ins. Co. v. Thackara et al.

Fixtures—Distinction between real and personal property—What passes at sheriff's sale of the realty—Gas fixtures are personalty; the purchaser of realty, whether at public or private sale, acquires no title to them in the absence of a special agreement.

Feigned issue between the Penn Mutual Life Insurance Co. and Thackara, Buck & Co., as to the ownership of certain gas fixtures. The parties agreed upon the following case stated:—

"On May 31, 1875, George E. Bliem purchased from one Snyder a lot of ground on Oxford Street above Seventeenth, in the city of Philadelphia. On the same day he entered into an agreement with the Penn Mutual Life Insurance Company, by the terms of which it was to advance to him the sum of $16,000, with which to pay for the said ground, and the further sum of $34,000 to pay for the erection of ten dwelling houses on the said property. To secure the said company for its said loan, Bliem executed and delivered to the company ten advance money mortgages for $5000 each, under the provisions of the law as then in force, with the usual accompanying bonds, and accompanying agreement, and covenant by the company to make the said advances.

"The contract was fully carried out, and Bliem completed the houses and rented the same, having first purchased from Thackara, Buck & Co., defendants herein, the necessary gas fixtures, and placed them in the said houses.

"On April 24, 1879, interest not having been paid on the mortgages on Nos. 1703, 1709, and 1711 Oxford Street—three of the aforesaid properties—the insurance company entered judgment against the said Bliem on the three bonds accompanying the said three mortgages, condemned the said properties, and sold the same at sheriff's sale on September 15, 1879. The company bought all three properties at said sale, went into possession, and have remained in possession ever since. The gas fixtures were at all times after their first attachment to the premises in the houses, and are there now, but they were not mentioned in the mortgages, the writs of fi. fa., the writs of vend. ex., the advertisements or handbills of the sheriff's sale, or the sheriff's deeds, and were only included, if included at all, in the general term, appurtenances.

"On October 2, 1880, Thackara, Buck & Co., the defendants in the feigned issue, issued a writ of fieri facias upon a judgment which had been obtained by them on March 29, 1880, against the said George E. Bliem in this Court, in an action for goods sold and delivered. Under this writ the sheriff levied upon the gas fixtures in these properties as the property of said George E. Bliem. These gas fixtures consisted of chandeliers and brackets of the kind ordinarily used in dwelling houses. The Penn Mutual Life Insurance Company claimed to own these gas fixtures by virtue of its purchase of the properties at sheriff's sale, under the writs of vend. ex. above mentioned. A rule of interpleader was granted, and this feigned issue framed.

"If the Court should be of opinion that the sheriff's sale under the writs of vend. ex. aforesaid passed the title to these gas fixtures to the Penn Mutual Life Insurance Company, and that the said fixtures were not subsequently liable to be seized in execution as the property of George E. Bliem, then judgment to be entered in favor of the plaintiff in the feigned issue.

"If the Court should be of opinion that the sheriff's sale under the writs of vend. ex. aforesaid did not pass the title to these gas fixtures to the Penn Mutual Life Insurance Company, but that the said fixtures remained the property of George E. Bliem, liable to be seized and sold on executions against him, then judgment to be entered in favor of the defendants in the feigned issue."

Samuel B. Huey (with whom was *John M. Williamson*), for the plaintiff.

Annexation is gradually ceasing to be the criterion in determining what are and what are not fixtures. The relation, as evidenced by the intention, is the true rule to be applied.

Meigs's Appeal, 12 Sm. 28.
Hill *v.* Sewald, 3 Id. 271.
Crane *v.* Brigham, 3 Stockton, 29, 35.
Ferrar *v.* Chauffetete, 5 Denio, 527, 531.
Murdock *v.* Harris, 20 Barb. 407.
Capen *v.* Peckman, 35 Conn. 88, 94.
Hill *v.* Wentworth, 28 Vt. 428, 437.

It is further to be deduced from these cases that the intent to make the relation permanent may be presumed to be strongest as between the heir and executor of a tenant in fee, and weakest as between the landlord and tenant for a short time, or at will.

Where realty and something, which, but for its relation to the realty, would be a chattel, form one completed thing, an intention to annex is to be presumed.

Voorhis *v.* Freeman, 2 W. & S. 116.
Pyle *v.* Pennock, Id. 390.
Christian *v.* Dripps, 4 Casey, 271.
Johnson *v.* Mehaffey, 7 Wright, 308.
Winslow *v.* Ins. Co., 4 Met. 306.

When the tenant, whatever be his interest, finally quits the premises, leaving the erection placed thereon, the right of removal is gone.

Davis *v.* Moss, 2 Wright, 346.
Thorpp's Appeal, 20 Smith, 395.

In Vaughan *v.* Haldeman (9 Casey, 522) the

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fixtures were put in by the owner and occupier of the premises, for his own personal convenience, and he was rightfully on the premises when legal proceedings raised the question. In the case at bar the gas fixtures were attached to give value to the realty.

Frank P. Prichard (with whom was *Albert B. Guilbert*), for the defendants.

The law is well settled in Pennsylvania that gas fixtures are personalty, and do not pass with the realty at either public or private sale.

Vaughen *v.* Haldeman, 9 C. 522.
Jarechi *v.* Philharmonic Soc., 29 Sm. 403.
Wilson *v.* Freeman, 7 WEEKLY NOTES, 33.
Johnson *v.* Mehaffey, 7 Wr. 308.

C. A. V.

April 2, 1881. THE COURT. The learned and elaborate argument submitted to us by the plaintiff's counsel has failed to convince us that this case differs in principle from Vaughen *v.* Haldeman (9 Casey, 522), and Jarechi *v.* Philharmonic Society (29 Smith, 403). All the cases in this State decide that unless there is some special agreement to the contrary, gas fixtures are mere personal chattels—as much so as oil lamps, candlesticks, candelabra, or gas stoves. Vaughan *v.* Haldeman determines the very point upon which the present case turns, viz., that such articles are not fixtures in the proper sense of the term, and do not pass by a sheriff's sale to the vendee of the realty. It can make no difference that in the present case the owner had rented the premises, and was not personally in possession. The possession of his tenant was the same as his possession, and renting the property to a tenant does not alone indicate that the owner intended to alter the character of the personalty any more than if he had agreed to allow the tenant the temporary use of any other chattels left in the house. These things were neither embraced in the plaintiffs' mortgage nor their levy, and constituted no part of the consideration paid for the property when sold at the sheriff's sale. In Jarechi *v.* The Philharmonic Society an effort was made to induce the Court to reconsider its determination in Vaughan *v.* Haldeman, but the Court adhered to its decision, the present Chief Justice re-affirming in his opinion the rule laid down in the former case, that unless there is a special agreement on the part of the owner to the contrary, the purchaser of the realty, whether at private sale or at a sheriff's sale, acquires no title to the gas fixtures. The result reached by the application of the rule in the present case is eminently equitable, for the plaintiffs have got the property which they relied upon as their security, and the defendants will get the proceeds of the property which they made, but which was never paid for.

Judgment for the defendants on the case stated.

Opinion by THAYER, P. J.

Orphans' Court.

March 22, 1881.

Wharton's Estate.

Collateral inheritance tax—When to be paid by tenant for life and when by remainderman—Penalty for delayed payment—Appraisement of life tenant's interest—Acts of March 11, 1850, May 4, 1855, and April 10, 1849.

Sur exceptions to adjudication.

The following extracts from the adjudication (before HANNA, P. J.) set forth the facts in this case.

"It was stated at the hearing that the collateral inheritance tax upon the legacy or fund held by the accountants had not been paid, and that the balance of income stated in the account was retained for that purpose, but the Auditing Judge is of opinion that the tax is to be deducted from the principal and not the income.

"Testator by his will gave and bequeathed to his friend—

"Mrs. Kate Lawrence, the sum of $20,000 for the support of herself and his son Edward Wharton, and in case of her death to be held in trust by his executors thereinafter named, for the use and maintenance of his said son until he arrived at the age of twenty-one years, the principal to be paid him at their discretion."

"All the residue of his estate he bequeathed and devised unto his sister, Mrs. Alida G. Montgomery.

"And in case of the death of Mrs. Kate Lawrence and his son without said son leaving any issue, he directed the amount bequeathed to them for their use and support, to be paid to his sister, Mrs. Montgomery."

"As it was admitted by counsel at the hearing, that said Edward Wharton, son of the testator, was not born in lawful wedlock, it is evident that the fund bequeathed as above, is subject to the collateral inheritance tax.

"This upon the legacy of $20,000 will be $1000, together with interest thereon from May, 14, 1875, and is to be deducted from the principal fund in the hands of accountants, and awarded to the Register of Wills."

The accountants, The Pennsylvania Company for Insurance on Lives, etc., Trustees, etc., filed exceptions to the finding that the interest on the $1000 awarded as collateral inheritance tax should be paid out of the principal, and claimed that said interest should be paid out of the income, and excepted also to the finding that it was admitted by counsel that Edward Wharton, son of the testator, was illegitimate.

J. G. Johnson, for exceptants.

P. T. Ransford, contra.

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April 2, 1880. THE COURT. As the law stood prior to the Act of March 11, 1850, § 1 (Purd. 216, § 7), the collateral inheritance tax was due upon all estates subject to such tax, at the end of one year from the death of the decedent, a penalty at the rate of twelve per cent. being added if not then paid. (Act of April 10, 1849, § 14, Purd., p. 215, § 5.

But by the Act referred to (March 11, 1850), it was provided that in case of a remainder or reversionary interest, after an estate for years or for life, the person entitled might elect to wait the actual coming into possession of his estate; and in such case should give security to the Register for the payment of the tax with interest at six per cent. from the time it accrued. The Act of May 4, 1855, § 1 (Purd. 216, § 9), went still further, and provided that the penalty should not be charged in any case against the party entitled in remainder, etc., until his interest shall come into actual possession and enjoyment; and that, "if such legatees or devisees shall elect to pay said tax in anticipation of the same coming into actual possession and enjoyment, the same shall be received at the then valuation of the legacy or devise, deducting the value of the life estate or term of years."

The estates of the tenant for life and of the remainderman are thus recognized as separate and distinct, and neither is to be affected by the tax or interest or penalty to be paid by the other. The tenant for life is entitled to the enjoyment of the entire estate while he lives—he paying only the tax assessed upon the "value of such estate"; while the tenant in remainder, when he shall come into the possession and enjoyment, is entitled to it without other deduction than the tax due by himself and such interest as may have accrued thereon. From the provision giving him the privilege to pay his tax in anticipation, the value of the life estate being deducted in estimating the amount upon which the tax is to be paid, it would seem that interest from the death of the decedent is not chargeable against him; or if it is, that it is to be charged only upon the valuation of his interest at the time he elects to pay the tax. The tax due by the tenant for life is payable immediately when distribution is, or should be, made. If payment is delayed, the consequences must fall upon him, and not upon the remainderman, against whom, it is clear, no part of the interest or penalty resulting from the default of the former can be charged.

The Act of April 10, 1849, § 12 (Purd., p. 218, § 22), makes provision for the appraisement for the purposes of collateral taxation, of all annuities and life estates, "growing out of" the real or personal estate of a decedent; and by Act of March 11, 1850, § 2 (Purd. 219, § 25), such appraisement is to be made by the official appraiser appointed by the Register of Wills.

It follows that the only tax now demandable in the case before us, is that payable by the tenant for life upon such valuation of her estate as may be made under the Act of Assembly; and that such tax, with the interest or penalty due thereon, must be paid by her alone, or charged against the income belonging to her. Whether the tenant in remainder will avail himself of the privilege of anticipating payment of his tax is a matter which he alone, or his trustee for him, can determine, and one which does not concern the present inquiry. Should he or the trustee desire to do so, a valuation of his estate will be required under the Act of May 4, 1855, *supra*.

With regard to the third exception, we think that the fact referred to might have well been assumed from all the circumstances of the case, without reference to the admissions of counsel. It may be conceded that the accountant's counsel did not join in the admission, but the *cestui que trust*, whose knowledge of the subject could not be questioned, was also represented by counsel, and no exception has been filed on her behalf to the adjudication.

The account is recommitted to the Auditing Judge for further proceedings in conformity with this opinion.

Opinion by PENROSE, J.

March 22, 1881.

Whitaker's Estate.

Probate of will in "common form" and solemn form in England—Probate by Register in Pennsylvania is according to the common form, and on an appeal to the Orphans' Court is assimilated to the solemn form, and the judgment is in rem—Act of March 15, 1832—Quære, how far a party interested who has not been notified, is estopped from contesting a will which has been admitted to probate, by the plea of res adjudicata.

Sur motion to dissolve injunction and to strike off appeal.

In July, 1879, the will of Mary G. Whitaker was presented before the Register for probate. It was contested by one Samuel Whitton, who alleged himself to be the son of a deceased brother of testatrix and her only next of kin, on the ground that the instrument had been executed by testatrix under undue influence and while she was *non compos mentis*. Evidence was adduced before the Register and the will admitted by him to probate on July 16, 1879. The contestant appealed to the Orphans' Court, and

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prayed for an issue to test the validity of the will. An examiner was appointed and testimony was adduced before him, but all touching the legitimacy of the contestant and his consequent right to a standing in Court. No testimony was adduced bearing upon the validity of the instrument.

In November, 1879, on motion of the executors named in the will, the Orphans' Court ordered Whitton, being a non resident, to enter security for costs. This order he failed satisfactorily to comply with, and accordingly on May 8, 1880, the Orphans' Court, after argument, entered a decree in consequence of this default and in view of the evidence taken, refusing the issue prayed for and affirming the decree of the Register admitting the will to probate. The executors on Sept. 16, 1880, duly filed their account, the same was audited and the adjudication thereon filed Nov. 23, 1880.

On December 22, 1880, one John G. Lyle, alleging himself to be next of kin to testatrix, and who had been notified of none of the former proceedings, although he had had knowledge of them, made application to the Register to annul and vacate the probate of the will on the ground that testatrix was *non compos mentis*, and under undue influence at the time of its execution. The Register refused this application, whereupon Lyle appealed to the Orphans' Court and presented a petition praying for a citation to the executors and all other persons interested as legatees, etc., to show cause why an issue *devisavit vel non* should not be granted, and for a citation to show cause why the adjudication upon the account should not be reviewed.

Citations were awarded as prayed for and the executors filed answers to the petition.

On December 31, 1880, the Court awarded an injunction restraining the executors from paying out any of the sums of money as decreed by the adjudication.

This motion was then made by the executors to dissolve the injunction and strike off the appeal.

J. Edward Ackley, *George Biddle*, *George W. Thorn*, and *George W. Biddle*, for petitioners.

The probate of a will is governed by the Act of March 15, 1832. The admission of the will to probate by the Register of Wills is a judicial act.

Holliday *v.* Ward, 7 Harris, 485.
Lovett *v.* Mathews, 12 Ibid. 330.
Shinn *v.* Holmes, 1 Casey, 142.

The admission of the will to probate is a judgment *in rem*.

Woodruff *v.* Taylor, 20 Vermont, 65.
Noell *v.* Wells, 1 Lev. 235.
Allen *v.* Dundas, 3 Term Reports, 125.
Plume *v.* Beale, 1 P. Williams, 388.
Allen *v.* McPherson, 1 House of Lords Cases, 191.
Laughton *v.* Atkins, 1 Pickering, 535.
Vanderpoel *v.* Van Valkenburgh, 2 Selden, 190.

It, being a judgment *in rem*, is binding not only on the parties to the suit and their privies, but is binding upon the whole world.

The probate is conclusive and cannot be questioned collaterally.

Wilson *v.* Gaston, 38 Leg. Int., 43.

This Court will not go back of the record of the judgment and examine the character of the testimony on which that judgment is founded.

Samuel Whitton has appealed once from the Register's decision, and after testimony taken and argument, the Court dismissed his appeal and refused his petition for an issue. This is a final decree on the merits of the case. To decide that any one can again take an appeal from the Register, is to decide that each one of the relatives of the decedent in turn can take an appeal and exhaust the estate in continued litigation.

Upon an appeal to the Supreme Court, the former decree may be set aside, and then, if this appeal is allowed, there would be two separate contests upon the same subject matter, and perhaps opposing judgments.

Alfred H. Jones and *George L. Crawford*, for respondents.

In Pennsylvania the probate before the Register is ordinarily without notice, and in common form. When an appeal is taken, it becomes in solemn form, but all parties interested must be notified in order to make it a binding judgment *in rem*. The authorities cited as to judgments *in rem* are not applicable to this case, as they refer to probates in solemn form.

We do not claim that each one of the relatives of the decedent in turn can have an appeal, but we propose to bring them all in by citation in this appeal, and they will all be bound by the result. The decision in the former appeal was not on the merits and did not touch the questions at issue, which were the mental unsoundness of the decedent and undue influence, but that appeal was dismissed on the ground of the illegitimacy of the appellant and want of interest. Lyle is not bound by that judgment and is entitled to this appeal.

April 2, 1881. THE COURT. The proceeding to admit a will to probate is recognized by the English cases as a proceeding *in rem*, the judgment in which is conclusive as to the whole world. (Noell *v.* Wells, 1 Lev. 235; Allen *v.* Dundas, 3 T. R. 125; Plume *v.* Beale, 1 P. Wms. 388; Allen *v.* McPherson, 1 H. of L. Cas. 191:) It is distinguishable from a proceeding *in personam*, which binds only parties to the suit, in the fact that it fixes the status of the instrument and not of the party. Like any other proceeding *in*

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rem, it cannot, in a suit concerning personalty, be attacked collaterally, nor, by a late decision in Pennsylvania, even in an action of ejectment. (Wilson *v.* Gaston, 38 Leg. Int. 43.) But it differs from proceedings purely *in rem* in this, that before it can receive the impress of this binding character, notice of its pendency must have been conveyed to all parties in interest. A glance at the procedure which prevails in England will prove this. According to Jarman (Treatise on Wills, ed. 1849, vol. 1, p. 215) a will is proved in common form when the executor presents it before the Judge, and in the absence of and without citing the parties interested, produces witnesses to prove the same. This probate may be re-examined at any time within thirty years from its date. A probate in solemn form, or by form of law, as it is sometimes called, is a probate made by the Judge after all the persons whose interests are affected by the will have been duly notified and have had an opportunity to be heard. The persons so cited appear to be the next of kin and "all others pretending interest in general." (1 Williams on Executors, 335.) After the will has been proved in this form and admitted to record, the probate is held generally to be forever binding. (1 Jar. 217; 1 Williams on Executors, 7th ed. 335; 2 Greenl. Ev. § 692.) In our own State, the probate of wills before the Register is ordinarily without notice, and therefore according to the common form. It is only upon appeals to the Register's Court, whose functions in this county are exercised by the Orphans' Court, that such notice is required by the Act of 15th March, 1832, and the proceedings are assimilated to those by solemn form. We are not now called upon to decide how far a party who is manifestly interested in the will, but who is shown by the record not to have been notified, would be estopped from a separate appeal by the plea of *res adjudicata*. The present appellant admits that he had knowledge of the former appeal. But he urges against the conclusiveness of the judgment on that appeal, that it was founded upon the petition of a party who was shown to have no legal standing in court. Laches cannot with fairness be charged upon his inaction in that proceeding, because the illegitimacy of the former appellant was unknown to him at the time, and the alleged kinship to the testator was of a degree which would exclude the present contestant from any share in the estate. But he urged as a second and stronger reason, that the judgment in the first appeal did not touch the questions upon which an issue was then and still is demanded, the questions of undue influence and of mental unsoundness. The Court may not shut its eyes to its own records, which, in this instance, show that no evidence touching the validity of the will was submitted, and that the prayer for an issue was refused on the sole ground that the petitioner was a volunteer. The net result of the proceeding was the determination of an inquiry into the interest of the party contesting. Such an inquiry, however, was a mere preliminary to the contest, and formed no part of the contest itself; and it was, moreover an inquiry which the proponents of the will had a clear right to institute before the contest could be begun. (Hingeston *v.* Tucker, 2 Sw. & Tr. 596.) If they failed to exercise the right at an earlier stage in the case than they did, they cannot set up the present shape of the records as a bar to any subsequent proceedings by genuine parties. The argument *ab inconvenienti* was strongly pressed at the hearing by counsel for the petitioners. But it is apparent that any embarrassment which may be caused by the form which the record has assumed, will be the result of the proponents' own act. By interjecting into an investigation respecting the validity of the will, a question which properly should have preceded it, they gave to a decree which was really interlocutory the appearance of a final judgment. If substance must in any case give way to form, the reason for the sacrifice should be at least something more than illusory. It is just within the limits of possibility that upon an appeal to the Supreme Court the former decree in this case might be set aside, and the original appellant be reinstated as a party. The incongruity would then be presented of two separate contests upon the same subject matter, the judgments in which, both in this Court and in the Common Pleas, might be opposed to each other. When this contingency with a double aspect shall have arisen, however, it will be perhaps time to deal with it. It would not be wholly without precedent. In The Goods of Langley, 2 Robertson, 407, administration was granted to the lawful widow of a decedent, although a prior administration was outstanding in a woman who had falsely represented herself to be the widow. Even the technical difficulty which has been suggested might, perhaps, be avoided by opening the decree upon the former appeal, so far as to allow the respondent to appear as a party to that record, and to prosecute the proceeding with effect. But we are of opinion that he is entitled to his independent remedy, and for that reason we dismiss the present petition.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JUNE 2, 1881.* [No. 7.

Supreme Court.

July, '79, 23. Feb. 11, 1881.

Ruchizky v. De Haven et al.

Infants—Contract—Stock gambling—Margins—Right of infant to recover back cash and value of stock deposited with broker for margins—Case stated—Inferences to be drawn from.

Where an infant enters into transactions in stocks by way of margins, without any intention to receive or deliver the stock bought or sold by his order, and in the course of such transactions from time to time makes advancements to his brokers, to be held or used by them as collateral security to them, by or on account of purchases or sales made by them for him, and the whole amount so deposited is lost in the aforesaid transactions:

Held, that such a contract is condemned by public policy and void *ab initio*, and that, upon electing to rescind it, the infant may recover from his brokers the whole amount advanced by him to them as collateral security.

In such a case it is error to regard the brokers as the agents of their customer, as the hand or medium through which he acted in transactions with other parties. The customer is dealing with them as principals.

Per GORDON, J. The doctrine that where an infant has executed a contract, and has enjoyed the benefit of it, and afterwards, on coming of age, seeks to avoid it, he must first restore the consideration which he has received, that he cannot have the benefit of the one side without restoring the equivalent on the other, may and certainly does apply in certain cases, but, as a general rule, is unsound.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Joseph Ruchizky, a minor, by his father and next friend, Joseph Ruchizky, against Alexander H. De Haven, Hugh De Haven, S. L. De Haven, and Henry L. Townsend, trading as De Haven & Townsend.

The plaintiff afterwards died and by suggestion filed of record his administrator, Conrad Auwaerter, was substituted in his place.

The following facts appeared from a case stated, which was, by agreement of the parties, submitted to the Court:—

"Joseph Ruchizky, the plaintiff decedent, at the time of bringing this suit was an infant under twenty-one years of age, and only attained his majority on August 12, 1877.

"The defendants are and were since January 1, 1875, and before that, stock brokers, having their place of business on Third Street, Philadelphia. The plaintiff decedent was on January 1, 1875, and before that, a clerk in the banking-house of the Northern Savings Fund, in Philadelphia, and so continued until September of 1876. In January, 1875, he began dealing in corporation-stocks, on margins, through the defendants, who acted as his brokers, not knowing him to be an infant. These transactions continued from time to time until some time in August, 1876. The value of stocks purchased by the defendants for the decedent on his order during this time, at the price paid for the same, was $472,419.55.

"The plaintiff decedent, while these transactions were being carried on, transferred certain corporate stocks to the defendants and paid to them certain sums of money, all to be held and used by defendants as collateral security to them against loss by or on account of purchases or sales made by them for him."

Said stocks so deposited at various times consisted of 40 shares Phila. & Erie R. R. Co., 14 shares Phila. & Reading Railroad Co., 100 shares Oil Creek and Allegheny Valley R. R. Co., 20 shares Keystone National Bank, and 40 shares Northern Savings Fund S. D. & T. Co.

"The full amount thus paid and transferred to the defendants by the decedent, from Jan. 22, 1875, to June 26, 1876, estimating the stocks as cash at the prices at which they were sold by the defendants, is $7024.96. In addition to that they took 20 shares Keystone Bank in the final settlement at $900; but it would not bring that amount then, or at any time since, and has not been sold.

"The defendants from time to time repaid to the plaintiff various sums of money, amounting to $2695.92.

"These transactions, taking them as a whole, resulted in a heavy loss to the plaintiff decedent, and on the second day of August, 1876, the defendants sold the last of the stocks held by them for plaintiff decedent, and closed the account, which showed an indebtedness from said decedent to defendants.

"Except the sum of $2695.92, repaid to plaintiff decedent by defendants, as aforesaid, he never received anything from defendants on account of such transactions, and none of the stock purchased by defendants on his order was ever actually delivered to him, except on January 3, 1876. Five shares of Pennsylvania Railroad Company stock were transferred to J. A. Landis, and cost of same charged to plaintiff decedent; but all other stocks were retained by defendants as security for the purchase-money paid therefor, and all of the said stocks were sold by the order of said decedent during, on, or before August, 1876

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"The decedent was a clerk at a salary of five hundred dollars a year, and had no estate or property, except that, at the commencement of his operations with defendants, he left, as collateral security for his transactions. 40 shares of the Philadelphia & Erie R. R., standing in his name, of the value of $759.37, and fourteen (14) shares of the capital stock of the Philadelphia & Reading R. R. Co., standing in his name, of the value of $785.75. Said stock was sold by defendants, and the proceeds lost in the aforesaid transactions, and at the time this suit was brought the decedent had no means out of which he could pay to defendants the money which they had paid him from time to time, nor did he acquire any means until the day of his death.

"The 20 shares of Keystone Bank that plaintiff decedent left as collateral was in his own name. The 100 shares Oil Creek Railroad and the 40 shares Northern Saving Fund S. D. & T. Co. were both in the name of P. K. Landis," in trust for whom plaintiff decedent for some time during his transactions with defendants kept his account. Said Landis, however, for the purposes of this case, disclaimed all knowledge of or interest in said transactions.

On August 4, 1876, plaintiff decedent made a settlement with defendants, and acknowledged himself to be indebted to them in the sum of $655.29.

"If the Court be of the opinion that, on the above facts, their judgment should be for the plaintiff, then judgment is to be entered for plaintiff for $5229.04, and interest from August 1, 1876, but on the delivery to said plaintiff of 20 shares Keystone National Bank (formerly Keystone Bank) together with all dividends that have or may have been declared on the same between May 14, 1875, and the time when said stock shall be returned, the said judgment is to be reduced to $4329.04, with interest from above date; but if not, then judgment to be entered for the defendants, the costs to follow the judgment, and either party reserving the right to sue out a writ of error thereon."

The Court entered judgment for the plaintiff on the case stated for $900, with interest from August, 1876, with the right on the part of the defendants to pay it by the delivery of 20 shares of the stock of the Keystone National Bank, together with any dividends that might have been received therefrom between May 14, 1875, and the time of delivery. (See report, in the Court below, and opinion by MITCHELL, J., Anwalter, Administrator, *v.* De Haven, 7 WEEKLY NOTES, 311.)

Plaintiff took this writ, assigning for error the judgment entered on the case stated.

Rudolph M. Shick and *Benjamin Harris Brewster*, for plaintiff in error.

The defendants were, as regards the cash and securities deposited with them, in no sense plaintiff's agents to contract for him with others unknown to him. As far as concerned said deposits for margins the contract was solely one between plaintiff and defendants as principals. They were not to do anything with the property so pledged, but were merely to hold it and reimburse themselves if loss occurred to *them* in filling plaintiff's orders.

If application had been made to a Court to order collaterals so deposited to be sold, they would have refused the order, because the pledgor was a minor, and would have held it a case of executory liability on his part which the Court would not enforce against him.

Smith *v.* Eisenlord, 2 Phila. 353.
Edwards on Bailments (2d ed.), 189.

The defendants therefore had no power, by appropriating or selling the collaterals for margins, to make the contract anything but executory as against the minor.

Vent *v.* Osgood, 19 Pick. 572.

Even if the contract be held to be executed, the minor may nevertheless elect to avoid the contract and recover his property. In this case the minor received nothing from defendants, and has therefore nothing to tender back to them, and the great weight of authority is to the effect that even where a minor has received something valuable in consequence of an executed contract, he may elect to disaffirm the contract and recover back his property without tendering that which has been received by him.

Shaw *v.* Boyd, 5 S. & R. 309.
Stoolfoos *v.* Jenkins, 12 S. & R. 399.
Corpe *v.* Overton, 10 Bing. 252.
Price *v.* Furman, 27 Vt. 268.
Ewell's L. C. Infancy, 126.
1 American L. C. 320.
Urban *v.* Grimes, 2 Grant Cas. 96.
Williams *et al. v.* Baker, 21 Smith, 476.
Lenhart *v.* Ream, 24 Smith, 59.
Schrader *v.* Decker, 9 Barr, 14.
Abell *v.* Warren, 4 Vt. 149.
Gibson *v.* Soper, 6 Gray, 279.
Chandler *v.* Simmons, 97 Mass. 508.
Walsh *v.* Young, 110 Mass. 396.
Carpenter *v.* Carpenter, 45 Ind. 142.
Mustard *v.* Wohlford's Heirs, 15 Gratt. 329.

We submit that it is eminently proper, in view of the fact that such transactions are opposed to public policy and simply a form of gambling, for the Court to declare that this contract is absolutely void, and so entitle the minor unquestionably to recover back the full amount deposited by him as security for margins.

Tucker *v.* Moreland, 10 Peters, 59.
Penrose *v.* Curren, 3 Rawle, 354.

Samuel Dickson, for defendants in error.

In transactions such as the case stated describes the course of business is for brokers like defendants, in pursuance of their customers'

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orders, to enter into contracts for the purchase or sale of stock in their own names, though for undiscovered principals. They become, therefore, according to general law and the rules of the Board of Brokers, personally liable to the parties with whom they contract. It is to guard them against losses which they may thus suffer in entering into such contracts in behalf of their customers, that they require a margin to be placed in their hands by him as collateral security. But when losses do occur, as they have here, the brokers with whom such collateral is deposited do not retain it themselves, but pay it over to the other principal or his broker to make good the contract of sale or purchase. The defendants have paid over all plaintiff's deposits of collateral in this way. They were merely his agents to pay over differences to those with whom he was really contracting. They are stakeholders who have paid the wager over before notice. The plaintiff, therefore, cannot recover.

Even if the minor plaintiff had brought his action against the right parties, he could not have recovered, because the contract was executed.

Ex parte Taylor, 8 De G. M. & G. 258.
2 Kent's Comm. p. *240.
Reeves on Domestic Relations, p. 244.
1 Parsons on Contracts, pp. *320, *322.
Bartholomew *v.* Fennemore, 17 Barb. 428.
Gray *v.* Lessington, 2 Bosworth, 257.
Strain *v.* Wright, 7 Geo. 568.
Lock *v.* Smith, 41 N. H. 346.
Bailey *v.* Barnberger, 13 D. Monroe, 113.
Cummings *v.* Powell, 8 Texas, 80.
Smith *v.* Evans, 5 Humphrey, 70.
Weed *v.* Beebe, 21 Vt. 498.
Williams *v.* Norris, 2 Littell, 157.
Hill *v.* Anderson, 5 Sm. & M. 216.
Edgerton *v.* Wolf, 6 Gray, 453.

February 28, 1881. THE COURT. When, under the case stated, the Court below assumed the defendants must be regarded as the agents of Ruchizky in the buying and selling of stocks, in other words, as the mere hand or medium through which he acted in transactions with other parties, it committed an error. An assumption of this kind is in the very face of the statement before us; the parties were dealing, not in stocks, but margins, and Ruchizky knew no principals but De Haven & Townsend. It was with them and no one else he was dealing, and with them alone he had to account. If any shares were bought, they were bought without the remotest intention of passing them to Ruchizky. The idleness of a supposition such as this, is made manifest by the fact that the pretended stock purchases amounted to the sum of $472,419.55, on an advancement of $7024.96; nor could the credit of the decedent in this transaction have amounted to anything; for to start with, he was an infant, and therefore had no credit which could be made available in the money market; then again he was but a clerk on a salary of five hundred dollars a year, and had no property of any kind, except that which, in the shape of money or stocks, went into the coffers of the defendants. But the case stated itself settles this matter, for by it we are informed that the several advancements made by the decedent were to be "held and used by the defendants as collateral security to them, against loss by or on account of purchases or sales made by them for him."

It is therefore certain that the money paid by Ruchizky was not merely passed by them, for him, to some third party with whom he was dealing, but was retained by them from first to last; first as collateral security, and last as margins, percentage, shaves, etc., which fell to them. Admittedly, then, this was a gambling contract, and, as has been ruled over and over again, twice so late as 8 Norris, in the cases of Fareira *v.* Gabell and North *v.* Phillips, transactions in stocks by way of margins, settlement of differences, and payment of the gain and loss, without the intention to deliver the stocks, are mere wagers, and cannot and will not be sustained. Now, if the parties had been *sui juris*, the contract having been fully executed, we would not interfere to help either party. But such is not the case; for, as we have said, Ruchizky was a minor, and hence was entitled to legal protection and guardianship. It is said they knew not that he was a minor; but what does that matter? He was, nevertheless, an infant, and their want of knowledge did not make him *sui juris*. Moreover, they did not know, because they did not choose to inquire. They were getting his money, and like all other persons engaged in unlawful callings, they cared not whether that money came from man, woman, or child; whether their victim was young or old, sane or insane. The defendants have endeavored to interpose for their protection the doctrine that where an infant has executed a contract, and has enjoyed the benefit of it, and afterwards on coming of age seeks to avoid it, he must first restore the consideration which he received; that he cannot have the benefit of the one side without restoring the equivalent on the other. This rule may, and certainly does, apply in certain cases, but, as a general rule, it is unsound. Its application was refused in Shaw *v.* Boyd (5 S. & R. 309), and, as was said by Mr. Justice BAILIES, in Abell *v.* Warren (4 Vermont, 149): "If this be true, then the privilege of infants is not worth possessing." But all this is foreign to the case in hand, for we have here a contract condemned by public policy—a contract that is not merely

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voidable but void *ab initio*. It follows that nothing can be imposed upon the infant as a condition of rescission; that is a result produced by legal policy, and nothing remains but to restore to the infant that which was unlawfully taken from him.

But more than this. Ruchizky got nothing from the defendants, either in the way of stocks or money; hence there was nothing to be restored; to him it was all loss and no gain; the defendants retained both stocks and money. It is therefore idle to talk about the refunding either by Ruchizky or his estate of that which he never had. His money was paid, not for any species of property, but for a mere chance in the stock lottery. We repeat, therefore, there is nothing to be returned to the defendants; they lost nothing in this transaction, and hence can the more easily return to the plaintiff's estate that which belongs to it.

The judgment is now reversed, and it is ordered that judgment be entered for the plaintiff in the sum of $5229.04, with interest from August 1, 1876, but on return forthwith, as provided in the case stated, to the plaintiff of twenty shares of the Keystone National Bank, said judgment shall be reduced to the sum of $4329.04, with interest as aforesaid, and costs of suit.

Opinion by GORDON, J.

Samuel Dickson, for defendants in error, subsequently filed a petition for a re-argument, on the following grounds:—

It is manifest from the language used by the learned Justice who delivered the opinion of the Court, that he failed to correctly understand the facts of the case, and the judgment of the Court is founded on supposed facts which never in truth existed.

It was a fact found by the case stated that the defendants were the agents of Ruchizky in the buying and selling of stocks, and that they "acted as his brokers." A broker is, as defined by Worcester, "one who transacts business or makes bargains for another," and by Story on Agency, s. 28, as follows: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade . . . for a compensation." The case stated further agreed that the purchases or sales were "made by them (defendants) for him (plaintiff)," and that the stock was "purchased by defendants on his (plaintiff's) order." Therefore when the learned Judge asserts that Ruchizky "knew no principals but De Haven & Townsend," he makes a statement which was not correct in point of actual truth, which was never asserted on the part of the plaintiff, nor conceded by the defendants, and which was in direct contradiction of the case stated.

The learned Judge is also mistaken in asserting that "if any shares were bought it was without the remotest intention of passing them to Ruchizky." No warrant is contained in the case stated for this allegation. The shares mentioned in the accounts were bought and sold on Ruchizky's account, and though it may be possible that he did not intend to take up and pay for the stocks so bought, this would not make the contract void where the defendants had bought and were ready to redeliver, and, as it is not agreed to as a fact that these dealings were gambling contracts, the Court has no power or right to infer that they were so.

Thayer *v.* Society of United Brethren, 8 Harris, 60.
Pitts., Ft. W., & C. R. R. *v.* Evans, 3 Smith, 250.
Loew *v.* Stocker, 11 Smith, 347.
Winchester *v.* Bennett, 4 Smith, 510.
Wilde *v.* Trainor, 9 Smith, 439.
Ferguson *v.* Wright, 11 Smith, 258.
P. & R. R. R. Co. *v.* Waterman, 4 Smith, 337.
Berks Co. *v.* Pile, 6 Harris, 493.
Diehl *v.* Ihrie, 3 Whart. 143.

A jury alone is competent to decide whether a stock transaction clothed in the form of a sale is really a gambling contract or not.

Kirkpatrick *v.* Bonsall, 22 Smith, 155.
Grizewood *v.* Blane, 11 C. B. 526.
Lewis on Law of Stocks, etc. 103, 104.

March 14, 1881. THE COURT. Motion for reargument refused.

PER CURIAM.

[See next case.]

Jan. '81, 108. Feb. 24, 1881.

Dickson's Executor v. Thomas.

Contract—Illegal consideration—Stock gambling—Broker—Stock exchange.

A. directed B., a stock broker, to sell "short" for him five hundred shares of stock, it being understood between them that there was to be no actual delivery of the stock by either of them to the other, but that A. was to protect B. from loss if the market value of the stock advanced, and was to receive the difference from B. if it declined. There was no agreement between them that B. should not make actual delivery of the stock he was directed to sell. The price of the stock rose. B. borrowed from a fellow broker the five hundred shares and delivered them to the buyer, and subsequently, the price still rising, purchased five hundred shares by defendant's order with which to make good his loan. The deliveries were all made through the clearing house, no actual certificates ever being in B.'s hands, but B. settling the differences appearing on the clearing house sheets. In an action by B. against A. to recover the amount expended for A.'s use in these transactions:

Held, That the evidence disclosed the fact that the contract was a mere gambling contract between the plaintiff and defendant, and that the former was not therefore entitled to recover.

Error to the Common Pleas No. 4, of Philadelphia County.

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Assumpsit, by John J. Thomas against John B. Dickson, to recover $3176.54 with interest, being the amount lost by plaintiff on defendant's account in an alleged transaction in stocks made by defendant's order. Defendant having died after suit was brought, his executor was substituted, it being agreed beforehand, in view of defendant's approaching death, that plaintiff should be permitted to testify at the trial, and that defendant's deposition should be read.

At the trial before BRIGGS, J., plaintiff testified, that in 1874 he was a stock broker, that on June 17 of that year, he received at the Philadelphia Club—a social club—a verbal order from defendant to sell short for his account five hundred shares of Pennsylvania Railroad stock. That he accordingly, on June 18th, sold 400 shares at $48⅞ and 100 shares at $49, seller's option, 15 days, and delivered the stock at the end of the fifteen days; that inasmuch as the market value of the stock had advanced in the mean time, he borrowed the stock with which to make good his delivery; that, contrary to his expectations, the market value continued to advance from that time until the 6th of November, when, by defendant's order, he purchased five hundred shares at $52⅝, in order to return the loan and close the transaction. That in addition to the difference between the market value in June and November, he was compelled to pay the sum of $1250, being the amount of a dividend which had been declared during the interval. That in point of fact no certificates of stock ever passed through his hands in this transaction, nor did he pay or receive the full sums due and payable on the purchase and sale, all this being done through the agency of the clearing house, plaintiff only settling for the differences which appeared against him on his clearing house sheet. Plaintiff further testified that at the time defendant directed him to sell the stock, it was understood between them that there was to be no delivery of the stock by plaintiff to defendant, nor by defendant to plaintiff, but that defendant was to protect plaintiff from loss if the stock advanced in value, and was to receive the difference in final settlement if it declined; but that there was no agreement between them that there should be no delivery of the stock to third persons. Plaintiff then offered in evidence a book of purchase and sale, such as is in use among brokers, containing a record of the sale of June 18, and proved the sale by his clerk, in whose handwriting this particular transaction was recorded.

The deposition of defendant's decedent was then read, wherein he denied having ever authorized plaintiff to buy or sell any stock on his account.

Defendant asked the Court to charge:—

1. The evidence of plaintiff, showing as it does, that he acted as agent for defendant in the transaction sued on, and that the understanding between them was that there was to be no delivery of the stock sold, but merely a settlement of differences, there can be no recovery in this suit.

2. Under the evidence the verdict must be for defendant.

These points were refused. The Court instructed the jury that if they believed the deposition of defendant, they should find for the defendant, but if not, then he instructed them, *inter alia*, as follows:—

"If the clearing house settlement was ratified by plaintiff by practical performance in accordance with the rules and regulations established by the clearing house of which he was a member, then the delivery is just as effectual as though the stock had been delivered in bulk, or the certificates had been received and then handed over. . . . Therefore, if you find in this case that this sale was made in good faith, and the delivery made by plaintiff in accordance with clearing house regulations, you may assume that the deliveries were according to law. . . . A sale of stock on time, made in good faith, with intent to deliver it, whether the seller has the stock in his possession or not, is a legal sale. . . . Therefore, if you find that Mr. Dickson authorized Mr. Thomas to sell this stock for his account, seller's option fifteen, without informing him that it was to be settled for in differences, and without informing him that it was merely a matter of gambling speculation, the plaintiff may recover. If, however, he communicated to him at the time, or it was known to him at the time, and if the evidence satisfies you that Mr. Thomas knew it was a stock gambling operation, that no stock was to be delivered to him, but the whole transaction, at the end of the time, or whenever it was closed, was to be settled in differences, it not being indicated at the time that any stock was to be delivered by him, or any stock was to be delivered by the broker who made this short sale, then it is what the law stamps as a gambling transaction, and the defendant would be entitled to your verdict. This is the law of the case. There was a distinction supposed by my brother, Judge THAYER, the President of this Court, that where the party was simply the agent or broker, and even if he knew that the transaction was one of a gambling character or nature, yet, if he advanced the money for the principal, he might, notwithstanding, recover. That was his view at the time, and I am not sure that after all it will not be declared to be the law, for the case that went to the Supreme Court was very obscure.

It was the thought of the profession up to that time, and it is still the law of England, from

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which we draw the present law that is administered in this country. I say, at the time this case was tried before, the learned President of this Court was under the impression that there might be a recovery, if Mr. Thomas was acting in the capacity of agent and advanced his money for the account of the principal. I refer to this, because the learned counsel have repeated it in your presence. . . . And while the motion for a new trial was still pending, the Supreme Court passed upon a case of similar nature and made this decision. And, gentlemen, we are always bound to take the decisions of the Supreme Court. I take its decision personally and judicially, and swallow it without a grimace or question. I do not pretend to say that that tribunal is wrong, as some Judges seem to think. I believe they are not wrong, and I have no fault to find with them. There must be a point where all contentions and controversies shall be settled and determined, for public peace and policy demand it, and that is the place for such determination. However, I take their decisions whether right or wrong, although the presumption is they are right; and in this case to which I have referred, and which they decided while a motion for a new trial was pending in this particular issue, they laid down this doctrine, that where perhaps one man loans money to another to go into a gambling operation, if he hands the money over to the receiver or operator, and does nothing more, he may recover the money back, because he is not an agent in the transaction; but where the man becomes an active party in executing the illegal transaction, as, for instance, if he advances the money, and plays with it for the account of the lender, and loses it, then he becomes so identified and mixed up with the transaction that he cannot then call upon the party to pay, because he executes the gambling contract. Now the analogies between that aspect of that case and this are, that Mr. Thomas must have known this was a gambling venture because, first, he not only lost his money, but second, he was the very party to carry into effect this transaction, and he himself was the very party who executed it.

Therefore, according to this very decision of the Supreme Court, you must, if you believe this is a gambling transaction, find a verdict for the defendant, because Mr. Thomas is directly within its range and principle and decision, because he was the man that absolutely executed the alleged gambling transaction or contract or venture. . . . "

Verdict for plaintiff for the full amount claimed, and judgment thereon.

Defendant took this writ, assigning for error, *inter alia*, the action of the Court in declining to affirm defendant's points, and in charging the jury as above quoted.

Benjamin Harris Brewster, for plaintiff in error.

If it was the understanding between plaintiff and defendant that there was to be no actual transaction in real stock, but the undertaking was to be carried on by the settlement of differences, there can be no recovery.

Brua's Appeal, 5 Sm. 294.
Smith *v.* Bouvier, 20 Sm. 325.
Fareira *v.* Gabell, 8 Norris, 89.
Sawyer *v.* Taggart, 14 W. P. D. Bush, 727.

John O. Bowman (with whom was *Thomas J. Diehl*), for defendant in error.

A sale short is not necessarily a wager.

Maxton *v.* Gheen, 25 Sm. 168.

It cannot be said that because the brokers pass the sales through the clearing house for convenience sake, the commodities so dealt with have never been delivered.

Whether the transactions were *bona fide*, or were merely in a form to cover gambling transactions, is for the jury.

Wynkoop *v.* Seal, 14 Sm. 360.
Smith *v.* Bouvier, 20 Sm. 325.

The jury found them in this case to have been *bona fide* sales and purchases of stock, and the verdict should therefore not be disturbed.

March 7, 1881. THE COURT. An inspection of the evidence of the plaintiff will, of itself, reveal the fact that there was a mistrial of this case in the Court below.

Thomas swears that he sold for Dickson five hundred shares of Pennsylvania Railroad stock, short, fifteen days, buyer's option. This means, of course, that Dickson had no such stock, and so Thomas further on explains, by saying that at the time he professed to sell this stock, he had no such stock in his hands to sell. Nevertheless, he says, when he sold these five hundred shares, he delivered them. This anomalous kind of testimony he explains by saying that this delivery was made on the clearing house sheet, which means a mere settlement of differences. It appears also, from this same testimony, that, in order properly to keep up appearances, when the time came for delivery, he had to borrow five hundred shares of stock from somebody whose name does not appear, and of these there was no actual delivery, but, as the witness says, it came through the clearing house sheet. All this means, in common parlance, that Thomas sold for Dickson five hundred shares of stock, which Dickson at that time neither had nor intended to have, and that under the pretence of meeting this contract when it fell due, Thomas pretended to borrow five hundred shares, which were not delivered to him; that this altogether fictitious transaction was accomplished through the agency of the clearing house, and was one in which no other parties were known but

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Thomas and Dickson, who were to account to each other for differences only.

In order to show that in this we are not mistaken, and that the confirmation may proceed from the plaintiff's own mouth, we subjoin the following evidence, to wit:—

"Q. Did not you upon a former trial in this case say, and have you not said it twice, we only pay the difference or receive the difference, we do not actually deliver the stock? Ans. That is for our clearing house certificate balances we only pay the difference or receive the difference. If we have something coming on one side that is going out on the other, of course we merely pay the difference.

"Q. Did you act as a broker for Mr. Dickson in that sense? Ans. Did I act as broker? Yes, sir.

"Q. When you and the defendant, Mr. Dickson, had this understanding as you have explained it, was it not understood by you and the defendant that there would be no actual delivery of the stock by you to him or by him to you, but that he was to receive the difference from you in case the price of stock went down, or was to pay the difference to you in case the price went up? Ans. Yes, sir.

"Q. That is, if there were any loss he was to pay? Ans. Yes, sir.

"Q. And if there was any profit you were to hand it over to him? Ans. Yes, sir."

Again, further on.

"Q. Have not you testified that at the time Mr. Dickson directed you to sell this stock, that it was understood between you and him that there was to be no actual delivery of the stock by you to him, or by him to you, but that he was to protect you from loss if the stock went up, and that he was to receive the difference from you in final settlement, if the stock went down; did you not say that? Ans. That certainly was the understanding."

Confessedly, then, this was a dealing in differences or margins, a wagering contract, and therefore utterly void. There was here no question as to a *bona fide* time contract, upon which the jury was called to pass, neither does it involve, as the Court below erroneously imagined, the question of agency, for there were but two parties who were mutually engaged in stock jobbing, and who were to settle with each other and not with some third party.

Moreover, we are somewhat surprised that the learned Judge who tried this case, should have regarded the recent decisions of this Court upon this subject as not only novel but doubtful.

We can assure him that they are obnoxious to neither of these charges. As early as Pritchet *v.* The Insurance Co. of North America (3 Yeates, 458), it was ruled, that whilst the British Statute of 19 Geo. 3 c. 37, did not bind us, *proprio vigore*, yet that the system of national policy which aimed at the suppression of wagering policies, had even at that period been adopted by our Courts, and in Edgell *v.* McLaughlin (6 Wharton, 176), it was said by Mr. Justice SERGEANT, that it was fortunate for Pennsylvania, that there was in its highest tribunals no decision favorable to the recovery of a wager, and that the only decision then existing upon the subject was expressly in point to the contrary.

Between this case and that of Brua's Appeal (5 P. F. S. 299), we have very many decisions condemnatory of wagering contracts in the way of betting on horse races, elections, etc. Brua's Appeal is in point, however, upon the very matter in controversy. It was there held that a contract to purchase shares of stock, without the intention to deliver or receive them, was a gaming contract. Mr. Justice THOMPSON, who delivered the opinion in that case, made use of the following language: "It is said the form in which this contract appears enters largely into the business of stock brokerage. This is a mistake, the *bona fide* purchase of stocks no doubt can be conducted in a legitimate way, and is so generally, without trenching in the least on the gambler's province. If this be impossible, however, the fewer licenses that are issued for such a business the better. Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it may be called."

Then we have Smith *v.* Bouvier (20 P. F. Smith, 325), in which Brua's Appeal is approved, and the distinction noted between *bona fide* time contracts and those of a purely wagering character. Next in order comes Fareira *v.* Gabell (8 Norris, 89), in which we have a per curiam opinion adopting the very clear and satisfactory opinion of Judge HARE of the Court below, and approving Smith *v.* Bouvier and Brua's Appeal. Then comes North *v.* Phillips (8 Norris, 250), Gheen, Morgan, & Co. *v.* Johnson (9 Norris, 38), and last of all Ruchizky *v.* De Haven but recently delivered. [*Ante*, p. 109.]

It is thus manifest, that contrary to what the learned Judge supposed, this doctrine is neither doubtful nor new; on the other hand, it is both old and well established.

Furthermore, he is entirely mistaken in his supposition that on this subject, there is a want of harmony between our Courts and those of Great Britain. This very same doctrine was held in Grizewood *v.* Blane (2 J. Scott, 11 Com. B. 526), a case which exhibits the ready disposition of the British Courts to follow the leadings of their own statute, 8 & 9 Vict. c. 109.

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Upon this subject, JARVIS, C. J., left the question to the jury to say, "whether either party meant to purchase or sell the shares in question," telling them that if they did not, the contract was in his opinion a gambling transaction and void. On a motion afterwards for a new trial, the opinion of the Chief Justice was sustained. Justice CRESSWELL, among other of the Judges, saying: "As to the evidence, I think it abundantly warranted the jury in coming to the conclusion that there was no real contract of sale, but that the whole thing was to be settled by the payment of differences; it clearly was a gambling transaction within the meaning of the statute."

Now the only real difference between this case and the one in hand is this, that in the case cited there was something to submit to a jury, whilst in the one now under consideration, there was nothing so to submit; the plaintiff himself by his own testimony having stamped the transaction with the brand of illegality.

Of the remaining exceptions it is unnecessary for us to speak, since what has already been said effectually disposes of this case.

The judgment is reversed.

Opinion by GORDON, J.

A motion for a reargument was subsequently made in this case.

April 1, 1881. THE COURT. Motion for reargument refused.

PER CURIAM.

[See preceding case.]

Jan. '80. March 14, 1881.

Merkel and Smith's Appeal.

Mortgage—Deed with parol defeasance, when a mortgage—Purchase-money mortgage—Lien of judgment against mortgagor in a mortgage by deed absolute with parol defeasance, as against mortgages, made by former mortgagor after acquiring legal title.

F., being the owner of a tract of land, made a contract with M. for the erection of a house upon a portion thereof, in consideration for which he agreed to convey to M. one-half the tract. After the house was completed, F. declined to convey the land on the ground that the work and materials were not paid for; M., thereupon, procured one D. to indorse notes for him to pay these debts, and to secure D. he procured on Jan. 11, 1872, a conveyance of his half of the land to him. There was no testimony to show that this conveyance was ever regarded by the parties other than as security for the notes. On April 28, 1876, S. recovered judgment against M. On May 12, 1876, D. (having previously conveyed several portions of the land according to M.'s direction) conveyed the balance of the land to M., who immediately executed two mortgages, one to D. and the other to L., the holder of one of the notes. In a proceeding to distribute the fund arising from a sheriff's sale of the land under L.'s mortgage:

Held (reversing the Court below), that M. had an equitable title under the agreement of F. to convey to him, that the deed from F. to D. as security for the notes constituted a mortgage, and that consequently the judgment of L. was a lien upon the equitable interest of M. from the date of its entry, and bound the legal title the instant it was conveyed to him in priority to the mortgages executed on that day.

Appeal of D. Merkel and Joshua Smith from a decree of the Common Pleas of Berks County, distributing the proceeds of a sheriff's sale of the real estate of Michael H. Miller.

From the depositions taken in the cause the following facts appeared: Henry Fritch, being the owner of a certain lot of ground in Topton, Berks Co., agreed with Michael H. Miller that in consideration of the erection of a certain house on a part of said lot, he would convey one-half said lot to Miller. The house was erected, but Miller being unable to discharge all the claims for work and materials, Fritch refused to convey one-half the lot to Miller, in accordance with the terms of the contract. In order to raise the money to pay these claims, Miller induced one Peter S. Diener to become indorser on one of his (Miller's) notes, and to become surety on another, and to secure Diener, Miller procured a deed to be made by Fritch to Diener for his (Miller's) share of the land. This deed was executed and delivered on Jan. 11, 1872, and was duly recorded.

As to this transaction Diener testified: "The deed was made to me instead of to him (Miller) as collateral security. I got the deed from Fritch and had it recorded. I had no interest in the property except as collateral security. . . . I kept the property to hold it as my own until the notes were paid."

While the title was thus in Diener, Miller sold some of the land in lots to various purchasers; and Diener after each sale made a deed to Miller, and Miller made a deed to the purchaser. On April 28, 1876, Merkel and Smith recovered judgment against Miller for $450.

On May 12, 1876, Diener conveyed the remainder of the lot to Miller, and the deed was duly recorded. On the same day Miller executed two mortgages, one to Dr. Long, the holder of the note upon which Diener was surety, for the amount of that note, viz., $500, and one to Diener for the amount of the note upon which he was indorser, viz., $400. These mortgages were recorded, the first May 12, 1876, the latter May 13, 1876.

Default being afterwards made in the payment of interest on Long's mortgage, he instituted suit thereon, and exposed the premises at sheriff's sale. The purchase-money thereof, viz., $539.25, was paid into Court and constituted the fund in

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litigation. Long claimed the whole amount on the ground that his mortgage was a first lien upon the premises, and distribution was accordingly so decreed by the Court.

Afterwards, on application of Merkel and Smith, a rule was granted to show cause why the decree should not be stricken off, and the amount of Merkel and Smith's judgment first awarded to them out of the fund. This rule was, after argument, discharged by the Court, in an opinion by SASSAMAN, J. Merkel and Smith thereupon took this appeal, assigning for error the action of the Court in discharging the above rule.

A. G. Green (*Wanner* with him), for appellants.

Miller had an equitable title under the agreement of Fritch to convey. The deed to Diener was nothing more than a mortgage.

Friedley *v.* Hamilton, 17 S. & R. 70.
Manuf. Bank *v.* Bank of Penna., 7 W. & S. 335.
Kerr *v.* Gilmore, 6 W. 405.
Kelly *v.* Thompson, 7 Id. 401.
Corpman *v.* Baccastow, 3 N. 363.

Now, while of course Diener held his mortgage as the first lien, yet it needs no argument to show that the instant he satisfied it by conveying the land to Miller, whatever subsisting liens there were, were instantly let in, in the order of their priority.

J. H. Jacobs, for appellee.

Conceding that the deed from Fritch to Diener constituted a mortgage of Miller's equitable interest, it was a mortgage to secure the consideration of the conveyance between Fritch and Miller, viz., the cost of the construction of the house. On May 12, 1876, Long was not paid the amount of this purchase-money, and, inasmuch as the deed to Miller and the mortgage to Long were executed and recorded the same day, the proceedings constituted a single transaction, and preserved to Long the priority of his lien for purchase-money. It mattered not that the vendor had been paid and that Long was a stranger to the transaction.

Fessler's Appeal, 25 Smith, 483.
Harper's Appeal, 14 Smith, 318.
Cake's Appeal, 11 H. 186.
Weldon *v.* Gibbon, 2 Phila. 176.
Deitzler *v.* Mishler, 1 Wright, 82.

March 14, 1881. THE COURT. It cannot be doubted that, under the contract between Fritch and Miller, the latter acquired an equitable title to the land, which was to be conveyed to him in consideration of building the house. Subsequently a portion of the land was sold by the sheriff as Miller's property, and thus the fund in Court was realized. When the building was completed, bills for which the holders thereof were entitled to file liens, were outstanding against the contractor, Miller; and for the purpose of raising money to pay these, Diener lent his name as indorser and surety on Miller's notes, with the understanding that he should be protected by a conveyance of the land. Accordingly, in January, 1872, Fritch, by direction of Miller, conveyed the land in fee to Diener; but while the deed to Diener was absolute on its face, it was distinctly understood between him and Miller that it was to be held only as security for his contingent liability on the notes by which Miller raised the money to pay the building debts. The testimony on this subject is clear and explicit. Diener says, the deed was to be made "to me, instead of to himself, as collateral security. I got the deed from Fritch and had it recorded. I had no interest in that property except as collateral security." It was further shown that a few years afterwards, Miller contracted to sell a portion of the land in lots; and for the purpose of enabling him to make deeds to the purchasers, Diener conveyed the lots to him. Afterwards on May 12, 1876, he conveyed the residue of the land in fee to Miller, who on that day executed two mortgages thereof, one to Dr. Long for $500, and the other to Diener for $400, to secure notes on which Diener was indorser and surety. Dr. Long's mortgage was recorded the same day, and Diener's on the day following. It is not pretended that these mortgages were for purchase-money; but inasmuch as they are the first liens in order after the conveyance of the legal title to Miller, the contention is, that they are entitled to the proceeds of the sheriff's sale, in preference to the judgment of appellants, entered against Miller on April 28, 1876, two weeks before the legal title was conveyed and the mortgages executed. This would undoubtedly be so, if at the date of the judgment Miller had no equitable title on which it could become a lien; but, unfortunately for the mortgagees, Miller had such title, and the judgment became and continued to be the first lien, not only in consequence of the character of the security which Diener held, but also because he surrendered that, and took new security after the judgment was entered. It is perfectly clear from the undisputed testimony in the case, that the legal relation between Miller and Diener, growing out of the conveyance in January, 1872, in connection with their contemporaneous understanding or agreement, as to the purpose for which the deed was made, was that of mortgagor and mortgagee. The deed in Diener's hands, coupled with the parol defeasance, was in legal contemplation nothing more than an unrecorded mortgage. The equity of redemption was in Miller, and upon payment of the notes on which Diener was indorser and surety, he had a right at any time to demand a conveyance of the land.

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The legal principles applicable to such a state of facts as the undisputed testimony in this case clearly establishes, have been too often recognized and enforced to be now questioned. In their various phases, they may be found in the following cases: Kellum *et al. v.* Smith (9 Casey, 158); Friedley *v.* Hamilton (17 S. & R. 70); Jacques *v.* Weeks (7 Watts, 261); The M. & M. Bank *v.* Bank of Penna. (7 W. & S. 335); Kerr *v.* Gilmore (6 Watts, 405); Kelly *v.* Thompson (7 Watts, 401); Wilson *v.* Shoenberger (7 Casey, 295); Corpman *v.* Baccastow (3 Norris, 363); McClintock *v.* McClintock (3 Brewst. 76).

While Miller thus occupied the position of mortgagor and owner of the equity of redemption and Diener that of mortgagee holding an unrecorded mortgage, appellant on April 28, 1876, obtained judgment against the former, and thus acquired the first lien against his interest in the land.

Subsequently the legal and equitable titles both united in him, but in such way as not to impair their security. They continued to hold the first lien on the land, and were entitled to be first paid out of the fund realized by the sale.

Decree reversed at costs of the appellees, and it is ordered that the record be remitted to the Court of Common Pleas with instructions to distribute the fund in accordance with the foregoing opinion.

Opinion by STERRETT, J.

July, '79, 6. March 18, 1881.

Quigley v. Molineaux.

Landlord and tenant—Ground-rent—Apportionment—Sale of land by sheriff in parts, in action of covenant for ground-rent, does not effect apportionment of rent.

A covenantee in a ground-rent deed brought an action of covenant for arrears of rent, recovered judgment, and in 1861 exposed the premises out of which the rent issued at sheriff's sale, selling them in four different lots. These lots were sold to different purchasers, and the successive owners of the rent continued to receive one-fourth part thereof from the purchasers of one-fourth of the premises, giving receipts "in full" therefor. In an action instituted by the owner of the rent in 1875 to recover all the arrears thereof, wherein the owners of the last-mentioned fourth part of the premises were named as terre-tenants:

Held, that the above evidence was insufficient to establish an apportionment of the rent as against the original covenantee and his assignees.

Error to the Common Pleas No. 3, of Philadelphia County.

Covenant for arrears of ground-rent, by Elias J. Molineaux, assignee of Mary Loxley, against Charles C. Hughes, administrator, etc., defendant, and Patrick Quigley, terre-tenant. Quigley, the defendant, offered to prove that Mary Loxley, the original covenantee of the rent, brought in 1861 an action of covenant for arrears thereof, in which action she recovered judgment, and directed the sheriff to expose the said premises to sale in four several parts; that said premises were accordingly so sold, and that at the sale defendant's grantor became the purchaser of one-fourth part thereof, and further, that during the occupancy of defendant and his said grantor of said one-fourth of the premises, one-fourth of the rent had been duly paid by them, and receipts therefor "in full" given by the respective owners of the rent—this to prove an apportionment of the rent by reason of which defendant claimed to be liable for only one-fourth part thereof.

Objected to. Objection sustained. Exception.

Verdict and judgment for plaintiff. Defendant took this writ, assigning for error, *inter alia*, as follows: "The learned Judge of the Court below erred in overruling plaintiff's general offer in defence at the trial."

John Dolman, for plaintiff in error.

The acts of the parties are competent evidence to show a grant or an apportionment. If continued for twenty-one years they create a grant or apportionment, as the case may be, as matter of law: but whether a continuance of such acts for a less time than twenty-one years are sufficient to raise a presumption of a grant, is a fact for a jury.

McElroy *v.* R. R. Co., 7 Barr, 536.
Newman *v.* Rutter, 8 Watts, 51.

E. C. Quin, for defendant in error, presented no paper-book.

February 28, 1881. THE COURT. The fourth assignment is not *sec. reg.*; but admitting it, we see nothing in the offer of evidence like a legal apportionment of the ground-rent. The mere fact that the covenantee, in selling under the judgment in her action for the arrears, divided the land into four lots and sold it at sheriff's sale, would be neither an apportionment nor evidence of it. The offer was therefore rightly refused. There is nothing in the remaining assignments.

Judgment affirmed.

PER CURIAM.

Jan. '80, 217. Jan. 13, 1881.

Squire's Appeal.

Conversion—Act of Feb. 24, 1834, § 33, relative to distribution of surplus of sheriff's sales of real estate of decedent—Construction of—Descent.

The provisions of the Act of February 24, 1834, § 33 (Purd. Dig. 425, pl. 101), that the surplus proceeds of

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the land of a decedent sold at sheriff's sale shall be paid to his executor or administrator, and by him be distributed as the real estate from which they arise would have been, is simply an application of the general rule in equity with regard to conversion. The operation of this rule is confined to the first transmission, and the money, having once vested in the person entitled, is no longer to be treated as real estate.

Where land descended to a minor from his father was sold by the sheriff under a mortgage created by a former owner, and the surplus proceeds paid to the guardian of the minor, by whom they were held when the minor subsequently died; in the distribution of the minor's estate:

Held, that the mother of the minor was entitled to the whole fund as personalty to the exclusion of the minor's heirs *ex parte paterna*.

Appeal of Henry John Squire from a decree of the Orphans' Court of Philadelphia County, awarding a certain fund of $3500, belonging to the estate of Marselis Squire, a minor, to his mother.

The facts of the case as they appeared before the Auditing Judge on the audit of the account of Robert K. Neff, the minor's guardian, were as follows: William H. Squire, father of Marselis Squire, died in December, 1865, seised of a certain piece of real estate which was subject to a mortgage given by a former owner. By his will Squire devised his property equally to his father and widow. A posthumous child, Marselis, the present decedent, was born June 8, 1866, whereby the will of William H. Squire was revoked *pro tanto*. The maternal grandfather of Marselis in October, 1866, purchased the mortgage upon the land whereof William H. Squire died seised, instituted suit thereon and exposed the premises at sheriff's sale. The sum of $3500, surplus after payment of the mortgage, was paid by the sheriff to Robert K. Neff, guardian of Marselis Squire, as the minor's share in said real estate. Marselis, the minor, died February 20, 1874. This sum of $3500 was claimed by the minor's mother as personalty, and also by Henry John Squire and Charlotte E. Fried, his paternal uncle and aunt, on the ground that the fund was, in contemplation of law, realty, and should pass to them as the minor's heirs *ex parte paterna*.

The Auditing Judge awarded the fund to the minor's mother for life, and after her death directed that it should go to his heirs *ex parte paterna*.

Exceptions were filed on behalf of the mother, which the Court, in an opinion by PENROSE, J., reported in 8 WEEKLY NOTES, 220, sustained and entered a decree awarding the fund in controversy to the minor's mother absolutely. Thereupon Henry John Squire took this appeal, assigning for error the decree of the Court as above.

Rodney, for appellant.

The alleged conversion was effected by a piece of legerdemain on the maternal grandfather's part, clearly contrary to the letter and spirit of the Act of 1833. The Act of February 24, 1834, provides that where real estate of a decedent is sold upon execution and more money is raised than is sufficient to pay off liens of record, the executor or administrator shall distribute such surplus as the real estate of which it is the proceeds would have been. If the heirs *ex parte paterna* had paid off this mortgage no power to convert would have existed.

The mother has no more than a life estate, and the surplus goes to the heirs *ex parte paterna*.

Bloomfield *v.* Budden, 1 Yeates, 189.
Diller *v.* Young, 2 Ib. 261.
Comm. *v.* Rahm, 2 S. & R. 375.

Walter L. C. Biddle and *Charles Hart*, for the appellee.

It is very clear from the authorities that the fund should be deemed realty only for the purposes of the first transmission, and that, having once reached the hands of the minor by his guardian, it is thenceforward to be considered in every respect as personalty.

Dyer *v.* Cornell, 4 Barr, 359.
Pennell's Appeal, 8 Harris, 515.
Spangler's Appeal, 12 Harris, 424.
Hay's Appeal, 2 Sm. 449.
Large's Appeal, 4 Sm. 383.
McCune's Appeal, 15 Sm. 450.
Sayer's Appeal, 29 Sm. 428.

January 24, 1881. THE COURT. This decree is affirmed upon the opinion of the learned Judge of the Court below.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

Common Pleas—Equity.

C. P. No. 4. April 16, 1881.

Fallon v. Remington et al.

Equity—Injunction—Policy of non-interference with co-ordinate tribunals—Powers of courts of equity over person without regard to situs of property in dispute—Injunction against issuing process out of Court of co-ordinate jurisdiction possessing equal equity powers.

Sur motion for special injunction.

Bill in equity between John Fallon, trustee, complainant, and Beekman Remington and Samuel Simes, defendants.

The bill averred that in 1877 the defendant Remington was seised of a certain tract of land

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in Montgomery County, which he held upon certain trusts for the benefit of himself and other parties. That in the spring of that year, disputes having arisen among the parties interested, they had all consented to submit the matters in controversy to the complainant as referee, agreeing that his award should be made a rule of Court, and that, further, all said parties had joined in a conveyance of the real estate in question to the complainant in trust to sell the same discharged of all trusts, and to distribute the proceeds among such parties and in such proportions as in his opinion would best accord with the rights and equities of the several parties respectively.

That in June, 1880, complainant accordingly filed his award in Court of Common Pleas No. 4, of Philadelphia County, to which no exceptions were filed, and upon which accordingly judgment was entered by the Court.

That on February 17, 1881, defendant Remington and defendant Simes agreed that Remington should confess judgment in a large sum to said Simes, which agreement was accordingly carried into effect on the day following, the judgment being entered in Montgome.y County, said Simes having, as was averred, full knowledge of all the facts and circumstances hereinbefore set forth.

That on February 19, 1881, said Simes issued execution upon said judgment and levied upon the property conveyed in trust to complainant, as the property of Remington, and further, that Remington had simultaneously with the issuing of this execution, instituted an action of ejectment against the complainant to recover said premises.

The bill then charged that the confession of judgment, issuing of execution, and action of ejectment were designed and intended by defendants Remington and Simes to obstruct the complainant in the execution of his trust, and to extort money from him, and that the existence of the levy and ejectment constituted a clog on the complainant's title, so as to endanger the value of the real estate, and obstruct him in the execution of his trust relative thereto. The bill therefore prayed that the defendants might be enjoined from proceeding with the levy and ejectment.

Numerous affidavits were read on either side in support and in denial of these allegations.

David W. Sellers, for the complainant.

The award of the referee is a judgment of this Court, and has never been disturbed. It cannot be questioned by one of those interested in it by suit in another county.

James Boyd, for Remington.

The process of another Court cannot be enjoined. We have a right to our action of ejectment.

North Penn Coal Co. *v.* Snowden, 6 Wright, 488.
Tillmes *v.* Marsh, 17 Smith, 507.
Com'th *v.* Naile, 7 Norris, 429.

Henry M. Dechert, with him *Chain & Swartz*, for Simes.

If the trust deed be fraudulent, ejectment is the only way to question it.

Unless the Court be satisfied of the existence of a conspiracy, there can be no injunction.

Schlecht's Appeal, 10 Smith, 172.
Winch's Appeal, 11 Id. 424.
Wiser's Appeal, 9 WEEKLY NOTES, 508.

C. A. V.

April 30, 1881. THE COURT. The objects sought to be accomplished by the plaintiff's bill and by the present motion are, first, to enjoin the defendant Samuel Simes from proceeding with an execution issued by him out of the Court of Common Pleas of Montgomery County, upon a judgment charged to have been fraudulently confessed by the other defendant, Beekman Remington, in favor of said Simes, in pursuance of an alleged conspiracy entered into between them, which judgment was entered up in the Court of Common Pleas of Montgomery County; and secondly, to enjoin the said Beekman Remington from proceeding with an action of ejectment simultaneously commenced by him against the plaintiff in the Court of Common Pleas of Montgomery County, for the purpose of obstructing the plaintiff in the execution of his trust, it being charged that both the execution and the writ of ejectment were fraudulently issued, in pursuance of a common design entered into between the two defendants to harass the plaintiff in the execution of his trust and to extort money from him. Upon the argument of the present motion a number of affidavits were read on either side in support and denial of these allegations. It is not necessary to enter into these, or to say whether the case presented by the plaintiff and the equities arising out of it are sufficiently answered by the affidavits read by the defendants, because we are of the opinion that inasmuch as the process and the suit as to which the defendants are sought to be enjoined were issued out of and are pending in another Court of co-ordinate jurisdiction, having as large equity powers as those which this Court possesses, it would be contrary to public policy and the well settled rule of Courts of Equity under such circumstances to grant the present application. The fact that the property lies in another jurisdiction would of itself be no obstacle to the plaintiff's success here, for the powers of a Court of Equity may always be brought into requisition wherever it can obtain jurisdiction of the defendant's person, whatever may be the *situs* of the property, and whether it be real or personal estate. *Aequitas agit in personam*, and it makes no difference that the subject of the controversy is situated in another county, or even in another State, or another

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country. It is entirely competent for Courts of Equity having jurisdiction of the person of the defendant to make decrees relative to the conveyance or other disposition of real estate which lies beyond the ordinary common law jurisdiction of the Courts. (Munson *v.* Tryon, 6 Phila. R. 395). "It is argued," said Judge STRONG, in that case, "that even if there is jurisdiction over the parties there is none over the cause. I am moved to enjoin against the commission of acts in the nature of waste upon lands outside of this county. But if I have jurisdiction of the persons of the defendants it cannot matter that the lands are located in another county. My order and decree affects the defendants personally. It is only indirectly and through the defendants that it affects the land. It has often been decided that when a Chancellor obtains jurisdiction over a party he may make a decree that affects land even in a foreign country," and the injunction was granted. The principle is too well settled in Courts of Equity to require further argument or authority. A familiar and conspicuous illustration of it is the case of Penn *v.* Lord Baltimore (1 Ves. 444), in which Lord Hardwicke held that the specific performance of a contract respecting the boundaries of Pennsylvania and Maryland entered into by the proprietaries, might be decreed by the Court of Chancery in England.

Neither do we entertain any doubt that where a Court of Equity has jurisdiction of the defendant's person, and has authority to enjoin proceedings at law, the writ of injunction may be used to prevent the commencement of oppressive and unjust litigation before other tribunals. But it is equally well settled that where suits have actually been begun, and are pending before another tribunal having full power to grant equitable relief, there no other Court can properly interfere by injunction with the prosecution of such suits, for to do so would produce endless confusion, disorder, and conflict of authority. Lorenz *v.* Wightman (8 Wright, 27), and Loomis *v.* Loomis (3 Casey, 233), were determined upon this principle. In the former case a bill was filed in the Supreme Court to avoid an assignment where the assignee had filed his account in the Court of Common Pleas of Allegheny County, which account had been referred to an auditor appointed by that Court. The bill was dismissed by the Supreme Court, the Court saying: "The Court of Common Pleas of Allegheny County has the whole matter in hand. The assignee has filed his account in that Court, and the whole fund was there to be marshalled before this bill was filed. That Court has equity powers as large as our own. It can decree the fund to whomsoever it belongs in equity. Whatever rights the complainants have may be asserted there as efficaciously as they can be here. As the jurisdiction of that Court over the property in controversy had attached before the present bill was filed, there is no propriety in our interference." In Loomis *v.* Loomis the Common Pleas of Erie County enjoined a defendant from prosecuting certain proceedings then pending in the Orphans' Court. The Supreme Court reversed the decree, not only upon the ground that the Orphans' Court had exclusive jurisdiction of the proceedings, but upon the further ground that the Orphans' Court being itself a Court of Equity, there was no necessity for the intervention of another Court of Equity. The same rule prevails in New York, and would seem now to be universally recognized. In Grant *v.* Quick (5 Sandford's R. 612), a bill was filed in the Superior Court to enjoin a defendant from proceeding with a suit already commenced in the Common Pleas. Judge DUER, holding that no Court in that State could rightfully enjoin a defendant from proceeding with a suit already commenced in another Court of that State having equal power to grant the relief sought by the complainant, dissolved the injunction, and the reporter adds: "At a joint meeting of the Judges of the Supreme Court, of the Court of Common Pleas, and of the Superior Court, which was held shortly after the above decision, it was communicated by DUER, J., and unanimously approved." To the same effect are Bicknell *v.* Field (8 Paige, 440); Bennett *v.* Leroy (6 Duer, 683); Saxton *v.* Wycoff (6 Paige, 182). In like manner in Mead *v.* Merritt (2 Paige Ch. R. 402) it was determined by the Court of Chancery of the same State that although where a party is within the jurisdiction of the Court, and the Court acquires jurisdiction of his person, it may by injunction compel him to desist from commencing a suit either in that State or in any foreign jurisdiction, it will not by injunction restrain him from prosecuting a suit previously commenced in a Court of a sister State, or in any of the Federal Courts. The same point was ruled in Burgess *v.* Smith (2 Barb. Ch. 276); Williams *v.* Ayrault (31 Barb. 364); Schuyler *v.* Pelissier (3 Edw. Ch. 191); and in Kittredge *v.* Emerson (15 N. Hamp. 227). And this principle has been adopted by the Supreme Court of the U. S. (Diggs *v.* Wolcott, 4 Cranch, 179; McKim *v.* Voorhies, 7 Id. 279; Peck *v.* Jenness, 7 Howard, 512.) See also Bank of Bellows Falls *v.* The R. & B. R. R. (2 Williams, 471); Deaderick *v.* Smith (6 Humphreys, 138); Rickett *v.* Johnson (8 Cal. 34); Anthony *v.* Dunlap (Ib. 26); Uhlfelder *v.* Levy (9 Id. 607); Gorham *v.* Toomey (9 Id. 77). In the very elaborate note to the Earl of Oxford's Case (2 White & Tudor's Lead. Cases in Equity, 1389), the learned American editor, after traversing the whole field

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of authority upon this subject, sums up the whole discussion by saying that the better opinion is that where the Court in which the suit is pending has both legal and equitable jurisdiction, and can exercise the powers of a chancellor on one side and that of a court of common law on the other, the principle of non-interference ought to be maintained, and this opinion is sustained by ample authority.

We are of opinion that we ought to adhere to this principle in the present case and in all similar cases. To refuse to do so would be to put in jeopardy the harmony of our judicial system, and possibly to bring about that most unseemly of all controversies—a conflict between different courts. If the plaintiff had filed his accounts as trustee in this Court, and they were in process of settlement here, and if this Court had thus acquired complete jurisdiction of all matters relating to the execution of the trust, possibly he would then have been entitled to protection against the assertion of claims in other tribunals over matters of which this Court would thus have acquired exclusive jurisdiction, in accordance with the principle asserted in Burke's Estate (1 Parsons, 470), and Weber *v.* Samuel (7 Barr, 500). But we cannot regard the filing of the award made by the trustee under the agreement of June 9th, 1877, as having an equivalent effect, or as giving us exclusive jurisdiction of all matters in controversy between the parties to this suit, particularly as the defendant Simes was not a party to that submission and was not bound by the award.

Motion refused.

Opinion by THAYER, P. J.

Orphans' Court.

March 23, 1881.

Lippincott's Estate.

Widow's claim for alimony out of husband's estate—In order to entitle her to recover alimony it is necessary for her to show that the separation from her husband was not caused by her own fault or misconduct—Evidence—Laches.

Sur exceptions to supplemental report of auditor.

This was a petition by the widow of Wallace Lippincott for an allowance for alimony out of his estate from 1853, when a separation took place, until decedent's death in 1870. This petition was filed in 1878.

The matter was referred to an auditor, who reported in favor of the allowance, and awarded the petitioner $1560. To this finding exceptions were filed. Other facts in the case are set forth in the opinion of the Court.

Joseph J. Broadhurst, for the exceptions.

J. W. Jermon, for the widow.

April 2, 1881. THE COURT. This matter was before us nearly three years ago, and we were then of opinion (Leg. Intell. 1878, p. 374) that, before the claimant could recover, it was necessary to show that the separation from her husband, the decedent, was not caused by her own act or misconduct; and that it was incumbent upon her also to explain why, with a proceeding instituted in the proper Court, and pending for many years during his lifetime, she had failed to establish her right to alimony.

The auditor has appended to his supplemental report a vast mass of testimony, as to which his only finding is, that after "a careful perusal" of it, he "is of opinion that the said claim has been sufficiently proved."

It is to be regretted that he failed to read the terms of our order of re-reference, which was for the purpose of having the facts reported; and that, by reason of his overlooking the distinction between the functions of an auditor and those of a mere examiner, he has cast the burden of performing his duties upon the Court. We have examined the evidence with care, and have found nothing in it from which we could reach the conclusion of the learned auditor.

The separation took place in 1853. In that year a libel for divorce *a mensa et thoro* and for alimony was filed by the claimant, and in the following year, one by decedent for divorce *a vinculo*.

At every stage of the proceedings the claimant was unsuccessful in her efforts to obtain an order for alimony. Her petition for this purpose was referred to an examiner, who, after two years, made his report. That it was not favorable to her may well be inferred, from the fact that no order for an allowance was obtained, and that the Court directed that the parties, both of whom had taken testimony, should pay the costs of the reference equally. And from that date, November 24, 1860, though the decedent's death did not take place until February, 1870, there was no renewal of her application.

It would further appear that the decedent's proceeding for divorce *a vinculo* resulted in a verdict in his favor, but that a new trial was granted in June, 1856. Afterwards, viz., September 17, 1860, a rule was taken to compel him to pay the cost of taking the respondent's depositions.

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This was made absolute October 15, 1860, apparently in the absence of libellant's counsel, for application having been made on the following Saturday for a rescission of the order, it was vacated November 3, 1860.

Having thus signally failed to establish her claim while the person sought to be charged was living and capable of making defence, it would require evidence of the most convincing character to justify its allowance after his death.

There was no such evidence. Two witnesses testified that at a date which was not fixed, but which was at least ten years before the decedent's death, the claimant had been refused admission to his house, and that on one or more occasions water had been thrown upon her from an upper window while she was standing on his doorstep. What the reasons for thus excluding her were, the evidence does not show; but that they were not insufficient, is to be presumed from the fact that during the years which afterwards elapsed before the decedent's death, it was not thought worth while to offer the testimony now produced to the Court in which the proceedings for alimony were then pending; or, if it was so offered, that it was not regarded by that Court as sufficient to establish the claim.

No explanation whatever has been given of the failure to proceed after the action of the Court in November, 1860.

We are compelled to sustain the exceptions to the supplemental report, and to disallow the claim of Mary A. Lippincott, the costs of the re-reference to be paid by her. Let a decree be prepared accordingly.

Opinion by PENROSE, J.

U. S. Circuit Court—Law.

April 20, 1881.

The Farmers' and Mechanics' National Bank of Mercer v. Hoagland.

National banks—Usury—Renewal notes—Set-off—Rev. Stat. U. S., sections 5197 and 5198.

Sur demurrer to plea.

Assumpsit, by the Farmers' and Mechanics' National Bank of Mercer against Seth Hoagland, upon a guaranty indorsed by defendant upon two promissory notes made by the officers of the Mercer County Mutual Fire Insurance Company for said Insurance Company, in favor of plaintiff.

The defence was that the notes were renewals of original notes discounted by the bank at usurious interest and from time to time renewed, part of the time at usurious interest, which interest was sometimes paid and sometimes included in the renewal notes. Defendant claimed a forfeiture of all interest, and also claimed the right to set off the usurious interest already paid. The facts are fully stated in the opinion of the Court.

N. W. Shafer, for plaintiff.

S. H. Miller, for defendant.

May 10, 1881. THE COURT. This is a suit to recover the amount of two promissory notes, payable to the plaintiff or order ninety days after date, one dated July 24, 1880, for $3618, the other dated August 25, 1880, for $3740.50. The defendant is one of the makers, and by a written agreement indorsed thereon is the individual guarantor of each of the notes. The declaration is upon the guaranty with the common counts added. The case came before the Court, and was argued upon a demurrer to the defendant's plea; but the parties have filed a written stipulation that the Court shall enter a final judgment, conformably to the disposition which may be made of the demurrer.

The facts as disclosed by the record are as follows: The notes in suit are respectively the last renewals of two series of notes, the originals of which bore date October 27, 1875, were each for $3000, one at sixty and one at ninety days, and were discounted by the plaintiff, a national bank, at the rate of ten per centum, which was then paid to the bank. Those notes were each renewed nineteen times, at intervals of ninety days, the parties to the several notes being in all instances the same. The interest charged at the several renewals down to that of April 6, 1877, inclusive, in the case of one of the series, and down to that of May 5, 1877, inclusive, of the other series, was at the rate of ten per centum, and it was paid to the bank, except that in three instances the discount, in whole or in part, was included in the new notes as part of the principal. The interest charged at the several subsequent renewals down until that of April 18, 1879, inclusive, of the one series, and that on February 15, 1879, inclusive, of the other series (with a single exception where six per centum was paid), was at the rate of nine per centum, which was sometimes paid to the bank and sometimes added into the new notes as principal. At the renewals on July 19, 1879, of the one series, and on May

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19, 1879, of the other series, and at all renewals thereafter made, the interest charged was at the rate of six per centum—the rate authorized by the Pennsylvania Act regulating interest—and on each occasion was included in the new note as part of its principal.

The demurrer admits that upon the discount of the original notes the bank charged and received usurious interest, and that at the several renewals down until those of May 19 and July 19, 1879, the bank charged more than legal interest, part of which, as already mentioned, was paid to the bank and part included in the notes given in renewal.

The controversy relates to the amount recoverable by the bank, in view of the provisions of sections 5197 and 5198 of the Revised Statutes. The former section limits the rate of interest chargeable by a national bank to that allowed by the local law, and the latter declares that "the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," and in case the unlawful rate has been paid, a penalty of twice the amount thereof is inflicted. The pleadings suggest three questions for solution.

1. Can the defendant set off against the plaintiff's claim the usurious interest paid to the bank? That he cannot do so is settled by the case of Barnet *v.* The National Bank (98 U. S. 555), which decides that interest in excess of the legal rate received by a national bank, although taken in the renewals of a series of bills, cannot be applied by way of set-off or payment in a suit upon the last of a series; the only remedy open to the party aggrieved being the penal suit given by the statute.

2. Can the plaintiff recover the interest charged at the earlier renewals at rates in excess of the legal rate, and included as part of the principal in the notes in suit? We are clearly of the opinion that he can recover no portion of such interest. By the terms of the Act of Congress the charging of such rates of interest worked a forfeiture of the entire interest which the several notes carried with them. Now such forfeiture was not waived by the giving of the subsequent notes, although as respects them the agreed rate of interest was a legal rate. They were mere renewals, and given without any new consideration. Nor did the new notes operate as payment of the debts for which they were given. (Peter *v.* Beverly, 10 Pet. 533; The Kimball, 3 Wall. 37.) In so far, then, as the notes in suit embrace the forfeited interest, they are without consideration. Moreover, it is an established principle that if there be usury in the original transaction, it affects all consecutive securities, however remote, growing out of it. (Walker *v.* The Bank of Washington, 3 How. 62; Campbell *v.* Sloan, 12 Sm. 481.) And neither the renewal of an old nor the substitution of a new security between the same parties can efface the usury. (Ibid.)

3. Can there be any recovery for interest from the dates at which the bank reduced its charge to a legal rate? We have already seen, from the authorities cited, that the notes in suit did not operate as payment, and that the taint of usury inheres in them. When the rate of interest was reduced to a legal standard, instead of purging the new notes then taken of all illegality, the bank then incorporated in them usurious interest previously charged as part of the new principal, and this illegal consideration pervaded the whole subsequent series of notes. Furthermore, upon every fresh renewal, interest was charged upon the usurious interest which had entered into the prior notes as principal. Thus the rate was but nominally reduced to six per centum, for, with reference to the amount legally due, the rate was in excess thereof. It appears, therefore, from the admissions upon this record that the bank from first to last persisted in its usurious charges.

In Barnet *v.* The National Bank, *supra*, it was declared that where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered. And in the First National Bank of Uniontown *v.* Stauffer (1 Fed. Rep. 187), it was held by this Court that where an usurious rate of interest has been paid a national bank upon the discount of a note, no interest accruing after the maturity of the note could be recovered, but only its face amount. Judge McKennan there says: "By the operation of the Act, a usurious contract is inherently vicious, so that it cannot carry any interest with it." The authorities, therefore, are decisive against the right of the plaintiff here to recover any interest whatsoever upon the usurious transactions.

It is to be added, however, that one of the notes in suit includes an item of indebtedness of $102, growing out of an independent matter.

Upon the demurrer, and under the stipulation of the parties, let final judgment be entered for the plaintiff; the judgment to include first, the face amount of the original notes, to wit, $6000, without interest; and second, the sum of $102, with interest on the latter sum, to be computed by the clerk.

Opinion by Acheson, J.

See National Bank of Fayette County *v.* Dushane, 9 Weekly Notes, 472; First Nat. Bank of Clarion *v.* Gruber, 8 Weekly Notes, 119.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JUNE 9, 1881.* [No. 8.

Supreme Court.

Jan. '80, 115. March 18, 1881.

Phila. and Reading R. R. Co. v. Schertle.

Negligence—Railroads—When no evidence of negligence, question must not be submitted to jury.

When in an action to recover damages for the death of another, alleged to have been caused by the negligence of defendant or of his servants or agents, there is no evidence of such negligence, or at most a scintilla only, it is the duty of the Court to give the jury binding instructions to find for the defendant.

A., a brakeman on a railroad train, was engaged in coupling and uncoupling cars. It became his duty, in order to couple a car to an engine, to take his stand on the back of the tank as the engine approached the car. Just before the engine began backing towards the car, A. jumped from the step where he had been standing on the back of the tank, and which was his customary and appropriate place to effect the coupling at the proper moment, and crossed the track. A moment after the engine began backing. A. was heard to cry out, and seen to spring back from the tank. The wheels passed over him and he was killed. No one saw the accident, or could tell whether A. was endeavoring to climb on the tank or not when he fell. There was evidence that the steps of the tank were imperfect in number and construction, although A., who had been employed on the engine a long time, had never complained of them or desired to have them altered, as it was the company's habit to have done on the request of employés; also that that part of the road-bed where the accident occurred was rough from recent repairs. In an action by A.'s widow and children against the railroad company to recover damages for A.'s death, alleged to have been caused while he was stepping on the tank, by reason of his missing his footing in consequence of the negligence of defendant in providing insufficient steps and a rough road-bed:

Held, that there was no evidence of negligence to go to a jury, and that the Court should have given binding instructions to find for defendant.

PER PAXSON, J. There is no duty on the part of a railroad company to ballast its track for the safety of its employés, and except, perhaps, at a crossing, it owes no such duty to the public.

Error to the Common Pleas of Schuylkill County.

Case by Sarah Schertle *et al.*, widow and minor children of George Schertle, against the Philadelphia and Reading Railroad Company, to recover damages for the death of said George Schertle, alleged to have been caused by the negligence of defendants.

The declaration averred, *inter alia*,

"That the said George Schertle (now deceased) lost his life . . through the negligence and defective machinery of the said defendants, viz., the said George Schertle, . . . while acting in the capacity of brakeman, upon a freight train of the said defendants, and on their road, . . . was, then and there, in the discharge of his duty as aforesaid, engaged in shifting freight and freight cars, and as he was about passing to the rear of the tank of the locomotive engine attached to said train, he missed his footing, owing to the defective and unskillful construction of the steps attached to said tank; and then and there dropped to the bed of the railroad, but the said railroad was not filled up, but pitted, and had wide and deep holes between the sills and cross-ties, and alongside of the same, whereby the said deceased was thrown under the said tank and the said train, and his legs were then caught by the wheels and crushed, in consequence of which injury the said George Schertle instantly died."

Plea, not guilty.

On the trial the following facts appeared:—

George Schertle, husband and father of plaintiffs, was, and had been for six years prior to the accident which caused his death, a brakeman on the road of the company defendant. On the night of September 25, 1874, he was employed at Port Clinton, on the line of the road of said company, in coupling and uncoupling cars. Early in the morning, between two and three o'clock, it became necessary to detach from an engine and leave upon a branch road at this point a certain freight car. In order to accomplish this, the engine and car were backed towards the branch road, and Schertle, stepping on the back step of the tank of the engine, uncoupled the car at the moment he thought the necessary impetus given to it. The engine almost immediately stopped, Schertle remaining standing on the step of the tank. The car moved on some little distance, but, owing to a misplaced switch, did not run upon the branch road as intended. In order to accomplish this, it became necessary to re-couple the engine and car. This it was Schertle's duty to perform. In order to effect it, it was necessary for him to be standing upon the back of the tank at the time the car and engine should come together. For some unexplained reason, however, he jumped off the step where he was standing and crossed the road, although it was in evidence that his custom was upon like occasions to retain his position on the step, and although that was a fit and proper position in which to effect the coupling at the proper moment.

The engine was immediately afterwards slowly backed towards the car. Suddenly Schertle was heard to cry out and spring back from the rear of the tank on the side of the road where he had gone, and immediately after, the wheels of the tank were felt to pass over his body. He was so crushed and mangled, that in the course of the same day he died of his injuries.

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The night was dark and foggy, and no one saw or knew any more of the accident than is stated above; no one could tell how Schertle came to fall under the wheels, whether he slipped in trying to climb on the tank or not.

The evidence was contradictory as to whether the tank of the engine in question was furnished with steps on both sides, as was customary, or whether there was only a step upon one side. Those witnesses who testified that it had but one step, were confident that that was not on the side where Schertle was killed. The testimony was clear that the step or steps on the tank in question were inside the wheel and parallel with the track, being constructed in the old fashion and not as on all the newer engines of the company extending beyond the wheels and at right angles with the track. As to the comparative safety of the old and new styles of steps, the witnesses differed, some expressing strong opinions one way and some another. The evidence showed, however, that it was a standing custom of the company always to alter the style of the steps if requested by the employés on or about an engine, and further, that Schertle had been employed upon and about the engine in question for more than a year, and had never made any complaint of it or expressed a desire to have it altered.

It also appeared in evidence that the day before the accident happened, a gang of workmen had been employed in raising the track upon the part of the road where the accident happened, in order to elevate the grade and accommodate it to that of a new bridge which had lately been constructed, and that these workmen had not completed the job, but had left the spaces between the ties and sills unfilled, so that the road-bed was rough and uneven, and full of pits and holes.

The defendant requested the Court to instruct the jury as follows:—

"9. Under all the evidence in this case, the plaintiffs cannot recover." *Answer.* "This would be taking the case from you, and we decline to so instruct you. We leave the facts for your consideration." (Seventh assignment of error.)

The Court, in its charge to the jury said, *inter alia:* "If you find that the company was negligent, as charged by plaintiffs, and that that negligence was the cause of Schertle's death, his representatives here would have a right to recover."

Verdict and judgment for the plaintiffs in the sum of $4000. Defendant took this writ, assigning for error, *inter alia*, the refusal of the Court to affirm the ninth point presented by defendants as above.

James Ellis and *James E. Gowen*, for the plaintiff in error.

The case was clearly one in which the decedent should be held to have assumed the dangers of the employment he engaged in. This fact will preclude plaintiffs from recovering.

Mansfield Coal & Coke Co. *v.* McEnery, 8 WEEKLY NOTES, 81.
Frazier *v.* Penna. R. R. Co., 2 Wright, 104.
Ryan *v.* Cumberland Valley R. R. Co., 11 Harris, 384.
Sullivan *v.* India Mfg. Co., 113 Mass. 396.
Priestley *v.* Fowler, 3 M. & W. 1.
Clarke *v.* Holmes, 7 H. & R. 937.

There was no evidence of negligence on the part of the company. It was, therefore, error to submit the question of negligence to the jury.

Weger *v.* Pennsylvania Railroad Co., 5 Smith, 460.
Howard Express Co. *v.* Wile, 14 Smith, 201.
Ryan *v.* Cumberland Valley Railroad Co., 11 Harris, 384.
Lehigh Valley Coal Co., *v.* Jones, 5 Norris, 432.
Mansfield Coal and Coke Co. *v.* Mary McEnery *et al.*, 8 WEEKLY NOTES, 81.
Pennsylvania Railroad Co. *v.* Fries, 6 Norris, 234
Boldt *v.* New York Central Railroad Co., 18 N. Y. 432.
Dynen *v.* Leach, 26 Law Jour. Exch. 221.
Waller *v.* Southeastern Railway Co., 32 Law Jour. Exch. 205.

Hughes and *Farquhar*, for defendants in error.

Schertle clearly lost his life while in the performance of his duty in getting upon the tank for the purpose of coupling the engine to the car.

There was evidence of the company's negligence to submit to a jury:—

1. The insufficient number of steps and the improper character of their construction.

2. The roughness of the road-bed, caused by the elevating of the track.

May 2, 1881. THE COURT. This was an action brought by the widow and minor children of George Schertle, deceased, to recover damages for injuries resulting in his death. The declaration alleges that said injuries were occasioned by the negligence of the Philadelphia and Reading Railroad Company, defendants below. The jury having found the negligence, the cause has been removed to this Court, and several errors have been assigned to the rulings of the Court below. As the seventh and last assignment, if well taken, renders a discussion of the others unnecessary, we will consider it here.

By the defendant's ninth point, the Court was called upon to pass upon the sufficiency of the evidence, the point being, "that under all the evidence in this case the plaintiffs cannot recover." The learned Judge declined to so instruct the jury, upon the ground that it would withdraw the case from their consideration. This was the object of the point. It was not error to refuse it if there was sufficient evidence of the negligence of the defendant company to sub-

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mit to the jury. On the other hand, it is equally clear that if there was no evidence, or at most a scintilla, it was the duty of the Court to withdraw the case from the jury and give a binding instruction to find for the defendant. The authorities upon this point are numerous, it is sufficient to refer to a few of the later ones. Howard Express Company *v.* Wile (14 P. F. S. 201); Hoag *v.* The Railroad Co. (4 Norris, 293); Penn. Railroad Company *v.* Fries (6 Norris, 234); and Mansfield Coal and Coke Company *v.* M'Enery (8 WEEKLY NOTES, 81).

I have looked in vain through this record for any evidence of negligence on the part of the defendant company. There is not even a scintilla. The deceased was at the time of the accident, and had been for years prior thereto, a brakeman in the employ of the company. On the night of the injury, which unfortunately resulted in his death, he was engaged in coupling and uncoupling the cars of a freight train. While so engaged, in some manner unexplained to the jury, he fell under the wheels of the tank or tender of the locomotive, which passed over one of his legs, producing the injuries complained of. As to how he fell, or the cause of his falling, there is not a word of evidence. The theory of the plaintiffs was that his fall was occasioned either by reason of the roughness or inequalities of the track, or in an attempt to get on the tank; the allegation being that the step was defective, and that he missed his footing because of such defect. It appears from the evidence that the track at the particular point where the accident occurred, was in the course of being repaired; that it had been raised a few inches, and that the space between the ties had not been ballasted or filled in; that as regards the step, it was not defective in its construction, but as plaintiffs alleged, was not in the position it should have been to insure the greatest amount of safety. Yet, even as to this point, the plaintiffs' own evidence was evenly balanced, in which it was not denied that the deceased had used the step for a year without complaint to the company, and that if he had made objection to it, the rule or practice of the company required it to be changed to suit the crew operating the engine, of which the deceased was one.

Had there been evidence to show that the deceased came to his death by reason of the condition of the track or of the step, it would, notwithstanding, have been too weak and inconclusive to establish negligence on the part of the defendant company and to base a verdict for damages upon. There certainly was no duty to ballast the track for the safety of its employés, and except perhaps at a crossing, no such duty to the public. Besides the inequalities were occasioned by necessary repairs to the track, of which repairs, the deceased, as an employé of the company, must be presumed to have had knowledge.

There was not, however, as before stated, a particle of proof that either the track or the step had anything to do with his death. For aught that appeared, he may have fallen in a fit, or for some cause wholly disconnected with either. The case was submitted to the jury without evidence, and the verdict has no better foundation than a guess, or almost mere possibilities. This will not do. The practical effect of the judgment below is to take the property of the defendants and give it to the plaintiffs. This is not allowable, even in the case of a corporation.

Judgment reversed.

Opinion by PAXSON, J.

Jan. '81, 24. March 15, 1881.

Hepler v. The Mount Carmel Savings Bank.

Evidence—Testimony of former evidence of a deceased person—What recollection necessary to qualify witness—Bills and notes—Indorser—Filling up of blank date not such alteration as will discharge indorser.

Although any material alteration in a note after indorsement will discharge the indorser, yet if, at the time of the indorsement, the date be blank and be subsequently filled in by the maker, the law necessarily presumes that the indorser authorized such filling up, and will not discharge him from liability.

When a witness is called to testify to the evidence formerly given by a witness since deceased, he may, if he cannot recollect the very words of the deceased witness, state, in his own language, the facts as detailed by that witness, as they were impressed on his mind at the time. All that is required is that the recollection of the witness should be reasonably clear as to the facts testified to, and how, if at all, such testimony was affected by the cross-examination.

Cornell *v.* Green, 10 S. & R. 14, and Wolf *v.* Wyeth, 11 S. & R. 148, followed.

Error to the Common Pleas of Schuylkill County.

Assumpsit, by the Mount Carmel Savings Bank against Daniel M. Hepler, upon a promissory note given to plaintiff by Nathan Bolich, on which defendant was indorser.

On the trial before WALKER, A. L. J., plaintiff offered the note in evidence, duly protested, etc. Defendant objected on the ground that the note showed upon its face an alteration, the word "April" being erased from its date, and the word "May" being substituted.

Plaintiff, in order to explain the alteration, then offered to show that when Bolich presented

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the note at the plaintiff's place of business it was duly indorsed, but without date. That Bolich, having his attention called to the fact, inserted a date, viz., April 4, and that plaintiff's officers, subsequently discovering that this date was erroneous, wrote to Bolich, who called and corrected his error, by erasing the word "April," and substituting the word "May." Objected to; objection overruled. Evidence admitted. Exception. (First assignment of error.)

The plaintiff then offered one Montelius to testify as to the testimony of one H. D. Rothermel relative to these same facts before a board of arbitrators, to whom the case had been submitted, the said Rothermel having since died. The witness, on his preliminary examination, testified: "I can recollect testimony of Rothermel on some points. I cannot give words. Can give substance on some points, on the date and condition of the note. I think I can. I think my recollection is clear." In response to preliminary cross-examination, he said: "I can't call any of the cross-examination to recollection. . . . The evidence was the same on the cross-examination as it was on the examination in chief, relating to the date of the note and the attendant circumstances. . . . Only one point I have recollection of, and that was in regard to the date of note and the circumstances relating to it. He (Rothermel) did not contradict himself in cross-examination."

The testimony of the witness was objected to; objection overruled. Evidence admitted. Exception. (Second assignment of error.)

The note, as protested, was then admitted in evidence.

Bolich, being called by defendant, testified that the note was dated April 4, when endorsed and presented by him at plaintiff's place of business, and that he subsequently erased the word "April," and inserted the word "May."

The Court charged the jury, *inter alia*: "If the note was in blank when indorsed, and so presented to the bank, then Bolich had a right to fill up the date, and the indorser would still be liable. If, however, the note was dated 'April 4,' and changed afterwards by Bolich to May 4, then it would be such a material alteration of the obligation under all the authorities as would relieve the indorser from liability if he had no knowledge of the change, and did not consent to it."

Verdict and judgment for plaintiff. The defendant took this writ, assigning for error the admission of plaintiff's testimony as above.

Wm. A. Marr, for plaintiff in error.

The note, having been altered after its indorsement, was not admissible in evidence in a suit against the indorser.

Clark *v.* Eckstine, 40 Harris, 507.

Paine *v.* Edsell, 7 Harris, 178.

Simpson *v.* Stackhouse, 9 Barr, 186.

In admitting the testimony of a witness as to the testimony of a deceased witness taken at a former trial, it has been held that the *very words* of the deceased witness must be given.

Com'th *v.* Richards, 18 Pick. 434.

Warren *v.* Nichols, 6 Metc. 261.

In Pennsylvania the rule, though it has been somewhat relaxed, demands that great strictness as to the accuracy of the witness's recollection be required.

Foster *v.* Shaw, 7 S. & R. 163.

Watson *v.* Gilday, 11 Id. 337.

D. C. Heming, for defendant in error.

If an indorser indorse a note without date, he is not discharged if a date be subsequently inserted.

As to the competency of Montelius's testimony as to the evidence given by the deceased witness, it cannot successfully be shown that the Court was in error; the strictness of the English rule has been relaxed in Pennsylvania.

Wolf *v.* Wyeth, 11 S. & R. 150.

Chess *v.* Chess, 17 Id. 411.

Cox *v.* Norton, 1 P. & W. 412.

Ins. Co. *v.* Johnson, 11 Harris, 72.

March 28, 1881. THE COURT. The promissory note, the subject of this suit, was drawn by Nathan Bolich, to the order of Daniel M. Hepler, in the sum of $2500, payable sixty days after date, at the Mount Carmel Savings Bank. By Hepler it was indorsed for the accommodation of Bolich, and by him, Bolich, transferred to the bank. When this note was presented on the trial of this case, it was discovered that the date had been altered by striking out the word "April," and substituting the word "May" in its place. On objection, by the defendant, Hepler, the Court below properly refused to admit the note in evidence until the alteration was explained. The bank then offered proof to show that when Bolich presented the note for discount it was altogether without date, and that Bolich afterwards had, himself, filled in the date "April 4," and immediately on his attention being called to the mistake, had stricken out the word "April," and inserted "May." We think the admission of this evidence, and its submission to the jury was proper. Whilst it is admitted that any material alteration in a note, after its indorsement, will invalidate it, as to the indorser, yet when it is indorsed without date, the presumption necessarily is that the drawer or indorser is authorized to fill in the date. This is undoubtedly the rule where the sum is left blank (Worrall *v.* Gheen, 3 Wr. 396), and no good reason can be urged why the same rule should not apply to the date. This note was drawn for the renewal of a former one, and as the parties may not have known the exact time when the

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former fell due, the reason for its being indorsed without date would, in that event, be obvious.

We think then, that, under the circumstances, this testimony was rightly admitted; hence the first exception of the plaintiff in error is dismissed.

The second exception relates to the admission of the evidence of H. D. Rothermel, a deceased witness, given at a previous trial of this same case, before a board of arbitrators. To prove what the evidence had been, a Mr. Montelius was called, who, on preliminary examination, said he could not give the words that had been used by the witness, but could give the substance of his evidence on some points, and those points were as to the date and condition of the note when presented for discount. On cross-examination, he said he could not recall to recollection any of the cross-examination of Rothermel, except that, as to the date of the note and circumstances attending it, he did not contradict himself. Under such a want of recollection of what the dead witness had sworn on cross-examination this testimony would not be admissible, for there ought to have been such a recollection of the cross-examination, that the witness could give, at least, the substance of it, otherwise, as was said in Wolf *v.* Wyeth (11 S. & R. 150), "to give what he swore on his examination in chief, and omit his cross-examination, would be to deprive the opposite party of his cross-examination."

Such testimony would be altogether one-sided, and for that reason inadmissible. Montelius, however, upon further interrogation, says, "the evidence was the same on the cross-examination, as it was on the examination in chief, relating to the date of the note and the attendant circumstances." From this we must understand that his recollection of the cross-examination was substantially the same as that of the examination in chief; that is, he had the same general recollection of the one as of the other, but no special, verbal recollection of either. But we are inclined to think that, under our own authorities, this general, or, as it is sometimes called, substantial recollection of what the deceased witness said, was sufficient to warrant its reception.

It is true, the contrary is held by English authorities, and these authorities have been followed by Chief Justice SHAW, in Warren *v.* Nichols (6 Met. 261); but, on the other hand, Mr. Greenleaf favors the more liberal rule as adopted in Pennsylvania, and we, whatever our private opinions might be, must be governed by the cases of Cornell *v.* Green (10 S. & R. 14), and Wolf *v.* Wyeth (*supra*).

Furthermore, by attention to the language of Chief Justice GIBSON, in the case of Cornell *v.* Green, we may readily formulate the rule governing cases of this kind. "I take it," he says, "that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence, and this on the ground that it is the best evidence of which the nature of the case is susceptible. . . . I cannot, therefore, see why the same necessity, which opens the way for secondary evidence of the very words of a deceased witness, should not also open the way for the substance of his testimony when his very words cannot be recollected, or discover the policy of a rule which would shut out the little light that is left merely because it may not be sufficient to remove everything like obscurity."

From this I take the rule to be, where the witness on the stand cannot recollect the very words of the deceased witness, he may state, in his own language, the facts as detailed by that witness, as they were impressed on his mind at the time; and this applies as well to the cross-examination as to the examination in chief. All that is required is, that the recollection of the witness be reasonably clear as to the fact testified to, and how, if at all, such testimony was affected by the cross-examination. As a rule, this is all that can be required of ordinary witnesses, and the adoption of a greater degree of strictness, would result in the total exclusion of such evidence, for the exception is rare where a conscientious witness will undertake to do more than this. Judging by this rule, we think the evidence complained of in this case was well admitted.

The judgment is affirmed.

Opinion by GORDON, J.

Jan. '81, 164. March 17, 1881.

Farmers' Mutual Fire Ins. Co. v. Moyer.

Fire insurance—Proof of loss and waiver of notice—When what constitutes such waiver is a question for the jury—Valued and open policies—Portable engine—Whether its use was an increase of risk properly left to the jury—Special clauses of by-laws and policy construed.

Where a building and its contents were destroyed by fire, and the officers of the insurance company wherein the same were insured were at once informally notified of the loss, and thereupon summoned a meeting of the board of directors, who passed a formal resolution not to pay the amount of the loss; in an action subsequently brought by the insured against the company to recover the amount of said loss:

Held, that the question was properly submitted to the jury, whether the company had not, by its action, waived a right to demand that formal proof of loss, which was, by its charter, made a condition precedent to any claim against it.

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Where the owner of a barn temporarily places a portable steam-threshing machine in the neighborhood thereof for immediate use, and in consequence of the explosion of such machine the barn is destroyed by fire; in an action by him against the insurance company, wherein said barn was insured, to recover his loss:

Held, that the use of such machine not being expressly prohibited by the charter and by-laws of said company, nor by the provisions of the policy, the plaintiff was entitled to recover, unless the use of said machine materially increased the risk of the company, and that whether said risk was so materially increased or not was properly left to the jury.

Error to the Common Pleas of Schuylkill County.

Covenant, on a policy of fire insurance by George K. Moyer against the Farmers' Mutual Fire Insurance Company of Schuylkill County.

The following facts appeared on the trial of the case before PERSHING, P. J.:—

On the 5th of April, 1869, George K. Moyer obtained a policy of insurance from the company defendant covering his barn and its contents. The building was insured in the sum of fifteen hundred dollars, and its contents in the sum of one thousand dollars. On the 20th day of November, 1875, it and all its contents were destroyed by a fire, caused by the explosion of the boiler of a portable engine, which had, the morning or the evening before, been stationed within some thirty-two feet of the barn, for the temporary purpose of threshing grain on the barn-floor, and which was connected by a strap with the threshing machinery.

The charter of the company defendant provided, *inter alia*, as follows:—

"SECTION 8. Suits at law may be prosecuted and maintained by any member against the said company, for losses and damages by fire, if payment be withheld or refused for more than three months after the company shall have been notified of such losses."

Articles 26 and 34 of the by-laws of the company defendant were as follows:—

26. "The following property can, under no circumstances, be insured by the company, viz.: All buildings situate within fifty yards of a railroad on which steam-power is employed, as forges, foundries, furnaces, rolling-mills, powder-mills, paper- and oil-mills, cotton factories, or, in general, any mills, or factories, or machineries driven by steam-power."

34. "If the owner of an insured building should convert it to some other purpose, or should carry on therein any of the trades specified in article 26, the policy of such insured building shall not be considered valid or binding upon this company for such length of time as it shall be appropriated to such purposes."

Moyer's policy contained, *inter alia*, the following clause:—

"The said loss or damage to be estimated according to the true and actual value of the said property, at the time the same shall happen, and to be paid within three months after date, and proof thereof made by the insured, in conformity to the charter and by-laws."

On November 23, 1875, three days after the fire, and more than three months before suit brought, Moyer sent a preliminary notice to the president and secretary of the company defendant of the destruction of his barn and its contents. On November 27 the board of directors of the company met. Moyer appeared before them and swore to the fact of his loss. They then resolved not to pay the loss unless compelled by law, on the ground that the fire had occurred in consequence of the use of the steam-engine for the threshing of grain.

On December 7 Moyer presented to the company formal proof of loss in accordance with the charter and by-laws, and the amount of said loss not being paid, on February 26, 1876, brought this suit.

On the trial the defendant submitted, *inter alia*, the following point: (1) "That under the uncontradicted evidence in this case, no proof of loss was furnished to the company, by Moyer, till the 7th day of December, 1875, and as by the terms of the policy the insurance was not payable till three months after such proof was furnished, and the suit in this case was instituted on the 26th of February, 1876, the verdict of the jury must be for defendant, the suit having been brought prematurely."

Answer. "The construction we put upon the clause of the policy referred to in this point is that the evidence of the loss must be furnished three months before the suit is brought, unless the company did something to waive it. The facts here are uncontradicted. The barn was a total loss, and the company had notice of the loss three months before suit was brought. . . . Notice, in detail, of the contents of the barn, was not sent to the company until December 7, which would be less than three months before the bringing of this suit, and would prevent a recovery so far as the contents of the barn are concerned, unless the company did something to waive the production of notice at an earlier date, or the production of any notice whatever. We think this is a question for the jury. The directors met on the 27th of November, took into consideration a notice which they had received from Moyer of the loss of his property, and they then adopted a resolution not to pay him anything. When they said they would pay nothing, and denied any liability, was it not a waiver of any notice as to the contents of the barn? It is for the jury to determine whether or not there was a waiver of notice on the part of the company."

Defendant also submitted the following point: "(8) That the true construction of the charter, policy, and by-laws in evidence, prohibits the insurance of any building or barn which is located within fifty yards of any steam-engine, or within which any steam-engine is used."

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Answer. "We will answer this in the negative in view of the language employed in the by-law."

The Court, *inter alia*, in its general charge, instructed the jury, as follows: "As we look at the law upon this subject, we think that if this plaintiff, by the introduction of this threshing machine upon his premises, increased the risk of the destruction of the building, that he could not recover here. It is said in one of the authorities cited, that where there is a *material* increase of the risk there can be no recovery. A number of our own cases say that if there is *any* increase of the risk by the conduct of the party insured, and that caused the destruction of the property, the plaintiff cannot recover. It is for you to say whether by the plaintiff's conduct there was an increase of the risk that the company assumed at the time they insured him, and whether the destruction was caused by that increased risk."

Verdict and judgment for plaintiff for $2492.47.

The defendants took this writ, assigning for error, *inter alia*, the answers of the Court to the defendant's points above cited.

F. W. Bechtol and *George R. Kaercher*, for plaintiff in error.

This being a mutual company, the insured was affected with knowledge of the rules and regulations of the company.

Mitchell *v.* Lycoming Mutual Ins. Co., 1 Sm. 402.

There is a broad distinction between notice of fire or loss, and proof of loss. There is a distinction between the kind of notice necessary in the case of a valued policy and an open one.

The policy in hand is not a valued one as in Schreffler's Appeal, 8 Wr. 269, and proof of loss should have been given, according to the by-laws of the company.

Where, by the charter and by-laws of a mutual insurance company the subjects of insurance are divided into risks that the company will assume, and those which it will not assume, and the property, at the time of insurance, is within the class *insurable*, and the assured afterwards voluntarily puts it in the class *non-insurable*, he thereby suspends the operation of his policy for the time being, and, if a loss by fire occurs by reason of what the assured has done, he loses his indemnity, and cannot recover.

Diehl *v.* Ins. Co., 8 Smith, 443.
Franklin Fire Ins. Co. *v.* Brock, 7 Id. 74.
Flanders on Fire Insurance, 335 and 515.

Hughes and *Farquhar*, for defendant in error.

The words in a deed or covenant must always be construed most strictly against the party making or using the words. The same rule applies to a policy of insurance.

White *v.* Smith *et al.*, 9 Casey, 186.
Fire Ins. Co. *v.* Brock, 7 Smith, 74.

When an insurance company acts upon any proof or notice of loss, without objecting to its sufficiency, the company is estopped from denying its sufficiency in an action upon the policy to recover such loss.

Ins. Co. *v.* Schreffler, 8 Wr. 269.
Ins. Co. *v.* Updegraff, 7 Id. 350.
Ins. Co. *v.* Taylor, 23 Smith, 342.
Ins. Co. *v.* Schreffler, 8 Wright, 259.
Buckley *v.* Garrett, 11 Wright, 205.

It is very clear that the prohibition against insuring certain classes of buildings does not apply to the present case where the use of the engine near the barn was merely temporary. The question whether the risk was or was not materially increased was properly left to the jury.

April 1, 1881. THE COURT. On the 5th of April, 1869, George K. Moyer, the plaintiff below, obtained a policy of insurance from the defendant company, covering his barn and its contents. The building was insured in the sum of fifteen hundred dollars, and its contents in the sum of one thousand dollars. On the 20th of November, 1875, it, and all it contained, were destroyed by fire. The fire which produced this destruction seems from the evidence to have originated from the explosion of the boiler of a portable steam engine, which had that morning, or the evening before, been stationed within some thirty-two feet of the barn, for the temporary purpose of threshing grain on the barn floor, a strap being used to connect the engine with the threshing machinery. The assignments of error, though numerically four, are substantially two, and are raised by the defendant's first and eighth points; they are as follows: (1) "That as under the uncontradicted evidence in this case, no proof of loss was furnished to the company by Moyer till the 7th of December, 1875, and as by the terms of the policy, the insurance was not payable till three months after such proof was furnished, and the suit in this case was instituted on February 26, 1876, the verdict of the jury must be for the defendant, the suit having been brought prematurely." (2) "That the true construction of the charter, policy, and by-laws in evidence, prohibits the insurance of any building or barn which is located within fifty yards of any steam engine, or within which any steam engine is used."

As to the first of these points, if indeed the "uncontradicted evidence" supported it, there would have been an end to the case; the plaintiff could not have recovered. But unfortunately for the defendant, such was not the case. In the first place, there was the preliminary notice of the total loss of the barn and its contents; that this was in time was admitted; and in the second place, there was the question of waiver, which

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the Court submitted to the jury. As to the first of these, the learned Judge held, that the preliminary notice, so far as the barn itself was concerned, the loss being total, was sufficient without the more formal proofs.

In this he was undoubtedly correct, if the case of the Lycoming County Mutual Insurance Co. *v.* Schreffler (8 Wr. 269), is law, for it is exactly in point. The counsel for the plaintiff in error attempts a distinction, which it seems the Court below was unable to comprehend, and we must confess to a similar want of intelligence. He insists that while the policy in the case cited was a valued one, that, in the case in hand, it is not a valued one. Of course this distinction, if it exists at all, must be found in some substantial difference of the wording of the two policies. Let us compare them; Schollenberger's policy covered a coal breaker, including a steam engine, shute, screens, machinery, and trestle work in a sum not exceeding $2500, for the term of five years. Moyer's insurance is, *inter alia*, upon "one bank barn of frame 70 feet by 36 feet for $1500," and for the term of ten years. Now as the word "for" in the quotation means "in a sum not exceeding," "to the amount of," it is impossible for us to discover the difference between the two policies, or why if the one is a valued policy, the other should not be.

As to the contents of the barn, the Court held that special notice of loss was necessary, and if it were not given until December, the suit was premature, and as to them it must abate, unless there was some act of the company which was equivalent to a waiver of such notice.

On this point the learned Judge held, that if at the meeting of the board of directors on the 27th of November, determination was had not to pay Moyer, or to recognize any liability whatever, on the ground that he ought not to have allowed the steam engine to have been brought upon the premises, and that he thereby forfeited his policy, and not upon the ground of want of the proofs of loss, the jury might regard such action of the company as evidence of a waiver of such proofs.

This was a correct ruling. Insurers undoubtedly have the power to waive the performance of a condition introduced into a policy for their own benefit, and it is not necessary that such waiver be express; it may be inferred from their acts, and among others of such acts, is a denial of the obligation exclusively for some other reason than that of a breach of the condition. (Inland Insurance Co. *v* Stauffer, 9 Casey, 397; State Insurance Co. *v.* Todd, 2 Norris, 272.)

As to the answer of the Court to the defendant's eighth point, and the charge relative to the subject matter covered by that point, we think, if in them there is any error, it is one of which the plaintiff had reason to complain rather than the defendant. It was held that the plaintiff could not recover if the use of the engine increased the risk; in other words, the jury were left at liberty to find a forfeiture on the ground stated; but, neither in the policy, by-laws, nor constitution of the company is the temporary use of a portable engine for grain threshing or other economic use, prohibited.

The 26th Article of the by-laws prohibits the insuring of any building "situated within fifty yards of a railroad on which steam power is employed, or of any forges, foundries, furnaces, rolling-mills, powder-mills, paper- and oil-mills, cotton-mills, or in general any mills, factories, or machineries driven by steam power." But the property in the case in hand is embraced by neither the letter nor spirit of this prohibition.

Again, Article 34 provides: "If the owner of an insured building should convert it to some other purpose, or should carry on therein any of the trades specified in Article 26, the policy of such insured building shall not be considered valid or binding upon this company for such length of time as it shall be appropriated to such purpose."

Neither is the plaintiff's case taken up by this provision; for this contemplates the conversion of the building to a purpose other than that for which it was used at the time of its insurance; an adaptation of it to some one of the occupations or trades mentioned in Article 26. But the plaintiff's barn was converted to no such purpose, it was insured as a barn, and as a barn it was burned.

These, however, seem to be all the regulations of this company which have even a remote bearing upon this subject. But it is only by a strained inference that either of them can be made to bear on the plaintiff's case, and it certainly would be out of all character to allow a forfeiture to be worked in favor of the company through the operation of a mere inference.

There being therefore no express prohibition found in the policy or rules of the company, against the use of a machine of this kind in the vicinity of the barn, the question was at most one of increase of risk, and that was properly left to the jury.

There is not much doubt but that the immediate occasion of the fire was the explosion of the boiler, by which the machine was driven; but this was one of those pure accidents that is not to be considered any more than the accidental breaking of a glass lantern, had that been the occasion of the fire.

Accidents will happen more frequently, perhaps, with steam engines than some other machines; nevertheless they are accidents, and as such, are beyond human forecast, and if insurance

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companies desire to prohibit even the temporary use of steam on or near the premises they insure, they should provide against such use in their policies, but it will not do for them to attempt to make rules and regulations, intended for a very different condition of things, cover an emergency not previously contemplated.

The judgment is affirmed.

Opinion by GORDON, J.

Jan. '81, 270. March 31, 1881.

Wilbur's Appeal.

Mortgage—Release by prior encumbrancer of part of mortgaged premises to the injury of security of second encumbrancer—What notice to first encumbrancer of second encumbrancer's rights not sufficient to make such release wrongful—Actual notice and direction not to release necessary—Sale by mortgagor of part of mortgaged premises—When residue not primarily liable for mortgage debt—Equity.

Where a junior encumbrancer seeks to claim an equity at the hands of a prior encumbrancer, he must give the latter express notice of his intention to claim such equity, and warn him to deal with his security so as not to prejudice the second encumbrance.

Where a mortgagor conveys part of the mortgaged premises, the general rule is that the part remaining in his hands is primarily liable for the mortgage debt; but this rule will not apply where the conveyance of the part is made expressly subject to the mortgage.

A. mortgaged a large tract to B., and divided it into lots. Subsequently A. mortgaged two of the lots to C., and conveyed the lots so mortgaged to D., subject to the above-named mortgages. Of this conveyance B. had knowledge. Subsequently B. for a nominal consideration released from the lien of his mortgage all the large lot of ground except that portion owned by D. The portion of the lot so released was sufficient to pay in full B.'s mortgage. B. was not personally notified by C. of the latter's subsequent encumbrance, the only knowledge he had of it being through knowledge of the conveyance to D. The land conveyed to D. being sold at sheriff's sale under B.'s mortgage, and the proceeds referred to a commissioner for distribution:

Held (affirming the judgment of the Court below), that B. was entitled to claim from the fund the full amount of his mortgage, to the exclusion of C.

Appeal of E. P. Wilbur from a decree of the Common Pleas of Northampton County, dismissing the exceptions to and confirming the report of the commissioner appointed to distribute the proceeds of a sheriff's sale of certain real estate under a levari facias issued on a judgment obtained on a mortgage executed by one Abraham Yost to Charles Hacker, in which suit John White had been joined as terre-tenant.

The following facts appeared from the report of the commissioner appointed to distribute the fund: On March 5, 1872, Charles Hacker conveyed to Abraham Yost a certain tract of land in the borough of South Bethlehem, Northampton County. On the same day, Yost executed to Hacker a mortgage for $5000 upon the whole of said lot, which mortgage was the same day duly recorded. By agreement of even date with the mortgage Hacker further contracted that within five years from the date of the agreement, he would release any part or parts of the lot from the lien of the mortgage on receiving from the mortgagor a sum not less than $500, at the rate of one foot of said lot in frontage for every $12 received.

Abraham Yost afterwards divided this tract into separate lots. On these he erected various buildings. Two of them had erected upon them an opera house and a building known as the "corner store."

On April 10, 1876, Abraham Yost executed a mortgage for $10,000 on the opera house lot, and on February 19, 1876, one for $5000 on the "corner store" lot to D. H. Yost. Both of these mortgages were, on April 10, 1876, assigned by D. H. Yost to E. P. Wilbur, and duly recorded June 5, 1876. Wilbur at the time of this assignment had full knowledge of the agreement between Hacker and Abraham Yost relative to the release of portions of the large lot of ground from the lien of Hacker's mortgage.

Meantime Hacker, in accordance with this agreement, had released a portion of the lot on April 1, 1873, for a valuable consideration. On November 16, 1876, he released another portion for a nominal consideration. Both these portions so released were afterwards conveyed to third parties by Abraham Yost. By these releases the lien of the mortgage became restricted to the opera house lot, the "corner store" lot, and to four other lots numbered respectively 7, 8, 9, and 10.

On July 24, 1877, Abraham Yost conveyed the opera house and "corner store" lots to John White, the deed expressly stating that the conveyance was subject to the Hacker and D. H. Yost mortgages. By this conveyance Abraham Yost divested himself of all title to the original lot of ground, except as to the above lots numbered 7, 8, 9, and 10 respectively. On March 13, 1878, Hacker for a nominal consideration released said four lots from the lien of his mortgage. At the time of said release, Hacker knew of the conveyance to White. The value of the four lots so released by Hacker was amply sufficient to pay his mortgage.

Subsequently, the interest upon Hacker's mortgage being in arrear, a scire facias was issued thereon, with notice to White as terre-tenant; judgment was obtained, a levari facias issued, and the opera house and "corner store"

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lots exposed at sheriff's sale, and sold for $8130, which sum, less the amount of the sheriff's costs, was paid into Court, and constituted the fund for distribution in this case.

Before the commissioner it was claimed, on the one hand, that Hacker was entitled to receive from the fund the whole amount of his mortgage, with interest thereon. On the other hand, it was contended on behalf of E. P. Wilbur & Co.: (1) that Abraham Yost having sold to White the opera house and corner store lots before March 13, 1878, that fact, in the interest of subsequent purchasers and encumbrancers, made that portion of the original tract covered by the Hacker mortgage still owned by Abraham Yost primarily liable for the whole of his mortgage, and that portion sold to White secondarily liable; in other words, that still owned by Abraham Yost was the principal debtor, that sold to White was the surety debtor, and Hacker having released the former, with knowledge of the sale to White, released the latter; and (2) that Hacker knowing, at the time of the said release, of the sale of, and deed of conveyance for, the opera house and corner store lots, by Abraham Yost to White, was charged with knowledge of the contents of that conveyance, which informed him of the existence of the Wilbur mortgages upon them, and that knowledge was equivalent to notice from Wilbur; that therefore he was not justified in releasing any portion of the lot to the detriment of the subsequent encumbrance, and having released sufficient to pay his mortgage in full, must be held to have lost the lien of his mortgage upon the remainder of the lot, and should therefore be debarred from participation in the fund.

The commissioner reported, *inter alia*, as follows:—

"A mere knowledge of the existence of a junior encumbrance upon a portion of the premises without actual notice of the equity claimed by the encumbrancer is not sufficient to impair the lien of a senior encumbrancer. . . .

"The testimony shows that Wilbur at the time of taking the assignment of the mortgages from D. H. Yost, had knowledge of the agreement entered into between Hacker and Yost at the time of the execution of the deed by the former to the latter, which stipulated the terms upon which Hacker would release portions of the mortgaged premises, and he must have known that the release of April, 1873, had been executed. Having this knowledge, he should have been on the alert as to the security of his encumbrance, and should have notified and cautioned Hacker not to release any portion of the premises not covered by his mortgages. Had he done this, he would now be in a position to claim an equity in this distribution of the fund in Court; but having failed to do it, the loss of his lien must be charged entirely to his own negligence. It is true Wilbur may have supposed that the terms of the agreement between Hacker and Yost would be complied with by the latter paying to the former twelve dollars per foot front, on account of the principal sum of his mortgage, whenever he should obtain a release of any portion of the mortgaged premises, and for that reason interposed no objection to Hacker's releasing; but he should not have relied upon such payments being made. The only parties to the agreement were Hacker and Yost, and they could mutually agree, as they did, to change its terms to suit themselves, unless distinctly notified not to do so by some person whose rights might be affected by the change.

. . . "The rule of law in this State undoubtedly is, that when a portion of land encumbered by a lien is aliened by the debtor, that portion to which he still holds title is primarily liable, in equity, to discharge the encumbrance, and the portion aliened secondarily liable. (Brightly's T. & H. vol. i. § 1440; Nailer *v.* Stanley, 10 S. & R. 450; Lloyd *et al. v.* Galbraith *et al.*, 8 Casey, 108; Lowry to the use of McKinney *v.* McKinney, 18 P. F. Smith, 294.) "If White had received an ordinary deed for the premises he purchased of Yost, subject to no encumbrances, it is probable that he could have resisted, successfully, any attempt on the part of Hacker to collect his mortgage by resorting to his land; but his deed contains a clause reciting that the conveyance is subject to the whole amount of Hacker's lien. He therefore was not injured by the release of March 13, 1878, and if he could claim no equity by reason of the release, it is difficult to understand how Wilbur, who was and is the mortgagee of White's grants, can claim an equity on account of the conveyance to White by Yost. The status of his lien was in no way changed by that conveyance, and if White was not in a position to claim that his purchase was discharged from the lien of the Hacker mortgage because of the release of the land still held by Yost after the sale to him, certainly Wilbur was not, unless he had given notice not to release—and no such notice was given."

The commissioner accordingly awarded to Hacker the full amount of his mortgage with interest. Wilbur thereupon filed exceptions.

The Court (MEYERS, P. J.) subsequently dismissed these exceptions, and confirmed the report, saying, *inter alia:* "As to the exceptions filed by E. P. Wilbur, we are of the opinion that the commissioner committed no error in his finding of facts and conclusions of law; that on the facts found by him, the question of the right of Charles Hacker or E. P. Wilbur to participate in the fund for distribution is ruled by Taylor's

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Ex'rs *v.* Maris (5 R. 51), and McIlvain *v.* Mutual Assurance Co. (8 WEEKLY NOTES, 260). The case of Amanda Martin's Appeal (9 WEEKLY NOTES, 485), has not altered the rule as to the equity of a second mortgagee, where the first mortgagee has released part of the mortgaged premises not bound by the second mortgage, in the absence of proof that notice was given by the second mortgagee to the first mortgagee not to release."

Wilbur thereupon took this appeal, assigning for error the decree of the Court awarding Hacker the full amount of his mortgage, with interest.

W. D. Luckenbach, for appellant.

When a mortgagor sells part of the mortgaged premises, the portion remaining to him is primarily liable for the amount of the mortgage, and the portion sold is only secondarily liable as surety; the first must be exhausted before recourse can be had to the second.

Paxton *v.* Harrier, 1 Jones, 315.
Lowry *v.* McKinley, 18 Sm 295.
Martin's Appeal, 9 WEEKLY NOTES, 486.
Mevey's Appeal, 4 Barr, 80.

The fund here was produced by the sale of part of a larger lot of ground, which part had been conveyed away by the mortgagor, while the title to the other parts sufficient to pay the debt was still in him; the case, therefore, falls exactly within the rule, and recourse cannot be had by the mortgagee to the fund until he has exhausted his remedies against that portion of the land which remained the mortgagor's, after he had parted with the title to the premises from the sale of which this fund was produced. It is, moreover, found by the commissioner that Hacker knew of the conveyance of the land here concerned, so that the case is brought fully within the rule.

If a prior mortgagee releases from the lien of his mortgage a portion of the land on which he alone has a lien sufficient to discharge his encumbrance, and so casts the lien of his mortgage altogether on another part, and thereby cuts out a second encumbrancer who he knows has a lien only on such second part, such release will operate to release also the second lot. The only question is as to knowledge and notice; and here Hacker knew of the conveyance, which made express mention of the subsequent mortgage, and this was enough to put him on inquiry. The authorities on which the Court below decided the case are different, for here the mortgagee had knowledge of the subsequent mortgage from the deed, so that there was no necessity for actual notice; the knowledge he had was sufficient to show him that he would injure the grantee by executing the release, and all the cases show that actual knowledge is what the law requires.

McIlvain *v.* Insurance Co., 8 WEEKLY NOTES, 260.
Taylor's Ex'rs *v.* Maris, 5 Rawle, 51.
Cogswell *v.* Stout, 10th Reporter, 569.
1 Jones on Mortgages, §§ 722, 725, 727, 728.
Jaques *v.* Weeks, 7 W. 267.
Guion *v.* Knapp, 6 Paige, 41.
Hoy *v.* Bramhall, 4 C. E. Green, 563.

R. E. Wright & Son, for appellee.

The commissioner expressly found that Hacker had not personal knowledge of the subsequent mortgage owned by appellants. The only notice we could have had was the record of the subsequent mortgage, and it has been repeatedly ruled that that is not sufficient notice to a prior encumbrancer. Actual notice of the subsequent encumbrancer's interest and a direction not to release are what the law demands.

Taylor *v.* Maris, 5 Rawle, 51.
McIlvain *v.* Insurance Co., 8 WEEKLY NOTES, 260.

Moreover, the deed expressly conveyed the property subject to our mortgage, and therefore it remains primarily liable for it.

Lloyd *v.* Galbraith, 8 Casey, 109.
Beddow *v.* Dewitt, 7 Wr. 326.

April 1, 1881. THE COURT. Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM. GREEN, J., did not sit, having been of counsel.

July, '80, 74. Jan. 5, 1881.

Moore v. Coxe et ux.

Constitutional law — Search warrant — Sufficiency of — Rights of search — Constitution of United States, fourth amendment — Constitution of Pennsylvania, Art. I. Sec. 8.

A search warrant for stolen articles, describing them as "jewelry and other personal effects," is a sufficient compliance with Art. 1. sec. 8, of the Constitution of Penna., requiring that no search warrant shall issue, unless the goods are described as near as may be.

The provision of the Fourth Amendment of the Constitution of the United States, requiring greater particularity of description, relates only to Federal legislation or process.

Error to the Common Pleas No. 3, of Philadelphia County.

Trespass *vi et armis*, by Edward Moore against Edwin T. Coxe and wife, to recover damages for a trespass of the said wife, committed in assisting to make a search for stolen goods upon plaintiff's premises without a sufficient search warrant. Plea, not guilty. The testimony on behalf of the plaintiff showed that on March 22, 1879, two policemen appeared at plaintiff's residence and produced a search warrant. The warrant, which was put in evidence, described the goods to be searched for only as "a quantity of jewelry and other personal

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effects, lately by some one feloniously taken, stolen, etc." The policemen said that they would wait for Mrs. Coxe, and she made her appearance in a few minutes thereafter, when, the warrant having been read, they proceeded to search the house, Mrs. Coxe accompanying them to identify the stolen goods, if any should be found.

Upon motion of defendant's counsel, the Court entered a compulsory nonsuit, and subsequently refused to take off the same.

Plaintiff took this writ, assigning for error the entry of the judgment of nonsuit and the refusal to take off the same.

F. F. Brightly, for plaintiff in error.

The warrant was bad upon its face in merely describing the goods to be searched for as "a quantity of jewelry and other personal effects."

Amendments to Constitution of the United States, Art. IV.
Constitution of Pennsylvania, Art. I. § 8.
Sanford *v.* Nichols, 13 Mass. 286.
Johnson *v.* Comstock, 14 Hun. 238.

The warrant having been issued in violation of the Constitution, was null and void to all intents and purposes; and not only are the officers who executed it trespassers, but also all who co-operated in or encouraged the commission of the act.

Johnson *v.* Tompkins, Baldwin, 571.
Deal *v.* Bogue, 8 Harris, 228.
McMurtrie *v.* Stewart, 9 Id. 322.
Smith *v.* Felt, 50 Barb. 612.
Elder *v.* Morrison, 10 Wend. 128.
Berry *v.* Fletcher, 1 Dill. 67.

The process being illegal upon its face, trespass, and not case, is the proper remedy.

Maher *v.* Ashmead, 6 Casey, 344.
Baird *v.* Householder, 8 Id. 168.
Kramer *v.* Lott, 14 Wright, 496.

J. D. Yocum, for defendant in error.

The Constitution of Pennsylvania only requires a description of the goods "as near as may be." The description here was sufficient.

Downing *v.* Porter, 8 Gray, 541.
Dwinnels *v.* Boynton, 3 Allen, 310.

January 17, 1881. THE COURT. We see no ground upon which the search warrant produced as the justification of the officers can be pronounced invalid. The Constitution of this State, Art. I. sec. 8, declares, that no search warrant shall issue for things "without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant." This does not render necessary such a particular description as is required in Art. IV. of the Amendments to the Constitution of the United States, but those amendments only apply to Federal legislation or process. In the Constitution of this State, all that is provided is that the things searched for should be described *as near as may be*. We cannot say that the description in the warrant in evidence is so insufficient as to render the process void. Sandford *v.* Nichols (13 Mass. 286) was decided under the Amendment to the Constitution of the United States, having been a warrant issued to seize goods which had been libelled and condemned in the District Court of the United States for a violation of the embargo laws. In the case before us, "jewelry and personal effects" sufficiently indicated the general character of the goods sought for.

PER CURIAM. Judgment affirmed.

Common Pleas—Law.

C. P. No. 2. March 16, 1881.

Whiteside v. Boardman et ux.

Married woman—Suit against married woman on contract made before coverture—How the Court will regulate the execution.

Sur motion for judgment on special verdict.

Assumpsit, by John Whiteside against John Boardman and Jane his wife, formerly Jane Vickers. The evidence on the trial showed that the said Jane, while still a *feme sole*, being indebted to Whiteside for goods sold, gave him the promissory notes in suit, and that the said Jane afterwards married John Boardman.

The jury found specially for the plaintiff, "that the defendant Jane Boardman is indebted to the plaintiff in the sum of $1016.79, for goods sold and delivered to her prior to her marriage with defendant, John Boardman."

Plaintiff's counsel subsequently moved for judgment on the verdict.

Read & Pettit, for the motion.

THE COURT made the following order: "Judgment for the plaintiff on the verdict, to be levied only on the property of said Jane Boardman."

C. P. No. 3. April 30, 1881.

Girard Life Insurance Co. to use, etc., v. The Mutual Life Insurance Co. of N. Y.

Evidence—Order directing attendance of witness at trial—When not granted.

Sur rule obtained by defendant to show cause why an order should not be made directing the attendance of Mrs. Sarah R. Burbridge on the

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trial of the above-mentioned case, whenever the same should come up for trial, for examination as a witness; and that, if, at any time, she should be found unable, from any cause, to attend, notice of such inability should be given in writing to the defendant's counsel, five days before any day thereafter assigned for the trial of the said case, and that the case should not be tried, unless she should be present in Court, to be examined as a witness.

Assumpsit, to the use of Sarah R. Burbridge upon a policy of insurance on the life of Edwin Magarge, her former husband. The affidavit on which the rule was obtained set forth that on one or more occasions a subpœna had been taken out for Mrs. Burbridge and placed in the hands of a clerk or agent, that she might be produced in Court to be examined as a witness on behalf of the defendant; that the effort thus made had failed, as she was not within the jurisdiction of the Court so far as could be ascertained; that her attendance had been requested so that she might be examined, but that she had not been produced; that on one occasion the case was continued in consequence of her absence; that the defendant had thus been put to serious inconvenience and expense in subpœnaing a large number of other witnesses for the trial which could not be had by reason of her absence; that defendant could not safely go to trial without the testimony of Mrs. Burbridge; that the case turned largely on the habits and health of her late husband, the insured; that the health of the insured had been affected by habits of intemperance, which tended to shorten his life; and that these habits were believed to be well known to his wife.

H. J. McCarthy, for the rule.

Upon the facts set forth in above affidavit such a rule should be granted, otherwise defendant might be seriously injured by the absence of the use plaintiff.

Dan'l Dougherty, against the rule.

This is a most extraordinary application. The endeavor to serve the subpœna appears to have been very slight. Mrs. Burbridge has been in Court. This case has been on the trial list since 1872; has twice been in the Supreme Court, once tried before a jury, and always resulted favorably to the plaintiff. The address of Mrs. Burbridge in Washington was given counsel in 1878, but no effort was made to take her testimony by commission; nor was any application made to the Court to take her deposition. The right of trial by jury is a constitutional right and cannot be limited by the Court in this way; the authority to procure evidence of witnesses, if at liberty, is by subpœna, commission, or letters rogatory; and if confined, by habeas corpus *ad testificandum*.

Wm. A. Porter, in reply.

It may be admitted that there is no authority for this rule, but the Court is asked to establish a precedent founded upon justice. If this plaintiff be entitled to recover she should appear in Court to testify. If she remain out of the jurisdiction, a subpœna is useless, and she may change her residence from State to State so as to frustrate any other method of examination.

May 7, 1881. Rule discharged.

C. P. No. 3. April 2, 1881.

Howard Building and Loan Association v. Wisner, defendant, and the Phila. & Reading R. R. Co., garnishees.

Attachment execution—Claim of defendant for exemption under the Act of 1849—When it may be made.

Rule to show cause why claim for exemption should not be stricken off.

On October 21, 1880, plaintiff caused an attachment *sur* judgment to issue against the defendant and the Phila. and Reading Railroad Company as garnishees, which was returned on the first Monday of November, 1880, "attached as commanded and made known to garnishees, *nihil habet* as to defendant." On March 5, 1881, defendant filed his claim for the benefit of the Act of April 9, 1849, exempting property to the amount of $300 from execution, etc. On March 26, 1881, the present rule was taken.

J. C. Longstreth, for the rule.

The claim for exemption is too late.

Morris *et al. v.* Shafer, 8 WEEKLY NOTES, 480.

Geo. Junkin, contra.

C. A. V.

April 9, 1881. Rule discharged.

C. P. No. 3. April 2, 1881.

Bank v. Chaney.

Bills and notes—Suit against indorser of a check—Acceptance of note, not yet due, as collateral, does not preclude holder of a check from recovery.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on a check for $850, drawn by one Thiery to the order of defendant, and by him indorsed to plaintiff. The check was dishonored on presentment, the drawer not being in funds.

The affidavit of defence set forth that, after learning of the dishonor of the check, "defendant gave to the plaintiff, as collateral security for the payment of said check, a promissory note for $940, made by Adolph Thiery, and indorsed by

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J. P. Wilkinson's Sons, C. H. Wolf, and defendant, which said note is not yet due. That the plaintiff accepted said note as collateral security, and has not tendered the same to defendant up to the present time. All of which defendant expects to be able to prove on the trial of the cause."

R. C. Dale, for the rule, cited—
Weakly *v.* Bell, 9 W. 273.
Joseph Hanson, contra.

THE COURT. Rule absolute.

C. P. No. 3. April 2, 1881.

Seidel v. Clark.

Mortgage—Collateral security—Failure of holder of mortgage to comply with agreement made with assignor—How far this may be set up as defence by the mortgagor or terre-tenant.

Rule for judgment for want of a sufficient affidavit of defence.

Scire facias sur mortgage, by Seidel, assignee of Corles, against Clark, mortgagor, and Pullen, terre-tenant. The mortgage contained the usual clause, that a scire facias might issue on default of payment of interest for thirty days. Averment of such default was filed with the præcipe.

The terre-tenant filed an affidavit of defence made by Corles, which averred, *inter alia*, that "Deponent . . . gave his note to plaintiff, dated June, 1880, at six months, for six hundred dollars, for money to be loaned by said plaintiff to deponent, and assigned this mortgage to plaintiff as a collateral security for said note. Deponent only received on account of said amount agreed upon, the sum of about four hundred and sixty dollars, and liens against the property amounting to about one hundred and thirty dollars, now held back, which plaintiff failed to settle and discharge as agreed upon prior to the maturity of said note. Deponent, therefore, submits that the interest-money on said mortgage cannot be, and is not, in default of payment, as plaintiff has actually in her hands a sufficient amount to the credit of deponent in this agreement to meet and satisfy the interest claimed; and the whole principal debt of eight hundred dollars is not become due and justly payable as set forth in plaintiff's statement."

J. P. Klinges, for the rule.

A creditor, holding several securities for the same debt, has a right to avail himself of any one of them until his whole debt is paid.

Taylor's Appeal, 3 WEEKLY NOTES, 75.

Security transferred as an indemnity against a particular event cannot be used for any other purpose.

Shroder *v.* Hatz's Executors, 11 Wr. 528.

O. P. Cornman, contra.

THE COURT. Rule absolute.

C. P. No. 4. May 14, 1881.

Burke v. Allen.

Practice—How case improperly on trial list is to be stricken off.

Rule to strike case from the trial list.

Tull, for the rule.

Counsel opposed to the rule instructs me to say that he has not had forty-eight hours' notice of the rule. This was impossible, for the trial list has just been printed, and there was no time to wait. The case is improperly on the list.

THE COURT. We will not dispose of such applications in banc. Make your objection to the sitting Judge.

Rule withdrawn.

C. P. No. 4. May 21, 1881.

Myer v. Verner.

Docket—Records—The Court will not order the record spread upon the docket for the purpose of showing a title.

Sur rule on the prothonotary to note upon the record the dates and records of certain instruments of writing, and also the date and record of the will of Isaac Myer, as set forth in plaintiff's narr.

The docket entries were as follows:—

Sums. Covt. Ex. Sept. 26, '76. Ret. 1 Mon. Oct. 1870. Served Edward O'Donnell, terre-tenant. Nihil habet as to Chittick Verner.
Oct. 4, '76, Copy of Ground-rent deed filed.
Eo die. Narr. & pl'ff's claim filed.

Daly, for the rule.

There is nothing on the record to show title in the plaintiff.

THE COURT. I see no reason why we should annotate the docket. The real record is the narr. and the papers on file, the docket is a mere minute book.

Rule discharged.

C. P. No. 4. May 21, 1881.

In re Nathan's Estate.

Practice—Auditor's reports—Exceptions—An auditor's report should be filed, and exceptions thereto heard by the Court in the first instance.

Sur motion for leave to file an auditor's report.

The auditor having completed his report, was notified by the parties of their intention to file exceptions to his findings, whereupon he asked leave to file his report.

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W. Herbert Washington, for the motion.

It is the duty of the auditor, when his report is complete, to file it. Exceptions thereto should be heard in the first instance by the Court, and not by the auditor.

THE COURT. Motion allowed.

Orphans' Court.

April 18, 1881.

Whitaker's Estate.

Decedents' estates—Issue of devisavit vel non—It is not incumbent upon the proponents of the will to produce the subscribing witnesses for examination before the examiner if they have been already examined by the register—Executors not compelled to produce witnesses for cross-examination—Practice.

Sur rule upon executors to take testimony and close the same within sixty days, and rule upon contestants to close testimony within the same period.

The will of Mary G. Whitaker was, on July 15, 1879, duly admitted to probate by the Register after the testimony of two out of the three subscribing witnesses thereto had been taken. John G. Lyle, as heir and next of kin of decedent, afterwards appealed from the decision of the Register admitting the will to probate, on the ground that testatrix was *non compos mentis* and under undue influence at the time of the execution thereof. (See *ante*, page 106, etc.) An examiner was appointed by the Court to take testimony on the question whether a feigned issue should be granted or not. Both sides declined to take any testimony, the executors claiming that the contestants must show by competent witnesses that there were disputable and difficult matters in controversy, before the Court could sustain the appeal or grant a feigned issue; the appellant contending that the executors were bound in the first instance to call the subscribing witnesses to the will, and re-prove the whole instrument, and that if they failed to do this, then the Court was obliged, without hearing any testimony, to grant a feigned issue and send it to the Common Pleas for trial. In order to have the question decided by the Court each party took a rule upon the other to close their testimony before the examiner in sixty days.

George L. Crawford (*Abram H. Jones* and *Benjamin Harris Brewster* with him), for the contestant.

The alleged will was admitted to probate, and letters testamentary granted thereon without notice to or the knowledge of the appellant, and upon only the formal proof of two of the three subscribing witnesses to the alleged will without cross-examination, and without producing the other subscribing witness. It is our right to have all the witnesses produced before the examiner and fully examined.

George Biddle (with him *George W. Thorn* and *George W. Biddle*), for the proponents.

The register is a judge, and the admission of a will to probate is a judicial decision.

Holliday *v.* Ward, 7 Harris, 485.

The register can only appoint a register's court for the decision of any disputable or difficult matter "at the request of any person interested."

Andrade's Will, 7 Phila. 251.

When any disputable matter arises, it must appear on the face of the testimony taken in the case upon which the Court is asked to decide the disputed fact; otherwise it is impossible for a Court having jurisdiction of the cause by appeal, to "affirm, reverse, alter, or modify the decree of the register's court, and the proceeding before the register's court is *coram non judice*, and irregular."

Cozzen's Will, 11 Smith, 196.

The dispute upon a matter of fact, when it arises in a register's court, must be shown by competent evidence to be an actual dispute. It is not sufficient simply to allege that a disputed state of facts exists.

Knight's Appeal, 7 Harris, 493.
Wickersham's Appeal, 25 Smith, 334.
South's Estate, 2 WEEKLY NOTES, 212.
Naylor's Estate, 32 Leg. Int. 91.

April 30, 1881. THE COURT. It is clear that we must discharge the rule upon the executors to close testimony. Until a *prima facie* case against the will has been made out by the contestant, they may rest upon the proof before the register, whose decree admitting the will to probate stands until duly reversed. The contestant must proceed in the first instance, and we will therefore make absolute the rule upon him to close in sixty days, with leave, upon proper cause shown, to apply for an extension of time.

Nor can the executors be compelled to produce the attesting witnesses for cross-examination. After witnesses have been permitted to depart, the party calling them in chief cannot be required to bring them back again (Daniell's Ch. Pract. 922).

Whether the contestant may not compel them to attend for cross-examination without losing

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the right to impeach their general character for veracity is a question not now before us. Attesting witnesses are regarded rather as the witnesses of the Court than of the party. (Bowman *v.* Bowman, 2 M. & Rob. 501; Bootle *v.* Blundell, 19 Vesey, 494, 500). And it would seem proper that their attendance should be enforced without prejudice to any right which the contestant, to whom their cross-examination may be a matter of vital importance, might otherwise have.

The method of compelling attendance for cross-examination is pointed out in Daniell's Ch. Prac. (edition of 1865), 922; see also Ib. 891; Hook's Estate (9 WEEKLY NOTES, 320); Campbell *v.* Scougal (19 Ves. 552). Without, however, now deciding these questions, we may say, that the refusal of the attesting witnesses to attend upon request for cross-examination, would so obviously tend to discredit their testimony, that in a case at all doubtful, this circumstance alone would probably determine the Court in granting an issue, and thus compel the proponent to establish the will *de novo* before a tribunal where the proof without cross-examination would be impossible. See Gresley's Eq. Ev. *188.

Rule upon executors discharged.

Rule upon contestant made absolute with leave, etc.

Opinion by PENROSE, J.

Dissenting opinion by HANNA, P. J.

With the disposition made of the rules taken by the parties to this contest I concur, and also in the main with the views expressed by the Court, but I cannot coincide with the suggestion, that the subscribing witnesses may be requested to attend before the examiner for examination by the contestant in the first instance, and that their neglect or refusal would either tend to discredit their testimony before the register, or furnish sufficient reason to grant an issue to determine the validity of the will. If the contestant desires to call the subscribing witnesses in his behalf he must subpœna them as other witnesses, if they will not voluntarily attend. If he cannot safely make them his own witnesses, then he should wait and examine them when called by the proponents of the will. If they are not examined in support of the will, the contestant has simply met with one of the frequent disappointments to which a litigant is subjected. His opponent has not called the witnesses it was expected he relied upon. And the contestant is consequently obliged to rely upon the other testimony submitted by him in support of his demand for an issue. Should the issue be refused, it is his misfortune perhaps, but if granted, it will rarely happen that the proponents fail to produce the subscribing witnesses, when he will have every opportunity, not only to cross-examine, but to discredit their testimony. The proposed practice is contrary to the experience of the past, and unsupported by precedent or authority.

May 5, 1881.

Hook's Estate.

Act of May 6, 1844, § 2—Construction of—Legacy—Death of legatee before execution of will—Preservation of such legacy from lapse by statute—To whom it is payable.

Sur audit of the final account of the executors of the estate of Henry W. Hook, deceased.

The facts, amicably admitted upon the audit, were as follows: The decedent died in Philadelphia, without issue, in 1879, leaving a will, executed about a month before his death, whereby he bequeathed a certain legacy to Cumberland C. Hook, the son of his deceased brother. Cumberland C. Hook had died in Maryland in 1875, leaving to survive him a widow and four minor children. The question was as to whom the legacy was payable.

Wm. Herbert Washington (with whom was *Wm. W. Wiltbank*), for the guardian of the minor children of Cumberland C. Hook, deceased.

The legacy is not due to the representative of Cumberland C. Hook's estate, for at the time of his death he had no possible interest in it. But the legacy to him, being a nephew, was preserved to his issue by the Act of May 6, 1844, § 2 (Purd. Dig. 1476); and the fact of his having died before the execution of the will does not impair the preserving power of the Act

Minter's Appeal, 4 Wr. 111.

The legacy, therefore, is payable to the guardian of the children, and not to the representatives of their father's estate.

Daniel M. Fox (*Henry K. Fox* with him), for the executors, submitted the matter to the judgment of the Court.

THE COURT. Under these facts, and the Act of 6th of May, 1844, as construed by Minter's Appeal, the legacy will be awarded to the guardian of the minor children of Cumberland C. Hook, deceased, and payment made to her upon her compliance with the law relating to foreign guardians.

Opinion by HANNA, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JUNE 16, 1881.* [No. 9.

Supreme Court.

May, '81, 190. May 5, 1881.

Heidelbaugh v. Thomas.

Act of March 14, 1876 (P. L. 7), authorising the Court to order judgments which have been paid to be marked satisfied of record—Who may apply for such satisfaction—Judgment creditors of the defendant whose liens are subsequent to that of the judgment alleged to be paid, cannot apply to have it marked satisfied.

The Act of March 14, 1876, sect. 1 (P. L. 7), provides that upon application of "the defendant or defendants in a judgment, or his, her, or their legal representatives, or other person or persons concerned in interest therein" setting forth that the same has been fully paid with costs, the Court may, if it appears to their satisfaction that such is the case, direct the prothonotary to mark such judgment satisfied of record:

Held, that subsequent judgment creditors of the defendant are not "persons concerned in interest therein" within the meaning of the Act; and have no standing to make such application.

Per STERRETT, J. "It may be fairly inferred that the persons described as concerned in interest therein are those only whose relation to the judgment is similar to that of the defendant, a relation of liability either in person or estate."

Semble, that a terre-tenant of land bound by the judgment, or sureties of defendant who had entered bail for stay of execution under the judgment, would be within the purview of the Act.

Error to the Common Pleas of Lancaster County.

Milton Heidelbaugh held to his use a judgment in the Common Pleas of Lancaster County against Arthur Thomas, which was revived by amicable sci. fa. to January Term, 1877, No. 174. On August 23, 1879, George M. Steinman & Co., judgment creditors of Arthur Thomas, whose judgments were subsequent to that of Heidelbaugh, presented to the Court an affidavit and petition, setting forth that the above judgment of Heidelbaugh had been fully paid, with interest and costs, and obtained a rule to show cause why the same should not be marked satisfied of record by the prothonotary under the provisions of the Act of March 14, 1876, § 1 (P. L. 7). This Act is as follows:—

"That in all cases where a judgment has been or may hereafter be entered in any court of record in this Commonwealth, whether originally or by transfer from any other Court, the Court having jurisdiction shall, upon application by the defendant or defendants in the said judgment, or of his, her, or their legal representatives, *or other person or persons concerned in interest therein*, setting forth under oath that the same, with all legal costs accrued thereon has been fully paid, grant a rule on the plaintiff or plaintiffs to show cause why the said judgment should not be marked satisfied of record at his, her, or their costs; and upon the hearing of such rule, should it appear to the satisfaction of the Court that said judgment has been fully paid, as set forth in the application of the defendants, the said Court shall then direct the prothonotary to mark such judgment satisfied of record, and shall also enter a decree requiring the plaintiff or plaintiffs to pay all costs incurred in the premises."

The defendant, Thomas, had previously obtained a similar rule, under which depositions had been taken, but before hearing he withdrew his petition, and at his request filed in writing, the Court discharged the said rule. By agreement of counsel filed, the depositions taken under the Thomas rule were considered as if taken under the Steinman rule, and the case was submitted to the Court upon the record and depositions without argument. On April 3, 1880, the Court (LIVINGSTON, P. J.) filed an opinion and entered the following decree: "It, therefore, appearing to the satisfaction of the Court, that said judgment has been fully paid, as set forth in the petition or application presented to the Court, the Court doth now, April 3, 1880, order and direct the prothonotary to mark said judgment satisfied of record; and doth further order, direct, and decree, that Milton Heidelbaugh, the plaintiff, shall pay all costs incurred in and by these proceedings on this application to have satisfaction entered of record."

Heidelbaugh thereupon took this writ, assigning for error the granting of the rule to show cause at the instance of Steinman & Co., and the said decree making the rule absolute.

Philip D. Baker, for the plaintiff in error.

Subsequent judgment creditors are not "persons concerned in interest" within the purview of the Act of March 14, 1876. So long as a judgment stands against a defendant of record, his subsequent judgment creditors cannot attack it in this summary and collateral proceeding.

There is no evidence of collusion or conspiracy between Thomas and Heidelbaugh to defraud Steinman & Co. When the fund comes in for distribution then these subsequent judgment creditors will have their status, and an opportunity to show, if they can, that our prior judgment has been paid.

Appeal of Second Nat. Bank of Titusville, 4 Nor. 531.
Thompson's Appeal, 7 Sm. 178.
Dougherty's Estate, 9 W. & S. 196.

H. M. North (with whom was *Andrew J. Steinman*), for Steinman & Co.

The depositions showed to the satisfaction of

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the Court that Heidelbaugh's judgment had been actually paid in full. If that judgment stands and takes the fund produced by a sale of Thomas's real estate we will get nothing. Are we not therefore "concerned in interest therein?" If not, what persons are referred to in the Act under that designation?

If the prior judgment has been in fact paid, it should not be kept alive, by the consent of the defendant, to defeat the collection of an acknowledged debt next in priority of lien. Even before the Act of 1876, the creditors might, if the defendant refused to act, use his name to apply to have a judgment opened, and an issue granted, where they allege it is kept unsatisfied of record to defraud them.

Lewis *v.* Rogers, 4 Harris, 21.
Clark *v.* Douglass, 12 Sm. 408.
Claason's Appeal, 10 Harris, 365.
Knabb's Appeal, 10 Barr, 186.

May 23, 1881. THE COURT. The proceedings which resulted in the order of Court, directing the judgment of plaintiff in error against Arthur Thomas to be marked "satisfied of record," were based on the petition of George M. Steinman & Co., subsequent judgment creditors of said Thomas, presented under the Act of March 14, 1876; and the only question is, whether, under the provisions of the Act, the petitioners had a right to commence and prosecute such proceedings.

That Act provides that any court of record, having jurisdiction of a judgment entered therein originally or by transfer from any other Court, "shall, upon application by the defendant or defendants in the said judgment, or his or their representatives, or other person or persons concerned in interest therein," setting forth that the same has been fully paid, grant a rule to show cause why the judgment should not be marked satisfied of record; and, if it shall appear to the satisfaction of the Court that the judgment has been fully paid, "as set forth in the application of the defendant or defendants, the Court shall then direct the prothonotary to mark such judgment satisfied of record," etc. (P. L. 7.) If within the true intent and meaning of the Act, the petitioners are "persons concerned in interest" in the judgment, the application was rightly entertained by the Court; and inasmuch as the evidence was sufficient to justify the order of satisfaction, it would follow that the same was properly made.

But we are of opinion that the class of persons described as "concerned in interest" in the judgment, does not include subsequent judgment creditors of the defendant, and therefore the petitioners had no standing in Court.

The summary power, conferred by the Act, is in derogation of the common law, and virtually a denial of the right of trial of jury. It should, therefore, be strictly construed, as was held in Gifford's Appeal (9 WEEKLY NOTES, 246). Perhaps, in an enlarged sense of the phrase, it may be said that a subsequent judgment creditor is "concerned in interest" in prior judgments against his debtor, in that the value of his security may be more or less affected by such antecedent liens, but his interest is not of the direct nature that is contemplated by the Act. It differs from that of the defendant in the judgment or his legal representatives, who are expressly named in the Act. The interest of a terre-tenant of land bound by the judgment, or of bail for stay of execution, is also different from that of a subsequent judgment creditor. The latter is not responsible, either in person or estate, for the payment of the judgment, but the others are; and, in that respect, their position is akin to that of the defendant. It may be fairly inferred that the persons described as "concerned in interest therein," are those only whose relation to the judgment is similar to that of the defendant—a relation of liability either in person or estate. By limiting the operation of the Act to the defendant, his legal representatives, and others who are personally responsible for the judgment, or whose property is exposed to execution in satisfaction thereof, full force and effect is given to the language of the statute, and the legislative intent will be carried out. If the Legislature had intended to include creditors they would have said so in express terms.

The phrase "persons concerned in interest therein," appears to have been borrowed from the 14th section of the original Act relating to the satisfaction of judgments, passed in 1791. (Purdon, 824, pl. 26.) It has never been claimed that subsequent judgment creditors are within the provisions of that Act. Nor is there any reason why they should be considered as included in the Act of 1876. Ample provision for their protection exists in proceedings for distribution. All questions touching the payment of prior judgments may be there raised and determined.

The order and decree of the Court of Common Pleas is reversed, and the petition of George M. Steinman & Co. is dismissed, with costs.

Opinion by STERRETT, J.

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Jan. '81, 73. April 1, 1881.

Wirebach's Executor v. Bank of Easton.

Bills and notes—Lunatic—Accommodation indorsement by—When lunatic not liable—Knowledge of the lunacy on the part of a bona fide holder—Jury—Challenges propter affectum—Challenges to the favor—Triors—Errors and appeals.

A lunatic who is an accommodation indorser without consideration upon a promissory note, and who has derived no advantage from his indorsement, either to himself or his estate, is not liable to a *bona fide* holder, although the latter had no knowledge of the lunacy.

The fact that a person drawn as a juror is the second cousin of the husband of a daughter and legatee of defendant's decedent constitutes good ground for principal challenge by the plaintiff. But if the plaintiff challenge said juror to the favor, and the question be by agreement of the parties submitted to the Court in place of triors, its decision rests upon the conscience and discretion of the Court, and is not reviewable.

Error to the Common Pleas of Northampton County.

Assumpsit, by the First National Bank of Easton against Uranus Wirebach, executor of Jacob C. Wirebach, upon a promissory note drawn by Richard Christman to the order of Jacob C. Wirebach, and indorsed by the latter. Plea, Non assumpsit.

When the cause was called for trial, before MEYERS, P. J., Daniel E. Richards being drawn as a juror was challenged for favor by the plaintiff. Richards, being sworn on his *voir dire*, testified that he was the second cousin of the husband of a daughter and legatee of Jacob C. Wirebach. The Court sustained the challenge. Exception by defendant.

Upon the trial the following facts appeared: In January, 1876, Jacob C. Wirebach indorsed a note of $4000 jointly with Joseph Richards and Charles Christman for the accommodation of W. U. Stocker & Co., a firm doing business in South Easton, which note was discounted by the First National Bank of Easton. Besides this note of $4000, the bank held at the time ten other notes of W. U. Stocker & Co., upon which Wirebach was not an indorser, but upon which Richards and Christman were indorsers, and these notes were carried along from time to time, in different amounts, and maturing at different dates. In the beginning of December, 1876, after one of the notes fell due and went to protest, Charles Christman had an interview with Forman, the president of the bank. It was then arranged that the said notes, eleven in number, should be replaced by one note, and that Christman should procure Jacob C. Wirebach to become indorser on the said note, and that Joseph Richards and Charles Christman should be the drawers. W. U. Stocker & Co. were not to be parties to the new note.

In pursuance of this agreement, Christman, on December 7, 1876, met Wirebach by appointment, and went with him to the bank, where, in the presence of Forman, who had prepared a calculation of the total amount of the eleven notes, the note in suit was duly executed for $10,075.

The defendant set up that both before and at the time of the execution of the original note and the renewal, Wirebach, by reason of several attacks of paralysis, was unsound in mind, and incapable of contracting, and that the bargain was unconscionable, and had been obtained by undue influence and fraud. The testimony as to the insanity of Wirebach was conflicting, but there was no direct testimony on the part of the defendant that the officers of the bank knew of Wirebach's condition except in so far as they might have inferred it from his actions while the transaction was being carried on.

The defendant presented, *inter alia*, the following points: "If the jury believe that at the time of the execution of the indorsement in suit Jacob C. Wirebach was a man of unsound mind, and by reason of mental unsoundness was unfit to transact business or make a contract, the verdict must be for the defendant." *Refused.*

"If the jury believe that at the time of the execution of the indorsement in suit Jacob C. Wirebach was a man of unsound mind, and by reason of mental unsoundness was unfit to transact business or make a contract, and such mental unsoundness was not only easily detected, but was plainly apparent from his appearance and conversation, and that the president of the bank saw the decedent at and immediately before the time of the execution of the indorsement, and could, by the exercise of due diligence, have ascertained his mental condition, the verdict must be for the defendant."

Answer. "If the jury find, from all the evidence in the case, that the mental unsoundness of Wirebach, referred to in the point, was plainly apparent from his appearance and conversation, to all persons with whom he came in contact, and by them easily detected, then, subject to this qualification, the point is affirmed. If, however, the jury find that Wirebach's mental unsoundness was not plainly apparent from his appearance and conversation, or was not apparent at all to every person with whom he came in contact, then the president of the bank was under no obligation at the time of the indorsement of the note by Wirebach to exercise any diligence for the purpose of ascertaining his mental condition at that time, unless the jury find that Wirebach's mental unsoundness was in fact from

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his appearance and conversation plainly apparent to the president of the bank."

The Court charged the jury, *inter alia*, as follows: "To entitle the defendant to a verdict in this case he must establish by satisfactory evidence that Wirebach was of unsound mind on the 7th of December, 1876, and that the bank had notice or knowledge of such unsoundness of mind. . . . We therefore charge you, as the law of this case, that it is not sufficient for the defendant to relieve himself from the responsibility of paying the note by merely proving that at the time when the note was indorsed by Wirebach he was of unsound mind, but he must further prove that the bank had notice or knowledge of such unsoundness."

The Court further charged that there was no evidence of undue influence or fraud having been exercised upon the defendant. Verdict and judgment for the plaintiff.

The defendant took this writ, assigning for error, *inter alia*, the sustaining the challenge to the juror, the answers to the several points of defendant cited, and those portions of the charge of the Court above quoted.

Edward J. Fox (*W. S. Kirkpatrick* with him), for the plaintiff in error.

The Court should have affirmed the first point. The old proposition that "a man cannot be permitted to stultify himself" by pleading his insanity, has long since been exploded.

Mitchell *v.* Kingman, 5 Pick. 431.
Taylor *v.* Dudley, 5 Dana, 310.
Thornton *v.* Appleton, 29 Maine, 298.
Webster *v.* Woodford, 3 Day, 100.
Grant *v.* Thompson, 4 Conn. 204.
Morris *v.* Clay, 8 Jones, 216.
Lazell *v.* Pinnick & Matson, 1 Tyler, 247.
Seaver *v.* Phelps, 11 Pick. 304.
Bank *v.* Moore, 28 Sm. 407.

The facts here are totally different from those cases where the lunatic has been held liable, for the basis of those decisions has invariably been that either the lunatic or his estate has derived benefit and full consideration from the transaction. Here Wirebach was purely an accommodation indorser without any consideration whatever, and this is an adequate defence to a note drawn by one whose mind is gone.

Moore *v.* Hershey, 7 WEEKLY NOTES, 478.
Snyder *v.* Laubach, 7 WEEKLY NOTES, 466.

The challenge of the juror was practically for principal cause. The triors being withdrawn, the question was left to the Court to decide, and the bare fact of such remote relationship by marriage only, was not sufficient to sustain the challenge for favor.

W. W. Schuyler (*William Mutchler* with him), for the defendant in error.

The true rule governing cases similar to this has but recently been laid down in Moore *v.* Hershey, *supra*, viz., That whilst a *bona fide* purchaser is affected by the status of the maker of a note, he may recover against a lunatic, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration. This is by no means a new rule, but has the support of many authorities.

La Rue *v.* Gilkyson, 4 Barr, 375.
Beals *v.* See, 10 Barr, 56.
Bank *v.* Moore, 28 Sm. 407.
Snyder *v.* Laubach, *supra*.
Molton *v.* Camroux, 2 Exch. 487.
Elliot *v.* Ince, 7 DeG. M. & G. 487.
Wilder *v.* Weakley, 34 Ind. 181.
Benjamin on Sales, § 29, 1 Am. Ed.

The juror was properly challenged for favor.

Rank *v.* Shewey, 4 W. 218.
Harrisburg Bank *v.* Forster, 8 W. 304.

May 2, 1881. THE COURT. Where a person fairly and in good faith, sells property or loans money to a lunatic who appears to be sane and is not known by the vendor or lender to be insane, and who has not been found to be a lunatic by judicial proceedings, and the lunatic receives and uses the same, whereby the contract becomes so far executed that the parties cannot be placed in *statu quo*, such a contract cannot afterwards be set aside, or payment refused by the lunatic or his representatives (La Rue *v.* Gilkyson, 4 Barr, 375; Beals *v.* See, 10 Barr, 56; Lancaster County Bank *v.* Moore, 28 P. F. S. 407; Wilder *v.* Weakley, 34 Ind. 181; Elliott *v.* Ince, 7 DeG. M. & G. 475, 487). In Elliott *v.* Ince it is remarked that "the result of the authorities seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." Chief Justice GIBSON based the lunatic's liability in such cases on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it; he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes.

There can be no binding executory agreement where one of the parties is bereft of reason: a capacity to contract is absolutely necessary. An insane person is incapable of committing a crime or making a contract, yet it is common to speak of his torts and his contracts, and on many of them he is liable in a civil action. One who knowingly sells goods to an insane person, necessary for his use, may recover their value, on the same principle that an infant is liable for necessaries he purchases. His liability for necessaries and suitable articles, is deemed rather a benefit than a disadvantage to him.

It is noticeable that in this Commonwealth, where the lunatic has been held liable, there was neither imposition nor want of full consideration for the amount of liability, and when not for

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necessaries, the opposite party had no knowledge of the lunacy. Thus in Lancaster County Bank *v.* Moore, *supra*, stress was put on the fact that the bank had no knowledge of Moore's insanity, and in good faith loaned the money which was placed to his credit and checked out by him. It was held to be within the doctrine of Beals *v.* See, that the contract was executed so far as the consideration was concerned and that the rule which prevents insane persons obtaining the property of innocent parties and retaining both property and price, required payment of the note. Snyder *v.* Laubach (7 WEEKLY NOTES, 464) is where York's indorsement of the note was merely a renewal of an indorsement made when he was unquestionably of sound mind; and it was held that he was clearly liable on the note of which the note in suit was a renewal, there was full consideration and the case was within the decision in Lancaster County Bank *v.* Moore. The consideration was a debt for the amount of the renewal note. So in Kneedler's Appeal (37 Leg. Intell. 504) a judgment entered on a bond by virtue of a warrant of attorney was allowed to stand because the lunatic, acting by advice of counsel, received the full consideration which he prudently applied in payment of his undisputed debts, and the plaintiff had no knowledge of the insanity when the money was loaned. Of like purport are every one of the cases decided elsewhere, which are cited and relied on by the defendant in error. In most if not all cases where an insane person has been held answerable, as if his contract were binding, he received and enjoyed an actual benefit from the contract.

The question now presented is: Will an action lie on the accommodation indorsement of a promissory note by a lunatic? If the determination of this was not made, it was very clearly indicated in Moore *v.* Hershey (9 Nor. 196). There the action was by an indorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane, but the offer was rejected, the Court below ruling that as the note in suit was commercial paper and the plaintiff a holder for value, the consideration could not be inquired into. This was held to be error. PAXSON, J., said, "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. . . The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration."

"There must be a limit to the civil responsibility of persons of unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

If the holder could recover against one who was insane when he indorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or indorses a note may by his representative plead his infancy as a complete defence. In like manner a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder who may have given value to his indorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration. Then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. Nor would a nominal sum be sufficient. It is said that the law protects those who cannot protect themselves, but it would be sorry protection, if one holding a valid note against a helpless man for four thousand dollars, could get it renewed for ten thousand dollars, and recover the full amount of the renewal note. The consideration must be fair and conscionable, and then it is proper. When it is a pre-existing debt, or money loaned, its measure is certain, and the insane man is liable for no more than the amount of such debt or loan. The holder of a madman's note stands in no better position than the payee. An accommodation maker or indorser, in fact, is a surety for the principal debtor, and when he is an infant or an insane person, he or his representative may defend as in other forms of contract. We are not persuaded that commercial or public interests require an adjudication that a lunatic who signs a contract as surety, or as accommodation maker or endorser, is liable for the debt of another man.

This action is upon a note for $10,075.92, which was given to the bank to take up notes of Stocker & Co., which were indorsed by Richards and Christman. J. C. Wirebach was accommodation indorser, and this was known to the bank. He was an indorser on one of the former notes for $4000. It is alleged by the defence that Wirebach was incapable of making a contract by reason of insanity, not only at the date of the note in suit, but also at the date of said former note. If this fact were established, the verdict should have been for defendant. And if he were sane when he indorsed the prior note, and insane

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at the time he indorsed the note in suit, he is not liable for the one in suit, as it is not a mere renewal note. The learned Judge of the Common Pleas instructed the jury that "to entitle the defendant to a verdict in this case, he must establish by satisfactory evidence that Wirebach was of unsound mind on the 7th of December, 1876, and that the bank had notice or knowledge of such unsoundness." We are of opinion that it was error to rule that the defence failed unless the bank had such notice or knowledge. This ruling pervaded the charge and answers to points of defendant; there is no occasion for special remark on each of the first nine specifications of error. We are not satisfied that the Court erred in charging that there was no evidence of fraud, misrepresentation, or undue influence on the part of the bank, or of fraudulent practices by Christman on Wirebach to authorize submission to these questions. Fraud is not to be presumed from the mere fact of indorsement, even by a man feeble in mind and body. It is common for one friend, though possessed of strong mind, to ruin himself financially by indorsing for another, and while it is very imprudent if not rash, it has never been considered unconscionable, except when procured by some artifice or fraud, of which there must be some evidence. Were the indorser weak minded, less evidence would be required to establish the fraud.

Daniel E. Richards, one of the jurors, was challenged to the favor. It appeared that he was second cousin to the husband of a daughter and legatee of J. C. Wirebach, deceased. This was cause of principal challenge, which may be to a juror of the blood or kindred of either party within the ninth degree (3 Black. Com. 363). "And how far remote soever he is of kindred, yet the challenge is good. . . Affinity or alliance by marriage is a principal challenge, and equivalent to consanguinity where it is between either of the parties, as if the plaintiff or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintiff or defendant, and the same continues or issue be had. But if the son of the juror hath married the daughter of the plaintiff, this is no principal challenge, but to the favor; because it is not between the parties. . . Challenge concluding to the favor is, when either party cannot take any principal challenge, but sheweth cause of favor, which must be left to the conscience and discretion of the triors upon hearing their evidence, to find him favorable or not favorable." (Coke upon Litt. 157, *b*.) The challenge was expressly to the favor, and the fact submitted to the Court instead of the triors. This mode of determining the fact was assented to by both parties, neither objected. It was a question of fact to be decided on the conscience and discretion of the Court, acting in place of triors, and the decision is not reviewable. Cummings *v.* Gann (2 P. F. S. 484) is not in point, for in that case the jurors were challenged *propter affectum*.*

None of the assignments relative to the offers of testimony by the defendant are sustained. One is to the effect that the defendant was prevented from proving by Mr. Scott that Wirebach was a shrewd, intelligent business man prior to 1875. Why the Court overruled the direct question is not stated, but the witness was properly examined, and testified that Wirebach's manner of conversation was good, that he was a fluent talker, intelligent, had a good memory, and was an intelligent business man. All of the witnesses were allowed to testify, so far as they knew, as to his appearance, manner, conversation, and acts, before and after the commencement of his alleged unsoundness of mind. Nor do we think that the insolvency of Richards and Christman, or the value of Wirebach's property at the date of the indorsement, or that Wirebach once took an interest in, and was well informed on political matters, were facts so strictly pertinent that it was error to reject them. The admissibility of such facts depends much on other testimony in the cause, and most generally safely rests in the judgment of the Court where the cause is tried.

The learned Judge seems to have carefully considered his rulings, and to have fairly submitted to the jury to determine as to the alleged insanity of Wirebach at the time of the indorsement. But for the single error relative to notice to, or knowledge by the bank of the insanity of Wirebach, the case must go back for another trial.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

July '80, 111. February 18, 1881.

Waters' Appeal.

Official bonds—Terms of, in excess of statutory requirements—When not invalid.

The statute creating the office of Receiver of Taxes for the Twenty-third Ward of the city of Philadelphia provides *inter alia*, that said Ward Receiver shall give bond to the city with good and sufficient security, but makes no specific provisions as to the character or terms of said bond.

A Receiver was elected for three successive terms, for each of which he gave bonds with sureties, upon which

* Challenges *propter affectum* are said by the authorities to include principal challenges and challenges to the favor. 3 Bl. Com. 363; Co. Litt. 157, *b*. The term, however, seems to be employed in the above opinion to designate principal challenges only.

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judgments were duly entered up by the city. By these bonds the Receiver and his sureties bound themselves to be liable for any dereliction of duty on the part of the Receiver for the official term for which he was elected or for any term or terms for which he might thereafter be re-elected to said office, so long as he continued in said office during said original or any subsequent term or terms.

The Receiver defaulted during his third term, and his sureties for that term, having paid the judgment, claimed to be subrogated to the rights of the city, and sold their principal's property. In a contest for the fund realized by the sale between the city, who claimed by virtue of their judgment on the bond given for the second term, and the sureties:

Held, that no particular form of bond being prescribed by the statute creating the office, the provision binding the principal and sureties for subsequent terms was valid, and that the judgment of the city being a first lien, it was entitled to the fund.

Appeal from the Common Pleas No. 2, of Philadelphia County.

Appeal of Charles Waters and George M. Shallcross from a decree sustaining the exceptions filed by the city of Philadelphia to the report of an auditor appointed to distribute a fund arising from a sheriff's sale of the real estate of Benjamin Shallcross upon an execution issued by Waters and Geo. M. Shallcross on a judgment obtained by the city of Philadelphia against Benjamin Shallcross.

From the report of the auditor the following facts appeared: Benjamin Shallcross was duly appointed Receiver of Taxes for the Twenty-third Ward of the city of Philadelphia for three successive terms, to wit: First, from January 27, 1873, to January 24, 1875. Second, from January 25, 1875, to January 28, 1877. Third, from January 29, 1877, to January 27, 1879. For the first term he gave his official bond in the sum of $10,000, with Charles Waters and George M. Shallcross as sureties. Judgment was entered on said bond, but its lien long since expired. For the second, a bond in like amount, with Robert W. Shallcross and Peter Castor as sureties, upon which judgment was entered March 10, 1875. And for the third term a bond in like amount, with Charles Waters and George M. Shallcross as sureties, on which judgment was entered February 23, 1877; this last judgment being the one under which these proceedings were taken. On or about February 19, 1878, during his third term of office, he became a defaulter in an amount, as far as could be ascertained, of $20,000. The evidence did not establish that he was a defaulter other than during his third term. On April 21, 1879, the City Solicitor filed a "suggestion and proofs of default" according to the condition of the bond for the third term, upon which judgment had been entered up and issued execution. Subsequently Waters and Shallcross, sureties upon the bond, paid the amount of the judgment and costs, and although they took no formal assignment of the judgment, claimed to be subrogated to all the rights of the city by operation of law, and accordingly issued execution, and sold the property of Benjamin Shallcross for $12,000, which sum, less a prior undisputed judgment, formed the fund for distribution. It was claimed on the one hand by the sureties, and on the other by the city of Philadelphia, by virtue of the judgment duly entered up upon the second bond, the basis of its claim being the following clause contained in all the bonds:—

" . . . . that if the above bounden Benjamin Shallcross shall and will faithfully perform the duties of the office of Receiver of Taxes, Twenty-third Ward, to which he was appointed by the Receiver of Taxes of Philadelphia, on the twenty-seventh day of January, 1877, as the same are defined by law, or the ordinances of Councils of Philadelphia, or otherwise, or as the same may be hereafter defined, for the official term for which he was elected as aforesaid, or for any term or terms for which he may hereafter be re-elected to said office, so long as he continues in said office during said original or any subsequent term or terms, then this obligation to be void, otherwise to remain in full force and virtue."

The Act of Assembly creating the office, provides no special form of bond other than that it should be given with good and sufficient security "for the faithful collecting and paying over to the general Receiver of Taxes, all moneys received, accompanied by a list of the parties so paying, the amount of valuation with the amount of city and State taxes so paid opposite to each name, once in every week during the current year for which said tax shall have been levied."

The auditor (Silas W. Pettit, Esq.), was of opinion, *first*, that the sureties had a right to be subrogated to all the rights of the city, although they took no formal assignment of the judgment, and *secondly*, that although the cases were conflicting, the weight of authority was in favor of confining official bonds to the requirements of the statute creating them, and as the provision in the bond for the second term making the sureties liable for defaults in subsequent terms, was in excess of the statutory requirements, that the bond and the judgment in favor of the city entered under it were invalid as regards a default occurring in a subsequent term of office. He therefore awarded the fund to the sureties. The city filed exceptions to this report on the ground, *inter alia*, that the auditor erred in awarding the fund as above. The Court sustained the exceptions, and awarded the fund to the city of Philadelphia. The sureties took this appeal, assigning for error the decree of the Court sustaining the exceptions *ut supra*.

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Lewis Stover, for the appellants.

The liability imposed upon the obligors in this bond is more onerous than the statute required. A statutory bond not drawn in conformity with the statute, is wholly void, and although the valid portions of a bond may be separated from the invalid, if the city recover in the present bond, it must be upon a condition unauthorized and void.

U. S. *v.* Morgan, 3 W. C. C. R. 10.
Com'th *v.* Lumb, 1 W. & S. 261.
U. S. *v.* Brown, Gilpin, 155.
Armstrong *v.* U. S., Pet. C. C. R. 46.

Where a bond is given for the faithful performance of the duties of an office, the term of which is clearly limited in time, the bond will be limited to the term of the office, notwithstanding such expressions in the bond as, "so long as he shall continue in office," or "for present and subsequent times," etc.

Lord Arlington *v.* Merrick, 2 Saunders, 411.
Liverpool W. Co. *v.* Harpley, 6 East, 507.
Loan Co. *v.* O. F. Hall, 12 Wr. 448.
Com'th *v.* West, 1 R. 29.
Com'th *v.* Baynton, 4 Dal. 282.
Moore *v.* Potter, 12 A. L. R. 764.

Where an officer has been reappointed and qualifies by giving bond, the new bond supersedes the old one, and all liability on it ceases.

U. S. *v.* Kirkpatrick, 9 Wheaton, 720.
U. S. *v.* Eckford, 1 Howard, 250.
Sparks *v.* Farmers' Bank, 9 A. L. R. 365.
Com'th *v.* West, 1 R. 31–33.
U. S. *v.* Wardwell, 5 Mason, 82.
U. S. *v.* Maurice, 2 Brock, 96.

C. E. Morgan, Assistant City Solicitor, and *W. N. West*, City Solicitor, for the appellees.

Where a bond is voluntary, and the intention to become bound in a manner or for a period in excess of the statutory requirements is plain and unmistakable, the obligation will be enforced to the full extent of its terms against both principal and surety. Nothing less than a positive statutory prohibition will relieve either of said obligors therefrom.

Chelmsford Co. *v.* Demarest, 7 Gray, 4.
Hassell *v.* Long, 2 M. & S. 363.
Dover *v.* Twombly, 42 N. H. 67.
Hoboken *v.* Harrison, 1 Vroom, 79.
Angero *v.* Keen, 1 Meeson & Welsby, 390.
Bank *v.* Cresson, 12 S. & R. 306.
Bank *v.* Boyer, 16 S. & R. 50.
Wolverton *v.* Commonwealth, 7 S. & R. 278.
Shrunk *v.* Miller, 5 Barr, 253.
Commonwealth *v.* West, 1 R. 29.
M. & M. Savings Fund Association *v.* Odd. F. H. Association, 12 Wr. 446.

Armstrong *et al. v.* U. S., 1 Peters C. C. 46, cited by the auditor as conclusive in favor of the appellants, is overruled by U. S. *v.* Hodson, 10 Wallace, 395.

February 28, 1881. THE COURT. The condition of the bond on which the judgment of March 10, 1875, was entered, and which was the prior lien on the property of the principal, the proceeds of which were before the Court for distribution, certainly included by its words not only the official term for which that bond was given, but also any term or terms for which he might thereafter be elected. The statute prescribed no form of bond. There certainly was nothing unlawful in this condition. We think, therefore, the decree below entirely right.

Decree affirmed, and appeal dismissed at the costs of the appellants.

PER CURIAM.

Jan. '81, 14. February 21 & 22, 1881.

City of Philadelphia v. Linnard.

Errors and appeals—What subject of—Referees—Acts of April 22, 1874, and May 14, 1874—Measure of damages—Eminent domain—Estoppel—City of Philadelphia—Widening of Chestnut Street—Act of April 28, 1870.

The Courts of Common Pleas have no jurisdiction to pass upon exceptions filed to the report of a referee under the Act of May 14, 1874. Such report can only be reviewed directly by the Supreme Court upon a writ of error taken to the referee's report when filed.

The findings of a referee upon a question of fact are as conclusive as the verdict of a jury.

The owner of premises on the south side of Chestnut Street, in the city of Philadelphia, in making alterations, was compelled, under the provisions of the Act of April 28, 1870, to recede five feet from the former building line. The adjoining buildings not being altered, remained upon the old line, thus placing the altered building in a recess:

Held, that the measure of damages was the difference between the market value of the property as it stood before the alteration, and its market value as affected by the alteration, and that inconvenience to occupants of the property caused by the recession of the front, and the difficulty of procuring tenants, are both to be considered as elements of damage; but that if the building as set back be of greater value than the building as it stood upon the old line, no damages are recoverable:

Held further, that the damage is to be estimated as of the date when the injury was complete and compensation was due:

Held further, that in determining the market value of the property after the recession, the possibility that the adjoining houses would be set back at some future period should be considered as an element of the present value.

The fact that the owner of a house on the south side of Chestnut Street, in the city of Philadelphia, voluntarily tears down the old front for the purpose of erecting a new front, with the knowledge that under the Act of April 28, 1870, he must recede five feet from the old building line, does not deprive such owner of his right to damages for the land he is thus deprived of.

Newville Road Case, 8 Watts, 172, followed. P. & V. C. R. R. Co. *v.* Rose, 24 Sm. 362, and Watson *v.* R. R. Co., 1 Wr. 469, distinguished.

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Error to the Common Pleas No. 1, of Philadelphia County.

Emily L. Linnard appealed from an award of a jury appointed by the Court of Quarter Sessions of Philadelphia County to view premises No. 1312 Chestnut Street, in the city of Philadelphia, and to assess the damages occasioned to her as the owner of these premises by reason of her being compelled to set back the front wall of the same five feet to the new south line of Chestnut Street, as established by the Act of April 28, 1870. This Act provides, *inter alia*, as follows:—

"The south line of Chestnut Street, between the rivers Delaware and Schuylkill, shall be at the distance of 539 feet southward of the south side of Market Street; *provided*, that this Act shall not interfere with any buildings now erected on the south side of Chestnut Street."

The case was submitted by the parties to C. Stuart Patterson, Esq., as referee, under the provisions of the Act of May 14, 1874, who found, in substance, as follows: Mrs. Linnard, in 1875, contracted with a builder to tear down the front building then on her lot, and rebuild a four-story brick building on the old line of Chestnut Street, but the city authorities interfering, she was obliged to recede five feet from the old line, and to erect her new front upon the line as established by the Act of April 28, 1870. The properties adjoining the premises of Mrs. Linnard, both upon the east and west, are still out upon the old line of the street, so that the plaintiff's property is in a recess of five feet between these buildings. Neither the plaintiff nor the city can, under existing legislation, compel the owners to pull these buildings down and to retire to the new line, and there is no possible way of determining when they will voluntarily conform to the new line, or when fire or other accident will compel them to rebuild.

After an elaborate review of the authorities, the referee reported "that the compensation to be awarded to the plaintiff was the pecuniary equivalent of the diminution in value of premises No. 1312 Chestnut Street directly and necessarily resulting from the appropriation to public uses of the ground taken, also considering as elements of damage the inconvenience to occupants of the property caused by the recession of its front between the adjoining houses, and the consequent difficulty of procuring constant tenants, but not regarding the conjectural appreciation in value by reason of a possible recession of either or both the adjoining buildings at some indefinite time in the future.

"That it also followed that the diminution in value, thus defined, must be determined in amount by the opinion of competent witnesses, and not by a capitalization of the rental for any given time, because the rent of a property depends upon conditions which necessarily fluctuate from time to time, and which cannot be predicted with even approximate accuracy."

Applying these principles, therefore, to the testimony in the case, the referee awarded to the plaintiff as her damages $7500, with interest, and entered judgment accordingly. Exceptions were filed to this report.

When the cause came on to be heard in the Court of Common Pleas No. 1, upon said exceptions, the Court, after hearing argument on the question of its jurisdiction, made the following minute:—

"June 21st, 1880. The Court declined to hear the exceptions in this case, for the reason that the Supreme Court having taken jurisdiction in another case upon an appeal from the decision of a referee to the Supreme Court, we hold that such action is binding upon us, and for this reason decline to entertain the question raised by the exceptions."

The exceptions were then considered by the referee, and discharged by him. The city of Philadelphia thereupon took this writ, assigning for error: 1st. That the referee erred in finding "that the compensation to be awarded to the plaintiff is the pecuniary equivalent of the diminution in value of No. 1312 Chestnut Street, directly and necessarily resulting from the appropriation to public uses of the ground taken, also considering as elements of damage the inconvenience to occupants of the property, caused by the recession of its front between the adjoining houses, and the consequent difficulty of procuring constant tenants, but not regarding the conjectural appreciation in value by reason of a possible recession of either or both the adjoining buildings at some indefinite time in the future."

2d. That the referee erred in not finding that the sole compensation the plaintiff was entitled to recover was the difference between the market value of the lot before and after the alleged taking of the said five feet, without any reference to the character of the erection thereon, or of the business carried on therein by the tenant.

3d. That the referee erred in entering judgment in the cause, and the Court below erred in declining to hear the exceptions filed in the cause.

4th. That the taking of the five feet of ground was solely due to the plaintiff's own action, and that therefore she was not entitled to recover.

C. E. Morgan, Assistant City Solicitor (with him *Wm. Nelson West*, City Solicitor), for the plaintiff in error.

The measure of damages is the difference in value before and after the taking; the increase in value of the piece left by the widening of the street is to be considered in mitigation of damages.

D., H., & W. R. R. *v.* Gearhart, 1 WEEKLY NOTES, 237.

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McTerren *v.* M. A. R. R., 2 Id. 40.
Clark *v.* City, Ibid. 396.
S. & A. R. R. *v.* Braham, 29 Sm. 447.
D. L. & W. R. R. *v.* Burson, 11 Id. 369.
Schuylkill Nav. Co. *v.* Freedley, 6 Wh. 109.
The President, etc., *v.* Thoburn, 7 S. & R. 411.
Navigation Co. *v.* Farr, 4 W. & S. 362.
Watson *v.* P. & C. R. R., 1 Wright, 469.
Searle *v.* R. R., 9 Casey, 63.
E. Pa. R. R. Co. *v.* Hottenstine, 11 Wright, 28.
Harvey *v.* L. & B. R. R., Ibid. 428.
East B. & W. R. R. *v.* Ranck, 28 Smith, 454.
P. & N. Y. R. R. *v.* Bunnell, 31 Smith, 425.
Hornstein *v.* A. & G. W. R. R., 1 Smith, 87.
In re Barbadoes St., 8 Phila. 498.

The Act of May 14, 1874, is to be explained by the Act of April 22, 1874; the two statutes are in *pari materia*. The Supreme Court can exercise no control over the Court of Common Pleas in regard to a cause submitted to a referee until a writ of error or appeal has brought the cause before them. The cause before the referee is a "suit pending" in the Common Pleas. The power of the referee is ended with the filing of his decision; he cannot certify the record to the Supreme Court in response to a writ of error.

To deny the Common Pleas the right to hear exceptions to the referee's report, is to deprive it of its constitutional jurisdiction.

Collins *v.* City, 8 WEEKLY NOTES, 409.

Article V. §§ 26 and 27 of the New Constitution prohibits the General Assembly from creating other tribunals to exercise the powers vested in the Common Pleas.

Samuel B. Huey, for the defendant in error.

If the judgment of the referee was improper, there was nothing to which a writ of error will lie. No exception was taken to the action of the Court below declining to hear the case. The city then went on before the referee. But, aside from this, under the Act of May 14, 1874, the referee is clothed with the full powers both of Judge and jury. Writs directly to the judgment of the referee have frequently been entertained by this Court.

Smith *v.* Ins. Co., 7 WEEKLY NOTES, 365.
Lee *v.* Keys, 7 Norris, 175.
McDowell *v.* Ackley, 8 WEEKLY NOTES, 464.

Denial of authority of the Common Pleas over the judgments of referees under the Acts of April 6, 1869, and January 20, 1870, was made in—

Butterfield *v.* Lathrop, 21 Sm. 225.
Fall Creek Co. *v.* Smith, Ibid. 230.
Thornton *v.* Enterprise Ins. Co., Ibid. 234.

The Act is not unconstitutional because (1) the Constitution did not confer on the Judges power to try questions of fact; and (2) the city by its consent created the tribunal herself.

The conclusions of the referee as to matters of fact are final.

Jamison *v.* Collins, 2 Norris, 359.
Lee *v.* Keys, 7 Id. 175.

So under the Bradford County Act.

Fall Creek C. & I. Co. *v.* Smith, 21 Sm. 230.

The diminution of value of the whole lot is to be considered in estimating the damages for the taking of a part.

Newville Road Case, 8 W. 172.
Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411.
Western Pa. R. R. Co. *v.* Hill, 6 Sm. 460.
W. & R. R. R. Co. *v.* Stauffer, 10 Id. 374.

So is the difficulty in procuring constant tenants.

P. V. & C. R. R. *v.* Rose, 24 Sm. 362.

Conjectural value at a future day is not to be considered.

Watson *v.* P. & C. R. R., 1 Wr. 481.
P. V. & C. R. R. *v.* Rose, 24 Sm. 362.

The referee very properly founds his decision upon the difference in market value before and after the taking.

May 2, 1881. THE COURT. In such case as this the rule for measurement of damages is settled by a uniform current of decisions taking its rise in Schuylkill Nav. Co. *v.* Thoburn (7 S. & R. 410). The damage is to be estimated as of the date when the injury was complete and the land-owner had a right to receive compensation; the property to be valued without reference to the person or the owner, or the actual state of his business; the true measure of damages being the difference between the market value of the land as affected by the taking of part for the street, and such value as unaffected. What would Mrs. Linnard's land have sold for at and immediately before the street was widened at its front? What would it have then sold for as affected by widening the street? The difference is the sum to which she is entitled. Many things may be considered as elements of damage, such as inconvenience to occupants of the property caused by recession of the front, and the difficulty of procuring constant tenants. These aid in fixing the value of the property. They are not to be considered with reference to a particular business. Though the property were ruined for its former use, if worth as much or more for another use, the owner suffered no damage for which she can recover. The pivotal inquiry is as to how much the property, as it was when injured, was diminished in value. The lot with its improvements was worth a certain sum; to estimate the loss by referring to more valuable improvements subsequently constructed would be error. For instance, if the new building would rent for more than the old, the new would be a false basis from which to estimate rents or value of the lot as affected by widening the street.

The learned referee appears to have clearly apprehended the rule for measuring damages. We do not think he intended to decide that any elements of damage such as inconvenience to occupants and decrease in rents should be considered in other light than as bearing on the

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question of value of the land at the time of the injury. But he refused to regard "the conjectural appreciation in value by reason of a possible recession of either or both the adjoining buildings at some indefinite time in the future." For this refusal, he rested on Pitt. V. & C. R. *v.* Rose (24 P. F. S. 362), and Watson *v.* P. & C. R. (1 Wright, 469). In the former case the company had proposed to make improvements by grading, and improving the street, unconnected with the finishing of their railway, and it was ruled that the case should be considered without reference to the proposal. To make such improvement, the company was not bound by law or contract. It was a naked proposition, worthless in itself, and to such as that the decision relates. In the other case the point was upon an offer of testimony by the plaintiff respecting the value of the land as injured and as it would be if uninjured. After repeating the rule as to damages, STRONG, J., said, "His attempted mode of proof of the difference between the two values was entirely inadmissible. His offers all had the same fault. They proposed to submit to the jury the conjecture of witnesses as to what the plaintiff's lands would be worth, or what their market value would be, at some unknown future time, when the railroad shall have been constructed. Such testimony does not rise even to the standard of an opinion. It is a mere guess with no substantial foundation upon which to rest." A glance reveals that the language applies to an absurd offer of evidence, and does not mean that testimony showing increased value of the land because of the railroad or advantages arising from it shall be excluded. The inquiry was as to the effect of the injury upon the value at the time, not how the value might be affected in the future. Any fact which affects the value of the land at the time of the injury is admissible. Thus in the Newville Road case (8 Watts, 172), the Court remark: "And the viewers are presumed to have taken into consideration, as it was their duty to do, as well the possibility of the road reverting back to the proprietors by being vacated at some future time, as the rights left to him under and over the highway in subservience to the public passage." Upon the vacation, a possible but uncertain event, the road reverts, and this is to be considered in appraising damages. Under the operation of the Act of April 28, 1870 (P. L. 1291), it is reasonably certain that between the two rivers all buildings will be removed from Chestnut Street. When this shall be accomplished is uncertain. When done, the very inconveniences and difficulties arising from the recess of Mrs. Linnard's property will cease. How can the value of the property be determined, or the amount of damages, without considering the fact that all buildings erected subsequent to the Act of 1870 must be as far from Market Street as the one on the lot in question? The first specification of error is sustained.

An Act to provide for the submission of civil cases to the decision of the Court, and to dispense with trial by jury, was enacted April 22, 1874 (P. L. 109). On the 14th of May following (Ibid. 166), an Act was approved, to provide for the submission of civil cases by agreement of the parties to a referee learned in the law, which can be readily understood by reference to the prior Act of 22d April. It enables the parties by written agreement to submit any civil case to the decision of a person learned in the law, in like manner as it could be submitted to the decision of the Court. The referee derives his authority by said agreement, not by the Court's appointment, and "so far as relates to the case, and the duties he is to perform as referee, shall, after acceptance of his appointment, be subject to the same control by the Supreme Court as the Court below would be in regard to a cause submitted to them in like manner." In all things pertaining to the trial and decision of the case he shall have the powers and perform the duties, that would belong to the Court under a like submission.

The decision shall be filed of record, "and in like manner and to the same extent shall be subject to exceptions and writ of error or appeal," as in cases submitted to the Court. The judgment entered upon his decision shall be considered the judgment of the Court, and thereafter the referee's power is ended, unless the case be referred back to him by the Supreme Court. On writ of error or appeal, the Supreme Court may remit the case for further hearing before the referee, or make such other order as may be proper to protect the rights of the parties. For certain causes, the Court in which the suit is pending, may set aside the agreement of submission; and said Court has power to settle the amount of the referee's costs and direct its taxation. The respective powers and duties of the referee and of the Court where the cause is pending, and of the Supreme Court are well defined. No provision is made for hearing of exceptions or otherwise reviewing or controlling the decision of the referee by the Court of Common Pleas. It is plain that no power is given to that Court over the referee or his decision other than is expressed. The power of control and review is expressed to be in the Supreme Court. Moreover, this statute is similar to the prior local Acts of April 6, 1869 (P. L. 725), and January 20, 1870 (P. L. 85) under which it had been decided that the Common Pleas had no power whatever to re-examine and pass upon the report of the referee. (Thornton *v.* Enterprise Ins. Co., 21 P. F. S.

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234; Butterfield *v.* Lathrop, Id. 225.) The meaning of those statutes on the point in question had been judicially ascertained, and therefore, the latter statute in similar terms, enacted in view of that adjudication, has the same intendment.

It is urged that this statute is in conflict with Art. V., sections 26 and 27 of the Constitution. Section 26 prohibits the creating of other Courts to exercise the powers vested in the Judges of the Courts of Common Pleas and Orphans' Court. A new Court is not created. The statute only applies to causes pending in Courts of Common Pleas and Orphans' Courts, and civil suits cannot be instituted elsewhere till new Courts are created. By agreement, the parties to a pending suit waive jury and trial, and submit the matters at variance between them to a referee, and judgment is entered on his decision. This no more violates the constitutional provision, than would an agreement by the parties confessing judgment in vacation. Section 27 imposes the duty upon the Court, when the parties file an agreement to that end, to hear and determine the cause. Prior to the Constitution of 1873, the Legislature could authorize the parties to make an agreement of submission to a referee, and to that is now added the power to compel the Courts to hear and determine issues of fact as well as of law, where the parties so elect.

In a writ of error under the Act of May 14, 1874, this Court can hear and determine only questions of law involved in the rulings of the referee, relating to the evidence or the law of the case. His findings of fact are as conclusive as the verdict of a jury. If the point were made before him that there was no evidence to warrant the plaintiff's recovery, or no evidence to warrant the finding of a disputed fact, its disposition could be reviewed the same as when made in a jury trial. (Lee *v.* Keys, 7 Nor. 175.)

It is claimed that "the plaintiff below is not entitled to recovery because the injury of which she complains, is due entirely to her own action." This point is well answered by the referee. By force of law, the instant the old building was torn down, the city took part of the land for public use, and is liable to make compensation to the owner, the same as if it had been taken in any other mode.

None of the assignments of error can be sustained, except the first. With reference to the second, there was no request for the ruling therein stated. Had it been desired, the point could have been made in like manner as if the trial were before a Court and jury. The referee may have acted in accord with the principle, though it is not stated in his opinion.

Judgment reversed, and it is ordered that the record be remitted to the Court below for a rehearing before the referee.

Opinion by TRUNKEY, J. MERCUR, J., absent.

Jan. '80. March 21, 1881.

Carn and wife v. Fillman.

Husband and wife—Married woman's contract for necessaries—When her separate estate may be charged under provisions of Act of April 11, 1848—Pleading—Amendment—Practice—Evidence—Admission of irrelevant testimony—When not a ground for reversal.

In an action against husband and wife for necessaries furnished for the use of the joint family, in which it is sought to charge the separate estate of the wife, it is necessary to allege in the declaration that the debt sued for was contracted by the wife, and incurred for articles necessary for the support of the joint family, and if these averments be made in one count, it is sufficient, though the other counts may be defective.

Where, in such an action, a defective narr. is pleaded to by the defendants, and afterwards, by leave of the Court, the plaintiff files an amended narr., and the case goes to trial without further pleas:

Held, that the presumption is that the trial was had on the amended narr., and that the mere fact that the Court did not order the plaintiff on the trial to elect under which narr. he would try, afforded no ground for reversal.

Circumstances under which the Court was justified in submitting the question to the jury, whether the plaintiff had brought his case within the terms of the Act of April 11, 1848, so as to charge the separate estate of a married woman, detailed and commented upon.

The admission of evidence, which although incompetent and irrelevant at the time, afterwards became admissible, and which certainly did not deceive or mislead the jury, will not constitute adequate ground for reversal.

Error to the Common Pleas of Montgomery County.

Assumpsit, by Henry B. Fillman against Henry Carn and Mary, his wife, to recover the value of certain meat alleged to have been furnished by plaintiff, from time to time, to defendants, at the request of said Mary Fillman, and on the credit of her separate estate, plaintiff's action being brought with the intent to charge said separate estate with the amount claimed therein.

The narr. alleged that defendants—

"Henry Carn and Mary Carn, his wife, ... were indebted to the said plaintiff in the sum of twenty thousand dollars for necessaries, to wit, meat furnished by plaintiff to the defendants for the maintenance and support of the family of the defendants under and in pursuance of an express contract made between the said plaintiff and the said Mary Carn, who is the lawful wife of the other defendant, for the same, and that the said debt was to be paid for out of her, the said Mary Carn's, separate

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estate, and said goods, chattels and meat was furnished at her request, and in compliance with said contract.

"Also . . . . for divers goods, wares and merchandise, by the said plaintiff to the said defendants before that time sold and delivered at the special instance and request of Mary Carn, one of the defendants, for necessaries furnished for the defendants at her request and on the credit of her separate estate. Also . . . . for work and labor done . . . in and about the business of said defendants . . . at their special instance and request. . . . . Also for money laid out and expended . . . . to use of said defendants at their instance and request, etc. . . . . And, being so indebted . . . they promised the said plaintiff to pay. . . . . Nevertheless the said defendants not regarding their said several promises and undertakings have not paid, . . . to the damage of the plaintiff, etc."

Defendants pleaded as to Henry Carn "Non-assumpsit," and as to Mary Carn "Coverture, Non-assumpsit, Set off, and Payment."

Subsequently plaintiff, by leave of the Court, filed an amended narr., which alleged that defendants—

"Henry Carn and Mary Carn, his wife, ... were indebted to the said plaintiff in the sum of twenty thousand dollars for necessaries for the support of the family of the said Mary Carn and Henry Carn under and in pursuance of a contract made between the plaintiff and the said Mary Carn, who is the lawful wife of the other defendant, that the said plaintiff should furnish on the credit of the said wife's separate estate, necessaries for the support of the family of the said defendants, to wit, meat, and the said plaintiff avers that on the credit of said Mary Carn's contract and on the liability of her estate, he furnished meat to the value of one thousand dollars for the support of the family of said defendant.

"Also . . . . for divers goods, wares and merchandise, by the said plaintiff to the said defendants before that time sold and delivered at the special instance and request of Mary Carn the wife of Henry Carn, the other defendant, for necessaries furnished on the contract of the said Mary Carn for the support of the family of the said defendants, on the credit of the separate estate of the said Mary Carn. Also . . . . for work and labor done about the business of the said defendants at the special instance and request of the said Mary Carn. Also . . . . for money laid out and expended . . . . to and for the use of said defendants and at her like instance and request, etc. . . . . And, being so indebted, she the said defendant promised the said plaintiff to pay. . . . . Nevertheless, the said defendants not regarding the said several promises and undertakings of the said Mary Carn, have not paid . . . to the damage of the said plaintiff, etc."

Defendants filed no further plea.

On the trial before Ross, P. J., plaintiff was called upon by defendants to elect whether he would try under the orginal or amended narr. This plaintiff declined to do. Defendants thereupon called upon the Court to order the plaintiff so to elect. This the Court declined to do.

It appeared from the evidence that the defendant, Mary Carn, owned a house and lot in Whitemarsh, that her husband, with whom she lived, had for some years been blind, and that she attended to the providing for the family. That for the necessary support of the family she obtained from time to time meat from the plaintiff, that the meat was generally received by Mrs. Carn personally, but occasionally by her daughters, and that from time to time she had made considerable payments on account to plaintiff for the meat she had received. As to the contract under which the meat was furnished the testimony was directly contradictory. The plaintiff testified: "Mary Carn ordered the meat from me. I was going around with the wagon and she told me to stop, she wanted to buy some meat of me. First she paid cash for it when she got it. Then she asked me if I would not trust her. I said I would if she would pay me. . . . I furnished the goods on Mrs. Carn's credit alone." Mrs. Carn on the contrary testified: "I never made any contract with Fillman for meat. He never sold me the meat saying he trusted me on my own credit. He never asked me for money. I gave it to him until towards the last. I got the meat as I always got before Henry went blind."

During the cross-examination of Mrs. Carn, she having been called for that purpose by plaintiff, she was asked, *inter alia*, the following question. "Since your husband's blindness have you controlled the earnings of yourself and family, and have you appropriated such earnings to the support of your family, and the surplus, if any, to your own use?" Objected to by defendants. THE COURT. "This is received for the purpose of showing that the defendant is a *feme sole* trader." Witness replied, "I always took the boys' earnings for a living and when I wanted to do any repair to the buildings on my property."

Defendants presented, *inter alia*, the following points:—

1 "The two declarations filed by the plaintiff are incongruous and incompatible and cannot stand together as one narr., and therefore the plaintiff cannot recover."

2 "Under the authority of Berger *v.* Clark (29 Smith, 340) and under the pleadings in this case the plaintiff cannot recover."

3 "As the evidence does not clearly prove that the wife did contract in her own behalf, the verdict must be for the defendant."

These points the Court refused, except in so far as they were answered in the general charge, in this charge the Court said, *inter alia*:—

"1. Is the subject of this bill what is termed a necessary? It was for meat actually consumed by the family.

"2. Did the wife solely and alone, apart from her husband, and not as his agent or messenger, procure it by her special instance and request, intending to pay for it out of her separate estate? [Here the Court read portions of the testimony to the jury.] If you shall determine that she

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did, you need inquire no further, and find for the plaintiff the amount of his bill with interest. In determining this you will remember that a subsequent promise to pay on the part of the wife will not bind her, the promises—the contract—must precede or be coincident with the delivery of the meat. If you should, however, find that she did not, you will next inquire whether she stood in the sense of the controlling head of the family, under the relations the law defines, and the statute provides, so as to render her estate liable for her contracts. If she stood in such relation, and it is for you to say so, under the evidence, then she would be liable for the meat purchased by her for the use of the family. If she did not, then there is no liability upon her part."

Verdict and judgment for the plaintiff in the sum of $276.90. Defendants thereupon took this writ, assigning for error, *inter alia*, the refusal of the Court to order the plaintiff to elect to try under the original or amended narr., the admission of the testimony of Mary Carn objected to, and the refusal of defendants' points above cited.

George N. Corson, for plaintiffs in error.

The pleadings should set forth a claim on a special contract with the wife alone. To go further and state a contract with husband and wife is fatal.

Berger *v.* Clark, 29 Smith, 344.

The Court should have made an order on the plaintiff to elect under which narr. he would try; we were entitled to know the nature of his claim.

A judgment cannot be recovered against a married woman under the Act of 1848, unless the pleadings make out a case within its provisions.

Hecker *v.* Haak, 7 Norris, 242.
Kuhns *v.* Turney, 6 Norris, 500.
Sawtelle's Appeal, 3 Norris, 308.
Cleaver *v.* Scheetz, 20 Smith, 498.

The evidence as to defendant's being a *feme sole* trader should have been rejected as having no bearing on the point at issue.

Charles Hunsicker, for defendant in error.

The trial took place under the second narr.; it nowhere states a contract with husband and wife; it alleges the contract of the wife specifically, and it is only necessary that this shall be averred in some way; the words used are immaterial.

Murray *v.* Keyes, 11 C. 391.
Parke *v.* Kleeber, 1 Wr. 251.
Berger *v.* Clark, 29 Sm. 340.

All that is requisite to make her separate estate liable is that the contract should be for "necessaries for the support and maintenance of the family," and insolvency of the husband is not a condition precedent.

Bear's Estate, 10 Sm. 430.
Davidson *v.* McCandlish & Son, 19 Sm. 169.

There was no need of an election as to which narr. plaintiff would try his case under: there was but one before the Court. An amended narr. filed by leave of Court is virtually a withdrawal of the original one.

The defendant need not plead *de novo* to an amended declaration.

Kay *v.* Fredrigal, 3 Barr, 221.
Good Intent Co. *v.* Hartzell, 10 Harris, 277.

May 2, 1881. THE COURT. In all cases where debts may be contracted for necessaries for the support of the family of any married woman, the creditor may bring suit against the husband and wife, and, after obtaining judgment, have execution against the husband alone, and if such execution shall be returned that no property of his can be found, then execution may be issued and levied on the property of the wife. (Act April 11, 1848, § 8, P. L. 536.) Accordingly this action was instituted against both husband and wife, and the declaration properly charges that the defendants are indebted. The same section provides, "That judgment shall not be rendered against the wife in such joint action, unless it shall have been proved that the debt sued for in such action was contracted by the wife, or incurred for articles necessary for the support of the family of the said husband and wife." This proviso is construed as if "and" were in place of "or." It is as essential to aver said matter in the declaration as to prove it. And the averment is fully and distinctly made in the amended narr. If the requisite averment be made in one count it is sufficient, though other counts may be defective.

The amended narr. cures any defect in the original; if filed by leave of Court it is presumed the trial was had on that, nothing appearing to the contrary (Kay *v.* Fredrigal, 3 Barr, 221). That the Court did not stop to order the plaintiff to make a formal election, does not repel the presumption. The defendant need not change his plea after amendment of the narr. unless he choose. But if the cause were tried without any plea, it would not avail either party as an objection in a court of error. (Good Intent Co. *v.* Hartzell, 10 Harris, 277.) None of the specifications of error which rest on alleged defects in the pleadings can be sustained.

Fillman and Mary Carn were witnesses, and substantially agree that for a number of years Fillman furnished meat delivered from his wagon at the defendant's house, that Mrs. Carn in person bought the meat, paid from time to time what was paid for it, and when she had not the money to pay down, she requested him to charge it, promising to pay as she would get money. They differ in this, Fillman says: "Mary Carn ordered the meat from me; I was

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going around with the wagon and she told me to stop, she wanted to buy some meat. First she paid cash for it when she got it. Then she asked me if I would not trust her, I said I would if she would pay me. . . . I furnished the goods on Mrs. Carn's credit alone." And Mrs. Carn says: "I never made any contract with Fillman for meat. He never sold me the meat saying he trusted me on my credit. . . . I got the meat as I always got it before Henry went blind." Mr. Carn had been blind for ten years and followed no kind of business. It was not disputed that the meat was necessary for the family. If the children sometimes got meat from the wagon, it was to the same effect as if the mother received it with her own hand, whether contracted for by herself or by her husband. The only material conflict in testimony was on the point as to Mary Carn being the contracting party for the meat. If she promised payment after it had been furnished, the promise was not binding; but if she contracted for it before it was furnished, her subsequent promise would not annul the contract. It is very clear that it was the duty of the Court to submit the evidence, and the jury were warranted in finding the facts made requisite by statute to be proved, which entitled the plaintiff to a judgment against the wife.

The only assignment of error seeming to require particular remark, is the twelfth, to the allowance of the following question to Mrs. Carn: "Since your husband's blindness have you controlled the earnings of yourself and family, and have you appropriated such earnings to the support of your family and the surplus if any to your own use?"

This was for the purpose of showing that she was a *feme sole* trader. But she was not sued as a *feme sole* trader, and as the case stood, it was not admissible to prove her such. So little weight is attached to this matter, that what the Court said respecting it in the charge is not assigned for error. It is manifest the case turned on the issue presented in the charge, namely, were the goods furnished necessary for the use of Mary Carn and her family, and were they contracted for by herself, and not by herself and husband jointly. Not one of the numerous points refers to the law relative to *feme sole* traders, or to the evidence received to prove Mrs. Carn was one. We think it certain that the jury were not misled by the remark that the evidence was received for the purpose of proving that Mrs. Carn was a *feme sole* trader. As to the evidence itself, it afterwards became admissible in cross-examination of Mrs. Carn, following her examination in chief. She denied the alleged contract and stated facts which made it competent to ask her about the control and use of the earnings of herself and family. Though evidence be incompetent when offered, if afterwards it becomes competent, its admission is no ground for reversal.

Judgment affirmed.

Opinion by TRUNKEY, J.

Jan. '81, 95. February 28, 1881.

Weightman's Appeal.

Appropriation of payments by law when not made by either debtor or creditor—Doctrine as to, not applied as against a surety.

The rule of law which, in the absence of appropriation by the parties, appropriates payments in the way most advantageous to the creditor, will not be applied to the prejudice of a surety.

A. and B. were partners. A. sold his interest to B. who continued the business, and agreed to pay the debts of the old firm. A. died, then B. died, insolvent. On the audit of the first account of A.'s executors, C. presented a claim against the firm of A. & B., and received a *pro rata* dividend of 24.86 per cent. On the audit of the account of B.'s executor, C. presented the same claim, and also a personal claim against B., and received a dividend of 45.93 per cent. on the aggregate of both claims. On the audit of the second account of A.'s executors, C. again presented his claim against the firm of A. & B.:

Held, that the amount awarded C. from B.'s estate was to be applied *pro rata* to his claim against B. personally, and to his claim against the firm of A. & B., and that therefore he was entitled to 24.86 per cent. only of his claim against the firm of A. & B.

Appeal of William Weightman, surviving partner of the firm of Powers & Weightman, from a decree of the Orphans' Court of Philadelphia County, dismissing the exceptions to and confirming the adjudication of the Judge auditing the second account of the executors of William W. Burnell.

The facts of this case and the opinion of the Court below are reported at length in 9 WEEKLY NOTES, 334, *q. v.*

Weightman took this appeal after the adjudication had been recommitted for amendment in other respects than those which he claimed to constitute error, but before final decree, assigning for error the action of the Court in awarding him but 24.86 per cent. of a claim presented by him against the estate of decedent, in lieu of 59.34 per cent. thereof, the amount which he claimed to be due thereon.

Subsequently a final decree was entered in the Court below, whereby Weightman was awarded 24.86 per cent. only, as aforesaid.

J. C. Stillwell and *R. J. C. Walker*, for appellants.

It has been repeatedly held that where no appropriation is made by the debtor, the creditor can appropriate the payments to that portion of

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his debt which is least secure. And in this case there was and could be no appropriation by the debtor, since he was deceased, and his estate insolvent, and the assets were being distributed by the Court.

Watt & Co. *v.* Hoch, 1 C. 411.
The County of Schuylkill *v.* The Commonwealth, 12 Id. 527.
McQuaide *v.* Stewart, 12 Wr. 199.
Woods *v.* Sherman, 21 Sm. 100.

Where a debtor owes more than one debt to the same creditor, and a payment is made generally, the law makes the application (Moore *v.* Kiff, 28 Sm. 97), and in the way most beneficial to the creditor; and therefore to the debt which is least secure.

Watt & Co. *v.* Hoch, *supra.*
Keim's Appeal, 3 C. 43.
Pierce *v.* Sweet, 9 Id. 151.
Smith *v.* Brooke, 13 Wr. 147.
Ege *v.* Watts, 5 Sm. 321.
Foster *v.* McGraw, 14 Id. 464.
McKelvey *v.* Jarvis, 6 Norris, 414.

W. C. Stoever and *J. W. Hunsicker*, for appellees.

At the time this appeal was taken, the account was in the hands of the Auditing Judge, having been referred back for correction. There was no final decree, therefore, and the appeal should be quashed. In any case, the decree of the Court will be sustained, for Burnell, as to the debts of the firm of Wheeler & Pape, was only surety for Wheeler, and the doctrine of appropriation of payments is not enforced to the prejudice of a surety.

Pierce *v.* Sweet, 9 C. 151.

February 28, 1881. THE COURT. When this appeal was taken, there was no final decree, and it ought properly to be quashed. As, however, such a decree was afterwards entered, and the motion to quash has not been pressed, we think it best to make an end of the case by affirming the decree, which we do upon the opinion of the learned Judge in the Court below upon the exceptions to the adjudication.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

May, '80, 70. May 2, 1881.

Bair v. Black.

Errors and appeals—Limitation—When writ of error taken too late.

A writ of error issued one day after the expiration of two years from the date of the judgment in the Court below is too late, and will be quashed. The fact that the præcipe was dated and mailed on the last day of the two years, but not received by the prothonotary until the following day, will not cure the defect.

Error to the Common Pleas of York County.

Ejectment, brought to April Term, 1871, for a parcel of land on the canal shore of the Susquehanna River, in York County. The case was tried January 25, 1877, when a verdict was rendered for the plaintiff. Judgment was entered on the verdict November 24, 1877. The plaintiff's counsel, who resided in York, signed a præcipe and affidavit for a writ of error November 24, 1879, and mailed it on the same day to the prothonotary of the Middle District, at Harrisburg, who received it on the next day, November 25, and on that day issued the writ of error, which was received and filed in the Court below November 26, 1879.

When the case was called for argument in the Supreme Court,

Edward Champneys, for the defendant in error, moved to quash the writ of error on the ground that it was not "commenced . . . within two years . . . after judgment signed or entered of record," as provided by the Act of April 1, 1874. (P. L. 50; Purd. Dig. Supplement, p. 1873, pl. 1.)

Thomas E. Cochran (with whom was *Hay*), for the plaintiff in error.

May 16, 1881. THE COURT. The judgment in this case in the Court below was entered November 24, 1877. The writ of error was issued November 25, 1879. The date of the præcipe for the writ cannot help the case. The two years' limitation had already expired when the writ issued, and the motion to quash must therefore be granted.

Writ of error quashed.

PER CURIAM.

Common Pleas—Law.

C. P. of Crawford County.

The Commonwealth ex rel. v. Davis et al.

Constitutional law—Constitution of the United States—Amendments—Art. XIV. Sec. 1—Act of May 8, 1854 (P. L. 621)—Common schools—Admission of colored children into—Mandamus.

Mandamus, by the Commonwealth *ex rel.* Elias H. Allen against M. P. Davis and others, school controllers of the city of Meadville,

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whereby relator sought to oblige defendants to admit his two minor children, who were negroes, to the Huidekoper Grammar School in said city.

A writ of alternative mandamus issued, to which defendants filed an answer. On the trial the following special verdict was rendered.

"The relator is a negro and his minor children are negroes. The respondents are controllers of the school district of Meadville. Said school district was formerly composed of two school districts, and for the purpose of electing directors, and holding and managing the real estate necessary for school purposes, is still two districts, the first of which is composed of the First and Second Wards of the city, and the second is composed of the Third and Fourth Wards of said city.

"The respondents maintain a school for negro and mulatto children in the First Ward on Park Avenue, about three-fourths of one mile from the residence of the relator, which all negro and mulatto children in the city graded below the 'H' class are allowed to attend. All the grades below the 'H' class are taught in the Huidekoper Grammar School—a school maintained by the respondents in the Third Ward of said city, about one-fourth of a mile from the residence of the relator, to which are admitted all the children of the Third and Fourth Wards, except negro and mulatto children, below the 'H' class, who desire to pursue studies taught in the district schools in said city.

"The relator lives in the Third Ward of said city, and on the fourth day of September, A. D. 1880, took his two minor children to the Huidekoper Grammar School and demanded of the teacher in charge of the proper class into which they were entitled to enter, which class was below the 'H' class, that they be admitted, and their admission was by direction of the respondents refused, for the sole reason that they were negroes or mulattoes.

"All negro and mulatto children in said city after they have reached the 'H' class are allowed to enter the same schools as white children.

"The public schools in said city are graded as follows: Eight grades or classes are taught in the proper district schools, of which the Huidekoper Grammar School is one, to wit: Classes M, L, K, J, H, G, F, and E, and four grades or classes are taught in the high school, to wit: D, C, B, and A. Each grade or class is completed by the pupil in one year. Four grades or classes are taught by the one teacher in the separate school for negro and mulatto children, while in the other schools, there is at least one teacher for each grade. It is further found that there are more than twenty negro and mulatto children in said city of Meadville over six and under twenty-one years of age.

"Upon these facts it is submitted to the judgment of the Court whether a mandamus should issue against respondents as prayed for by relator."

Subsequently the question raised upon the special verdict was argued.

Thomas Roddy, for relator.

W. R. Bole, for respondents.

May 9, 1881. THE COURT (after stating the facts). The question presented in this special verdict and to be resolved by the Court is, whether the school controllers of this city were and are justified in refusing admission of the relator's minor children into the public schools of the district.

In the Act of Assembly of this Commonwealth of the 8th May, 1854, and known as the General School Law, it is enacted, *inter alia*, as follows:—

Section 2 provides: "That the Board of Controllers . . . shall establish a sufficient number of common schools for the education of every individual between the ages of six and twenty-one years in their respective districts, who may apply for admission and instruction, either in person or by parent, guardian, or next friend, . . . and they shall have power to establish schools of different grades, and to determine into which school each pupil shall be admitted."

Section 24 provides: "That the directors and controllers of the several districts of the State are hereby authorized and required to establish in their respective districts, separate schools for the tuition of negro and mulatto children whenever such schools can be so located as to accommodate twenty or more pupils; and whenever such separate schools shall be established and kept open four months in any year, the directors and controllers shall not be compelled to admit such pupils into any other schools of the district."

It is to be noted that neither in the respondent's answer nor in the special verdict does it appear that the separate school for negro and mulatto children has been and is established and kept open four months in the current year, and hence the more compulsory clause in section 24 cannot be successfully invoked in favor of these respondent school controllers. We cannot know from the record before us whether or not this separate school, which is found by the verdict to be established, has been and is maintained during four months in any one year. If we apply the rule that whatever does not appear of record, and as a fact found, provided it be of importance,

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is to be taken as not existing, we must assume that such four months' school is not maintained. Whether the general schools of the city are maintained four months in a year, is a matter of no moment here, because in the section cited there is no mention of length of time for the maintenance of any other school or kind of school than the separate negro or mulatto school. The establishment of this latter school, then, need have no effect upon the right of the relator to have his children admitted into the general public schools of the city; or, in the language of the Act, "the other schools of the city." It is no concern of the relator's how many separate schools are established and maintained, provided he has a right to send his children to the general schools of the district. It was the obvious meaning of the Act that the four months' maintenance of the separate negro school was to be the criterion of the discretion of the school board in this behalf, and that it was only to be exercised in that contingency.

Admitting, however, that this separate negro school is maintained four months or more in any one year, a much more important question than this is raised by this record.

"The Constitution of the United States is the supreme law of the land, . . . and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." It is contended that the 24th section of the Act of 8th May, 1854, above cited, is repugnant to the Constitution of the United States, and therefore inoperative, null, and void.

The first section of Art. XIV. of the Amendments to that Constitution is as follows:—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

"No searching analysis is necessary to eliminate the meaning of this section. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer the intent and purpose sought to be carried out." (Per SWAYNE, J., 16 Wall. 126.)

The section recognizes in express terms and defines citizenship in the United States. It makes citizenship dependent upon the place of one's birth, or the fact of one's adoption, and not upon the Constitution or laws of any State, or the condition of one's ancestry.

The "privileges and immunities" of a citizen of the United States include among other things the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership in the Union, among which may be included the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject only to such restraints as the government may provide for the general good of the whole. Life, liberty, and property are forbidden to be taken from any person, whether citizen or not, "without due process of law," and "equal protection of the laws" is guaranteed to all. A citizen of the United States is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. Citizenship of the United States is, according to the Constitution, a sure and undoubted title to equal rights in every State, subject to such regulations as the Legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

This equality of rights with exemption from any and all disparaging and partial enactments in the lawful pursuits of life, is the distinguishing privilege of citizens of the United States. To them everywhere all pursuits, all professions, all avocations are open, without other restriction than such as are imposed equally upon all others of the same age, sex, and condition.

This section of the XIVth Amendment, after assuring citizenship to negroes, was designed to assure to them the enjoyment of all the civil rights that under the law are enjoyed by white persons, and gave to them the protection of the general government in that enjoyment whenever it should be denied to them by the States. It not only gave citizenship and its privileges to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. When the amendment ordains that no State shall deprive any person of life, liberty, and property without due process of law, or deny to any person the equal protection of the laws, this is declaring most emphatically that the laws in the States shall be the same for the black as for the white. That all persons whether colored or white shall stand equal before the laws of the States and that in regard to the colored race, no discrimination shall be made against them by law because of their color. (Per STRONG, J., in 10 Otto, 307.)

This amendment opens the courts of the country to every one on the same terms for the

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security of his person and property, the prevention and redress of wrong and the enforcement of contracts. It assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; it secures to all persons their civil rights upon the same terms. These civil rights are absolute and personal, and are never to be withheld, and may always be judicially enforced. (Per FIELD, J., in 10 Otto, 368.)

The privileges and immunities therefore, of every citizen of the United States which are prohibited by the XIVth Amendment from being abridged by the State, I have shown to include the fundamental rights of life, liberty, and property, with the right to acquire and possess the same freely and equally. This property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property; education is property. It is entitled to protection without abridgment. The right to make this species of property available is next in importance to the right of life and liberty. It lies to a large extent at the foundation of most other forms of property and of all solid individual and national prosperity.

Applying this exposition of the Constitution of the United States to the facts of the case before us, to what result do we come? A citizen of the United States and of this Commonwealth appeals to the controllers of the public schools of the district wherein he resides, that his minor children be admitted as pupils to such school, there to receive those privileges to which they are entitled by the Constitution of the United States and of this State, and their admission is refused (in the language of the special verdict), "for the sole reason that they were negroes and mulattoes." The school wherein he applies for admission is a graded or classified school, where the children of other citizens are admitted to the respective classes or grades they are capable of entering. Yet the citizen in question is told that he cannot have the same privileges, but is referred to another school, in another district, which is ungraded and unclassified, and which is much less convenient of access than the classified one in his own district; and all this for no other reason than a difference in the color of his skin. Graded or classified schools are either beneficial or not beneficial to the scholar. If they are beneficial they confer privileges and immunities upon the citizens who are recipients of them to which every citizen is entitled, and which the State cannot abridge by the passing or enforcing of any law. If they are not beneficial, or rather, if ungraded schools are the more beneficial, then the establishment of the ungraded school in Park Avenue for the exclusive use of negro children, is contrary to law, because the controllers have no right to exclude white children therefrom. The privilege and immunities of white citizens are as much protected from abridgment as those of colored citizens.

Again if the 24th Section of the Act of 8th May, 1854, is capable of enforcement, notwithstanding the Constitution, the controllers could be compelled by mandamus to establish a separate school for negro children whenever the number of such children in any one district exceeded twenty. The language of the Act is "authorized and required," and if the negro parents of negro children should fancy their privileges would be increased by such separate school, they could invoke this Act to compel such establishment and maintenance, but that would be contrary to this XIVth Amendment as increasing the privileges and immunities of colored citizens, and abridging those of white citizens.

Moreover, if this negro school as separately established were a graded school, I cannot think it would justify these respondents in refusing admission of this relator's children to the grammar school. The relator has the same right to the benefit of the proximity of his residence to the grammar school, as his white neighbor has. This is a privilege which is abridged by the turning him over to a school which is at a much greater distance from his residence than the other.

The XVth Amendment of the Constitution of the United States prohibits the denial or abridgment of voting to any citizen of the United States, on account of race or color. If a State were to enact that in voting all citizens of color within the State or even within a county, should vote at one election poll only, and that poll separate from the poll where white citizens were permitted to vote, and scores of miles, it might be, distant from the residence of the colored citizen, while white citizens were given polls numerous and convenient, would it not be said that the right of suffrage was abridged, though the abstract right of depositing a ballot remained? So with the privilege of travelling in public conveyances, visiting hotels, and attending public places of entertainment, and the like, secured to colored citizens by the constitutional and legal enactments with which we are familiar. It has never been for a moment supposed that the duties imposed by these enactments could be evaded by the setting apart of one car, or one train, or one theatre, or one hotel, or one dining-room in a hotel for the exclusive use of colored people. How then can the spirit or policy of

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these enactments be evaded by school directors by the setting apart of one school for the exclusive use of negro children? Simply to state the proposition, is to furnish a complete answer to it, and that answer must be that such cannot be done.

In the consideration of the question presented by this record, I have been almost forced to believe that it need not be by any very strained construction, that the acts done and suffered by these respondents, and of which the relator complains are virtually under the prohibition of the XIIIth Amendment to the Constitution of the United States.

It was not adverted to in the argument by either party, and I content myself by merely referring to it. In addition to slavery, *involuntary servitude* except as a punishment for crime, was abolished by this last-named enactment. This abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and thus to endow him with civil liberty. "Civil liberty is the power of doing whatsoever we will, except when restrained by just and equal laws." (Sharswood's Blackstone, p. 6 in note.) Therefore, when a law makes a discrimination between classes of persons, and one which deprives the one class of their freedom or their property (in the sense I have heretofore used the word property) or which makes a caste of them to subserve the pride or vanity of others, or which deprives one citizen of civil rights which are secured to other citizens, it would seem to be an encroachment of his liberty, and a badge of servitude which is prohibited by the Constitution.

Since the Act of 1854 was passed a great revolution has taken place in this country. Absolute equality before the law, and equal protection under the laws, is to be predicated of the recent constitutional and legal enactments of every State composing the United States, and of the Federal Government itself. Under these circumstances I cannot see why this section under consideration, involving as it does the very personification of caste, has been suffered to remain upon the statute book. As a matter of fact, I believe it to be practically a dead letter throughout the Commonwealth. It ought to be so in this city, and now must be held incapable of enforcement as being violative of the principles of the Constitution of the United States. It must no longer be said that the Huidekoper Grammar School is the only place within the United States where a distinction is made as to the civil rights of a citizen on account of his race or color. If the Senate of the United States is open to the entry of a person of the hitherto proscribed race, so much the more ought to be open to such a person, a public district school.

The question of propriety and taste, as well as the social and intellectual inferiority of the colored race, was dwelt upon by counsel for respondents in their argument, but it is manifest that with these features of the case, this Court has nothing to do. It is a question of constitutional law, pure and simple.

Yet I cannot avoid the remark, that I can see nothing destructive to our institutions in the demolition of the legal barriers that have been erected so long and so high between the colored race, and their natural, civil, and political rights and liberties.

The white race owes the colored race at least fair play in their great struggle for education and improvement and advancement, which they are making, and have a right to make in their recently emancipated condition.

If, after being accorded equal advantages and freedom from petty tyranny and studied insult, and the incentive to self-respect which is meted to others, the colored man then falls behind in the great race for human progress, it will then be time to talk of the moral and intellectual inferiority of his race. Nothing but gross uncharitableness can be jealous or envious of advancement and progress founded upon true merit.

To conclude, the answer of the respondent to the alternative writ of mandamus, is, under the facts found by the special verdict, adjudged insufficient. The relator has shown himself entitled to the relief prayed for. Mandamus is conceded to be the proper remedy for the wrong complained of, and a peremptory writ of mandamus is ordered to be issued commanding and requiring the respondents as school controllers of the city of Meadville to admit the minor children of the relator over the age of six years as pupils into the public school under their control in the second school district of said city, and known as the Huidekoper Grammar School, and to proceed to determine into which grade or class of said school the said minor children shall so be admitted as pupils.

It is further ordered that the respondents do pay the costs of this proceeding.

Opinion by CHURCH, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JUNE 23, 1881.* [No. 10.

Supreme Court.

May '81, 151 and 159. May 16 and 19, 1881.

The Bourguignon Building Association v. The Commonwealth.

The Excelsior Building and Loan Association v. The Commonwealth.

Taxes and taxation—Building associations—Capital stock of, liable to taxation—Act of April 10, 1879 (P. L. 16)—Act of June 7, 1879 (P. L. 112)—Construction of.

The Act of June 7, 1879 (P. L. 112), imposing a tax upon the capital stock of corporations, operated as an express repeal of the Act of April 10, 1879 (P. L. 16), exempting building associations from taxation.

Building associations are included within the corporations upon whose capital stock taxation is imposed by the Act of June 7, 1879 (P. L. 112).

Writs of error to the Common Pleas of Dauphin County.

Appeals from settlements made by the Auditor-General and State Treasurer against the Bourguignon Building Association and the Excelsior Building and Loan Association respectively, for taxes upon their capital stock.

In the case of the Bourguignon Building Association, the following case stated was by agreement submitted to the Court.

"This is an appeal from a settlement made by the Auditor-General and State Treasurer for tax on capital stock under the Act of June 7, 1879, for year ending first Monday of November, 1879. The company is a building association incorporated in 1878, under the Act of April 29, 1874, with a nominal capital of one million dollars, divided into shares of $200 each. At the time of its incorporation, no capital had been paid in. 1615 shares have been subscribed, payable one dollar per month on each share. Up to first Monday of November, 1879, $50,113.45 had been paid in. This money is loaned out to members on mortgage security. By the Act of Assembly approved April 10, 1879, building associations are exempted from the tax claimed under the settlement made in this case. The Act was formally accepted by appellants, and thereupon new letters patent were issued thereunder. The Commonwealth demands the tax in question under the provisions of the general Revenue Act of June 7, 1879."

In the case of the Excelsior Building and Loan Association, the following case stated was by agreement submitted:—

"This is an appeal from the settlement made against the Excelsior Building and Loan Association by the Auditor-General and State Treasurer. This Association was incorporated under the Act of April 29, 1874, and by authority of the ninth section of the Act of April 10, 1879, accepted and became entitled to all the privileges and immunities of the last named Act, and received letters patent reciting the same. Up to the first Monday of November, 1879, 1001 shares had been subscribed for and issued. From the instalments of one dollar per month on these shares and the profits thereon, the capital stock had, on the first Monday of November, 1879, attained an appraised value of $60,190.43. Upon this basis the Auditor-General and State Treasurer assessed a tax at the rate of three mills for the 149 days' interval between the approval of the Revenue Act of June 7, 1879, and the first Monday of November, 1879, said tax amounting to $77.39."

The questions stated and submitted to the Court in both cases were:—

1. Are the provisions of the Act of April 10, 1879, exempting appellants from taxation, repealed by the General Revenue Act of June 7, 1879?

2. If repealed, does the Act of June 7, 1879, impose a tax on the capital stock of building associations?

If the Court found both these propositions against the appellants, then judgments were to be entered for the Commonwealth in the amounts of $73.03 and $77.39 respectively, otherwise judgments were to be entered for appellants.

The Court in opinions by HENDERSON, J., found in favor of the Commonwealth in both cases. Exceptions were in both cases filed and in both overruled, and judgments entered on the findings of the Court. The appellants thereupon took these writs, assigning for error, *inter alia*, the entry of judgments for the Commonwealth.

J. W. M. Newlin and *M. H. Stutzbach* (with them *J. P. Klinges*), for the Bourguignon Building Association, and *John. I. Rodgers* (with him *J. Levering Jones* and *William A. Redding*), for the Excelsior Building and Loan Association, plaintiffs in error.

When the Act of April 10, 1879 was passed, building associations were already exempt from taxation. The intent of that Act must have been therefore to secure to them immunity from taxation under subsequent Acts.

The Act of June 7, 1879, was passed at the same session of the Legislature, and should, if

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possible, be construed so as to harmonize with other Acts passed at the same session.

A general law does not operate as a repeal of a special law, unless it is impossible by any construction to make them stand together.

Dyer *v.* Covington, 4 Casey, 186.
Brown *v.* Commissioners, 9 Harris, 37.
Bounty Accounts, 20 Smith, 96.
Erie *v.* Bootz, 22 Smith, 199.
Shinn *v.* Commonwealth, 3 Gr. Cas. 205.
In re Egypt St., 2 Id. 455.
Bowen *v.* Lease, 5 Hill, 221.
McFarland *v.* State Bank, 4 Ark. 410.
Ottawa *v.* County of La Salle, 12 Ill. 339.
Williams *v.* Pritchard, 4 T. R. 2.
United States *v.* Wigglesworth, 2 Story, 369.
Erie Railway Co. *v.* Commonwealth, 16 Smith, 84.
Thorpe *v.* Adams, L. R. 6 C. P. 125.
Kilgore *v.* Commonwealth, 9 WEEKLY NOTES, 184.

When statutes can be so construed as to stand together they should be. A statute is not to be repealed by implication.

Street *v.* Commonwealth, 6 W. & S. 209.
Pearce *v.* Bank, 33 Ala. 693.
McCool *v.* Smith, 1 Black. 459.
Wood *v.* United States, 16 Pet. 342.
Harford *v.* United States, 8 Cranch, 109.
Easton Bank *v.* Commonwealth, 10 Barr, 448.
Hume *v.* Gossett, 43 Ill. 297.
Johnston's Estate, 9 Casey, 511.
Gwinner *v.* R. R., 5 Smith, 126.
Cohen *v.* Commonwealth, 6 Barr, 111.
Morris *v.* Canal Co., 4 W. & S. 461.

The Act of June 7, 1879, must be strictly construed.

Sewall *v.* Jones, 9 Pick. 412.
Moseley *v.* Tift, 4 Fla. 402.

Its terms cannot be construed to apply to building associations, because—

1. They are "savings institutions" within the meaning of the Act, and therefore exempt from taxation. 2. They have no "capital stock" within the meaning of the Act. The "shares" in a building association lack the distinctive features of "stock" in other kinds of corporations.

Lyman D. Gilbert, Deputy Attorney-General (with him *Henry W. Palmer*, Attorney-General), for the Commonwealth, defendant in error.

A general tax law repeals all earlier special laws, unless they are specially excepted, or are protected by contract.

Iron City Bank *v.* Pittsburgh, 1 Wright, 340.
Commonwealth *v.* Fayette Co. R. R. Co., 5 Smith, 452.
Union Improvement Co. *v.* Commonwealth, 19 Smith, 140.

The Act of June 7, 1879, clearly imposes a tax on building associations. They cannot be deemed savings institutions within the purview of the Act, and have capital stock which is clearly liable to taxation.

THE BOURGUIGNON BUILDING ASSOCIATION *v.* THE COMMONWEALTH. June 6, 1881. THE COURT. The fourth section of the "Act to provide revenue by taxation," approved June 7, 1879, provides as follows:—

"That every company or association whatever, now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State or territory of the United States, or foreign government, and doing business in this Commonwealth or having capital employed in this Commonwealth in the name of any other company, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks, and savings institutions, shall be subject to, and pay into the treasury of the Commonwealth annually, a tax to be computed as follows," etc.

The facts of this case are brought before us by a case stated, in which it is agreed that the appellant "is a building association incorporated in 1878, under the Act of twenty-ninth of April, 1874, with a nominal capital of $1,000,000, divided into shares of $200 each." It is also agreed that up to the first Monday of November, 1879, $50,113.45 (of capital) had been paid in," and "this money is loaned out to members on mortgage security."

By the terms of the case stated it appears, therefore, that the appellant is an association incorporated by a law of this Commonwealth, having a paid in capital of $50,113.45 on the first Monday of November, 1879.

Apparently the language of the revenue Act of June 7, 1879, subjects the appellant to the payment of a tax upon its capital stock. It is contended, however, that it is not liable to such a tax, upon two grounds—first, because building associations are excepted from the tax claimed by virtue of the Act of April 10, 1879, relating to mutual savings fund, building and loan associations, and, second, because the Act of June 7, 1879, does not, when properly construed, impose a tax upon building associations. As it is undoubted that the Act of April 10, 1879, does exempt from taxation all building associations which prior to and at that time were subject to taxation by existing laws, the contentions of the parties to this litigation are presented by the case stated in the two following questions:—

First. Are the provisions of the Act of April 10, 1879, exempting the appellant from taxation, repealed by the general revenue Act of June 7, 1879?

Second. If repealed, does the Act of June 7, 1879, impose a tax upon the capital stock of building associations?

The Court below having decided both these questions against the appellant and sustained the settlement made by the Auditor-General and State Treasurer, the association has brought the case for review by writ of error.

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As to the first question, the language of the 8th section of the Act of April 10, 1879, is as follows: "The bonus or tax due to the Commonwealth upon the capital stock of corporations as provided for by Act of first of May, one thousand eight hundred and sixty-eight, or by any other Act, shall not apply to, or be due from mutual savings fund or building and loan associations." The effect of this proviso undoubtedly was to exempt mutual savings fund and building and loan associations from the payment of the bonus or tax imposed upon them by the Act of May 1, 1868, or by any other Act in force on April 10, 1879, but that was its whole effect. Neither this section, nor any other of the Act of April 10, 1879, assumed to surrender the right of the Commonwealth to impose any taxes she might choose to impose in the future. Not the slightest attempt is made to prohibit subsequent legislation in hostility with that of the Act in question. Hence it cannot be doubted that on any day after the 10th day of April, 1879, it was within the authority of the Commonwealth, acting through the law-making power, to re-impose any taxes which were removed by the legislation of that date. While it may be argued with some force that it would be inconsistent for the same Legislature to remove a tax by one Act and re-establish it by another of a subsequent date, yet that is but an argument of inconsistency at the best. It would be very proper to be addressed to the legislative body as a reason for not passing the subsequent Act, but it is absolutely of no force where addressed to a Court which is bound to construe and enforce plain legislative words. Were the subject an open one, it would be enough to suggest that in the interval between the dates of the two Acts there may have occurred such a change in the financial affairs of the Commonwealth, or in the opinions of the members of the legislative body respecting those affairs, as to induce them to re-impose taxes which they had by the earlier Act removed. In view of these considerations, it is evident that if the Act of June 7, 1879, imposes the tax in question, it is scarcely essential to the discussion to determine whether it is a repeal of the Act of April 10, preceding.

But if it were material, the question is not difficult of solution. The eighteenth section of the Act of June 7th provides, "that this shall go into effect immediately, and that all laws or parts of laws inconsistent herewith, or which are hereby substantially re-enacted, be and the same are hereby repealed." The eighth section of the Act of April 10th is certainly and necessarily inconsistent with the fourth section of the Act of June 7th if the latter imposes a tax which the former removes, and hence the question is not one of implied but express repeal. In the case of Commonwealth *v.* Fayette County Railroad Company (5 P. F. S., on p. 455) we said: "The Act of twelfth April, 1859, expressly repeals any existing law inconsistent with the provision as to taxation, and as the defendants are conceded to be within the words of the Act, the limitation of taxation in their fifth section is clearly altered or repealed." In the case of The Union Improvement Company *v.* The Commonwealth (19 P. F. S. 140), the company was by the express provision of a supplement to its charter exempted from taxation on its capital stock and dividends. Yet we held that it was liable to such tax under the general language of the Act of May 1, 1868, imposing tax upon all corporations, without any words either of special or general repeal. The decision was put solely upon the ground that the Act of 1868 subjected to taxation the capital stock of all corporations, and that therefore it must be intended to repeal even previous Acts which gave special exemption. On page 143 it was said by WILLIAMS, Justice: "It is true that this company was exempted from taxation by a special Act, but this is wholly immaterial if it was the intention of the Legislature to repeal the exemption by the Act of 1868. If no such repeal was intended why did the Legislature declare that the stock of all companies whatever, except banks, savings institutions, and foreign insurance companies, should be subject to the tax imposed by the Act? The exemption of these three classes of corporations from the operation of the Act conclusively shows that the Legislature intended to include within its provisions all other corporations whatever, whether they had been previously exempted from taxation or not. If such was not their intention, why were they not included in the saving provisions of the Act?

This language goes much further than any requirement of the present case demands. In the case just cited the exemption was by a special Act which constituted part of the charter of the company, and, of course, it was limited to that particular corporation. In the case at bar the plaintiff in error is one of a class, and claims the benefit of a general Act exempting all building associations. The Act of May 1, 1868, contained no general repealing clause, but did contain a section, the sixteenth, which repealed a number of Acts and parts of Acts, by precise description, but none of which embraced the Exempting Act of 11 April, 1862, which applied to the Union Improvement Company. Notwithstanding all this, it was determined by this Court that the more general language of the Act of 1868, making the capital stock of all corporations liable to taxation, operated as a repeal of the special exemption in question. In the case of the Erie Railway Company *v.* The Common-

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wealth (16 P. F. S., on p. 87), the present Chief Justice said: "There is no principle better established, and it requires no long array of cases to prove it, than that no surrender of the general power of taxation by any legislative act can be implied." In the present case there is no language in any part of the Act of April 10, 1879, as we have heretofore shown, that purports to surrender in any degree the general power of taxation possessed by the Commonwealth. Under the case last referred to, it was held that such surrender cannot be implied.

We are therefore clearly of opinion that the Act of June 7, 1879, was a fresh and independent exercise of the taxing power, unrestrained by any previous surrender or limitation, so far as building associations are concerned, and also that it operated as an express repeal of the Act of April 10, 1879, exempting such associations from taxation.

The remaining question submitted by the case stated is, "Does the Act of June 7, 1879, impose a tax upon the capital stock of building associations?" The express language of this Act includes "every company and association whatever . . . . except foreign insurance companies, banks, and savings institutions." A building association is neither a foreign insurance company nor a bank, and it cannot, without a manifest abuse of terms, be denominated a savings institution. Technically, building associations and savings institutions have not a feature in common. In practical details of their operation they are totally dissimilar. The latter were well known and in general use long before the former were heard of, or had any authorized existence. If there were the slightest doubt as to whether the Legislature regarded *savings institutions* and *building associations* as the same, it is instantly dispelled by observing the manner in which they are treated in various Acts. The Act of May 1, 1868, imposed taxation upon all companies whatever, "except banks and savings institutions and foreign insurance companies;" but yet provided in the same section "that building associations, plank road or turnpike companies, shall not be liable for any tax to the Commonwealth when such companies make or declare no dividends." If "building associations" were already exempt from the operation of the 4th section, because they were "savings institutions," the proviso clause of that section which exempts them when they declare no dividends would be an absurdity. In the 5th section of the Tax Act of April 24, 1874, occurs the following clause: "and excepting also banks and savings institutions, building associations, and foreign insurance companies." If the two classes were the same, of course they would not receive separate designation. Precisely the same independent designation of these two classes of corporations occurs in the excepting clause of section three of the general tax law of March 20, 1877. When the Act of June 7, 1879, was passed, all companies or associations whatever were subjected to the tax, "except foreign insurance companies, banks, and savings institutions," and the conclusion is irresistible that, inasmuch as in the previous Acts upon the same subject, building associations were included in the excepting clauses by express mention, they were omitted from the excepting clause of this Act because it was so intended. It is unnecessary to pursue the discussion. We are of opinion that the learned Court below were correct in their conclusion upon both questions submitted, and therefore the judgment is affirmed.

Opinion by GREEN, J.

THE EXCELSIOR BUILDING AND LOAN ASSOCIATION *v.* THE COMMONWEALTH. June 6, 1881. THE COURT. This case is determined by the opinion just filed in the case of the Bourguignon Building Association *v.* The Commonwealth.

Judgment affirmed.

PER CURIAM.

July, '80, 97. February 8, 1881.

Orcutt's Appeal.

Collateral inheritance tax—Acts of April 7, 1826, sect. 1 (P. L. 227), April 10, 1849, sect. 13 (P. L. 571), March 11, 1850, sect. 3 (P. L. 170), and April, 22, 1858 (P. L. 470), discussed and construed—Situs—United States securities, wherever deposited, have as their situs the domicile of the owner—Executors and administrators—Comity of States—Foreign executor.

The bonds of the United States, wherever deposited, are simply evidences of indebtedness, and cannot therefore acquire a *situs* different from the domicile of their owner.

Estates must have a *situs* within this Commonwealth in order to be liable to the collateral inheritance tax under the laws thereof.

The collateral inheritance tax does not attach to the very articles of property of which the deceased died possessed; it is only imposed upon what remains for distribution after expenses of administration, debts, and rightful claims of third parties have been paid or provided for. It is on the net succession to the beneficiaries, and not on the securities in which the estate of the decedent was invested, that the tax is payable.

The collateral inheritance tax is payable only upon estates passing by a will operative within this State, or under the intestate laws thereof, or by deed or grant intended to take effect after the death of the decedent.

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A., a citizen of New Jersey, died domiciled there, leaving a will nominating B. as his executrix, who was also domiciled in New Jersey, and to whom letters were granted by the surrogate of the domicile of the testator. A. had at the time of his death, certain United States securities deposited with C., in Philadelphia, which were overdue. B. demanded the bonds of C., who refused to deliver them, but took out ancillary letters of administration, *c. t. a.*, in Pennsylvania, collected the amount of the bonds, and filed his account. There were no creditors in Pennsylvania, and the beneficiaries under A.'s will were all domiciled in other States:

Held, that the fund produced from the proceeds of the bonds lacked at least some of the ingredients of liability above referred to; that it had no *situs* other than the domicile of the testator or his executrix; that, while the will was sufficient to pass the personalty in this State, it did not appear that, upon final administration and distribution in the domicile of the testator, any part thereof would go to collateral legatees; and that, therefore, it was not liable to the collateral inheritance tax under the laws of this Commonwealth.

Semble, that, under the above circumstances, there was no good reason why C. should not have delivered the bonds to B. when she requested that they should be so delivered.

The Act of April 10, 1849, sect. 13 (P. L. 572), providing that, if any non-resident of the State shall die leaving real or personal property within this Commonwealth, the same shall be subject to the payment of collateral inheritance tax, was intended only to embrace personal property of a tangible nature, actually situated or used for business purposes within this Commonwealth, and cannot be construed to refer to mere certificates of indebtedness, such as government bonds, deposited within this Commonwealth for safe keeping.

Whether said last-named Act was repealed by the Act of April 22, 1858 (P. L. 470), not decided.

Appeal of Lydia Ann Orcutt, executrix of the will of Wesley Grindle, deceased, under letters testamentary granted in New Jersey, from the decree of the Orphans' Court of Philadelphia County dismissing her exceptions to the adjudication on the account of The Fidelity Insurance, Trust, and Safe Deposit Company, administrator *c. t. a.* of the said decedent in Pennsylvania.

The facts of the case, as they were set forth in the adjudication of the Auditing Judge (HANNA, P. J.), were as follows: "Wesley Grindle, the decedent, was a citizen of and domiciled in the State of New Jersey, and died in that State on the 12th day of June, 1879. His last will and testament, dated the 27th day of March, 1879, was admitted to probate in the surrogate's office at Camden, New Jersey, on the 31st day of October, 1879, and letters testamentary thereon were granted to Lydia Ann Orcutt, the executrix named therein, on the 6th day of December, 1879.

"The decedent had on deposit with The Fidelity Insurance, Trust, and Safe Deposit Company of the city of Philadelphia $24,000 in bonds of the 10-40 loan of the United States, which had been called for redemption, and, being over-due, only awaited the intervention of decedent's legal representative to be converted into money.

"The Fidelity Insurance, Trust, and Safe Deposit Company declined to deliver the bonds to the executrix, being advised that it was needful for their protection to require ancillary letters to be granted in Pennsylvania.

"The executrix, being a resident of New Jersey, was incompetent to take letters testamentary in this State without entering security. In order to obtain possession of the bonds in question for the purposes of her administration, she therefore requested that ancillary letters of administration *cum testamento annexo* should be granted by the Register of Wills for the county of Philadelphia to the present accountants. Letters were accordingly granted to them on the 20th day of January, 1880. The bonds were disposed of, and the proceeds constituted the subject of the account.

"This administration was purely ancillary to that of the executrix in New Jersey, there were no creditors in this State, and the fund remaining in the hands of the accountants, after deduction of all charges, viz., $22,029.02, was to be awarded to the executrix of the domicile for administration according to the terms of the will.

"By the will, with the exception of a legacy of $2000 to the testator's mother, the entire estate was bequeathed, in equal proportions, to the testator's brothers and sisters. All the legatees resided in the States of New Jersey and New York, and none in this State.

"In view of these facts, it was claimed on behalf of the executrix and legatees that the fund was not liable to the tax on collateral inheritances imposed by the laws of Pennsylvania, and should be awarded to the executrix of the domicile without charge therefor. It was also stated that the Register of Wills of this county, to whom the facts above stated had been made known, made no claim for the said tax."

The Auditing Judge awarded $1108.28 to the Commonwealth of Pennsylvania, being the amount of the collateral inheritance tax upon the fund for distribution less the legacy of $2000 to testator's mother.

To this adjudication, Lydia Ann Orcutt, executrix, filed exceptions, which were dismissed by the Court, and a decree entered confirming the adjudication. The said executrix thereupon took this appeal, assigning for error the decree of the Court as above.

J. B. Townsend, for the appellant.

The doctrine that the *situs* of personal property is to be deemed that of the domicile of the owner is unquestionable.

Under the Act of April 7, 1826 (Purd. Dig.

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214, pl. 1), the property taxable is such only as passes to volunteers.

Commonwealth's Appeal, 10 Casey, 204.

The explanatory Act of March 11, 1850, § 3 (Purd. Dig. 216, pl. 8), limits the effect of the original Act so that it relates to persons and estates within the Commonwealth. The fund in question must be administered in New Jersey; it is impossible to tax it without knowing whether or not it may all be required in the domicile of the decedent to pay debts.

Strode *v.* Com'th, 2 Sm. 181.

The legislation prohibiting foreign executors from acting in this State has been modified by various enabling Acts. The tendency of these modifications is altogether at variance with the proposed right to tax in this case.

The case of Commonwealth *v.* Alexander (4 Pa. L. J. 448), was founded on English cases which have since been overruled.

Jackson *v.* Forbes, 2 C. & J. (Ex.) R. 382.
In re Bruce, Ibid. 436.
Att'y-General *v.* Forbes, 2 C. & F. 48.
Att'y-General *v.* Jackson, 8 Bligh, 15.
Arnold *v.* Arnold, 2 M. & C. 256.
Thomson *v.* Adv.-General, 13 Simons, 153.
Att'y-General *v.* Napier, 6 Exch. 217.
2 Williams on Executors (Am. Ed.), 1485.

The principle that the collateral inheritance tax ought not to be levied on the property of non-residents has also been recognized in—

R. R. Co. *v.* Pa., 15 Wall. 300.
Murray *v.* Charleston, 6 Otto, 433.
Kintzing *v.* Hutchinson, 34 Leg. Int. 365.

To sustain the taxing power in this case would be to impose a double tax and to violate the comity of States.

The Act of April 10, 1849 § 13 (Purd. Dig. 215, pl. 4), which would seem to provide for taxation of the property of a non-resident, has been repealed by the Act of April 22, 1858, § 8 (P. L. 470).

H. W. Palmer, Attorney-General for the Commonwealth, did not appear and presented no paper-book.

May 2, 1881. THE COURT. The fund for distribution $22,029.02, as shown by the account of the ancillary administrator, is the net proceeds of United States ten-forty bonds, which belonged to Wesley Grindle, a citizen of the State of New Jersey, and domiciled therein at the time of his decease in June, 1879. The bonds deposited by the decedent with the Fidelity Insurance, Trust, and Safe Deposit Company of Philadelphia, for safe keeping, had been called for redemption, and being over due, were payable on presentation at the United States Treasury. By his last will and testament, the decedent gave a legacy of $2000 to his mother, and bequeathed the entire residue of his estate, in equal proportions, to his brothers and sisters, all of whom reside in the States of New Jersey and New York. The will was probated in New Jersey, and in December, 1879, letters testamentary were duly granted by the Surrogate to appellant, the executrix therein named. The Fidelity Company, claiming that for its protection ancillary letters should be taken out in this State, declined to deliver the bonds to the executrix. Letters of administration were accordingly granted by the Register of Wills, in Philadelphia, to the accountant, who collected the bonds and filed an account showing the above balance of cash on hand. The administration under these letters was purely ancillary to that of the executrix in New Jersey, and inasmuch as there appear to be no creditors, legatees, or distributees in this State, the fund, after deducting all proper charges, must be awarded to her for administration according to the laws of New Jersey and the provisions of testator's will.

We are not called upon to express any opinion as to whether under the circumstances, the demand of the Fidelity Company was reasonable or not. It was acquiesced in, and the single question presented by the assignments of error is, whether the residue of the fund, after deducting Court costs and the legacy of $2000 to testator's mother, is subject to collateral inheritance tax under the laws of this State. The learned President of the Orphans' Court held that it was, and he accordingly decreed the payment of $1108.28 to the register of wills for collateral inheritance tax, and the residue to the executrix in New Jersey, for administration and distribution there.

The first Act on the subject of collateral inheritance taxes, passed in 1826, provides that all estates, real, personal, or mixed, passing from any person who may die seized or possessed of such estate, being within this Commonwealth, either by will or under the intestate laws thereof, to any person other than to father, mother, husband, wife, children or lineal descendants, shall be liable to a tax; and makes it the duty of all executors, administrators, and their sureties to pay the same (P. L. 227). By the Act of 1850, the words "being within this Commonwealth," in the Act of 1826, were construed, "to relate to all persons, who have been at the time of their decease, or may now be domiciled within this Commonwealth, as well as to estates; and this is declared to be the true intent and meaning of said Act" (P. L. 170).

Shortly after the passage of the latter Act, it was decided in Short's Estate (4 Harris 63), that personalty of a citizen of Pennsylvania, derived either from within or without the State and passing to others than those named in and excepted by the terms of the original Act, was liable to the tax. This position has never been questioned.

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Nor can there be any doubt as to real estate situated within the Commonwealth. Whether the person dying seised or possessed thereof be a citizen of the State or not, so much thereof as passes to collaterals is subject to the tax, because it has a *situs* within the State, and the title must be transmitted according to our laws governing the conveyance or descent of real estate. It is only in regard to personal property of non-residents that any question can arise. The general rule undoubtedly is, that the *situs* of personal property follows the domicile of the owner; but, for particular purposes, some species of personal property may have an actual *situs* distinct from the legal one. This qualification of the rule, however, cannot apply to the kind of property from which the fund in this case was realized. The bonds were simply evidence of indebtedness, not by any person or corporation within the Commonwealth, but by the general Government. There is no reason why such property should, for any purpose, have a *situs* different from the domicile of its owner. The testator entrusted the bonds temporarily, for safe-keeping, to the Fidelity Company, but they were, constructively at least, in his possession at the time of his decease. There were no creditors, legatees, or distributees in the State claiming them or any portion of the proceeds thereof; and in the absence of creditors or other interested parties in this State claiming administration here, I can see no good reason for refusing to deliver the bonds to the executrix. As it is, however, the fund here is in the hands of a purely ancillary administrator whose sole function was to receive from the United States Treasury the amount called for by the bonds and transmit the same, less costs and charges, to the executrix in New Jersey for administration according to the laws of that State, and the directions of the testator. It is true that, if creditors or distributees, residing here, had intervened and demanded distribution or payment directly from the accountant, the Orphans' Court, in its discretion, might have heard them and might also have permitted foreign creditors to present their claims; but, that is matter of judicial discretion, not of right (Dent's Appeal, 10 Harris, 514).

It is also clear from the Act itself, as well as from the construction it has heretofore received, that the property taxable is such only as passes to *volunteers*, persons not excepted by the terms of the Act. The tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts, and rightful claims of third parties are paid or provided for. It is on the net succession to the beneficiaries and not on the securities in which the estate of the decedent was invested. (Commonwealth's Appeal, 10 Casey 204; Strode *v.* Commonwealth, 2 P. F. Smith, 181.) How, then, is it possible to impose a tax on this fund when it has never been ascertained judicially how much or whether any of it will go to the collateral legatees? When the executrix charges herself with the fund received from the ancillary administrator and settles her account in New Jersey, who can tell how much of it may be successfully claimed by creditors and others as against the legatees? The Court of the testator's domicile is the only one that can properly determine how much of it will ultimately go to the collateral legatees.

Again, by the very words of the Act, the tax is not only limited to such estates as have a *situs* within the Commonwealth, and also pass to collateral heirs or legatees, but it is further restricted by defining the mode in which they shall pass, viz., estates, "being within this Commonwealth" and "passing from any person," etc., "either by will or under the intestate laws thereof," etc. It is clear, therefore, that estates, not passing by a will that is operative within the State, or under the intestate laws thereof, or by deed or grant intended to take effect after the death of the decedent, are not within the purview of the Act. Devolution, either under the intestate laws of the Commonwealth, or under a properly executed will, is clearly made a condition of liability to the tax. To render estates liable to the tax, therefore, they must in the first place have a *situs* within the Commonwealth, and in the second place, they must pass, in one or other of the modes prescribed, to the collateral heirs or distributees intended by the Act. We are of opinion that the fund in question lacks at least some of the ingredients of liability above referred to. Neither the bonds themselves, nor their proceeds ever had any *situs* other than the domicile of the testator or his executrix; and while the will is sufficient to pass personal property in this State, it does not yet appear that upon final administration and distribution, any part of the fund will go to the collateral legatees.

The Act of April 10th, 1849, provides in general terms, that if any non-resident of the State shall die leaving real or personal estate within this Commonwealth the same shall be subject to the payment of collateral inheritance tax. It is contended that this Act was repealed by the Act of April 22d, 1858. Without passing on that question, we are of opinion that the Act was never intended to apply to the kind of personal property from which the fund in this case was realized. It was doubtless intended to embrace only personal property, of a tangible nature, actually situated or used for business purposes within the Commonwealth, and not to mere certificates of indebtedness, such as Government

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bonds, whose *situs* necessarily follows the owner's domicile.

Decree reversed and it is now adjudged and decreed that the residue of the fund, viz., twenty thousand and five dollars and fifty-two cents, less the costs of this appeal, be paid to the appellant, Lydia Ann Orcutt, executrix of the last will of Wesley Grindle, deceased, for administration and distribution according to the laws of the State of New Jersey and the provisions of said testator's will; and it is further ordered that the costs of this appeal be paid by the appellee out of the fund in hand.

Opinion by STERRETT, J.

Jan. '81, 4 and 5. March 10, 1881.

Miller's Appeals.

Taxes and taxation—Exemption from—"Purely public charity"—Constitution of Pennsylvania, Art. IX. sect. 1—Act of May 14, 1874—Convents—Roman Catholic schools—Equity—Injunction—Powers of Court of Equity to enjoin collection of illegal taxes.

Taxes were levied upon certain properties held respectively by a Roman Catholic bishop in trust, and by a Roman Catholic charitable corporation, which properties were used as schools, supported for the most part by charity, in which children were instructed partly in the Roman Catholic faith, but which were open to all children without distinction of sex, race, or religious belief. Those children only paid tuition who were able to do so. The instruction was given altogether by sisters of charity, who lived in the buildings, and who also educated certain novices and postulants living with them gratuitously. Bills in equity being filed to restrain the collector of taxes from levying and collecting the taxes imposed on said properties, preliminary injunctions were granted. Motions to dissolve said injunctions on the ground of want of equitable jurisdiction in the premises, and that the charity was not *purely* public under the provisions of the Constitution and Act of Assembly relating to exemption from the payment of taxes, were afterwards discharged, and the injunctions continued:

Held, that the Court erred in granting the injunctions, and that they should be dissolved.

Appeals by G. M. Miller, Receiver of Taxes for the city of Wilkesbarre, from two interlocutory decrees of the Court of Common Pleas of Luzerne County.

The two appeals, involving the same question, were heard together.

On December 7, 1880, two bills in equity were filed, one by William O'Hara, Roman Catholic Bishop of Scranton, holder of certain properties in the city of Wilkesbarre, in trust for certain Roman Catholic congregations, and the other by a corporation known as the Society of the Sisters of Christian Charity, duly incorporated under the Act of Assembly of April 29, 1874, owner in fee of certain other properties in the said city, against G. M. Miller, Receiver of Taxes for the city of Wilkesbarre.

The bills set forth that taxes were levied on the said properties by the proper authorities, and that the defendant was about to enforce the collection of the same by warrant, and prayed for a preliminary injunction to enjoin and restrain him from so doing.

The affidavits taken in support of the bills established the fact that the buildings were originally designed and erected for schools, and that they had always been used as such; that these schools were carried on with no view to profit, and were open alike to all children without reference to creed or color, though, indeed, a leading purpose of their organization and maintenance was the education of the children of Catholic parents, and a part of the daily exercises consisted of the religious services prescribed by the Catholic church; that tuition was charged for the instruction of those children whose parents were able and willing to pay it, while all other children were admitted free of expense so far as the capacity of the buildings and number of teachers would allow; that theretofore the expenses of maintaining these schools had been largely in excess of the receipts realized from payments for tuition, the balance having been supplied from year to year by charity, and that, from the very nature of the institutions, this order of things must continue; that no revenues from the schools could in any event ever inure to profit or gain; that the schools were taught by sisters of charity, who resided therein, and that in addition to the regular sisters of the order there were others called postulants and novices, who lived with them, and who received the preparatory instruction necessary before entering the society; that these were charged no tuition fee; and finally, that the purpose of the corporation known as "The Society of the Sisters of Christian Charity," complainants in the second suit, was, as stated in their charter, "to found, endow, and maintain an institution of purely public charity for the education and instruction of the young."

Preliminary injunctions were awarded, and on the same day motions were entered by defendant to dissolve the injunctions, on the ground of want of equitable jurisdiction, and that the schools were not purely public charities under Article IX. Sect. 1, of the Constitution and the Act of May 14, 1874, passed in pursuance thereof. These motions were refused by the Court, and the preliminary injunctions continued on January 20, 1881, in an opinion by WOODWARD, P. J.

Thereupon defendant took these appeals, assigning for error the action of the Court in granting the special injunctions restraining the de-

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fendant from collecting the taxes levied and assessed upon the properties mentioned in the bills.

Thomas H. Atherton, *Allan H. Dickson*, and *William S. McClean*, for appellant.

A court of equity has no jurisdiction to restrain the collection of a tax where the only reason for the interposition by injunction is the illegality of the tax.

Hewitt's Appeal, 7 Norris, 60.
Dows *v.* City of Chicago, 11 Wall. 110.
State Railroad Tax Cases, 2 Otto, 613.
Haunewinkle *v.* Georgetown, 15 Wall. 548.
Youngblood *v.* Sexton, 32 Mich. 406.
Brewer *v.* Springfield, 97 Mass. 154.
Gorrell *v.* Murphy, 1 Leg. Gaz. Rep. 495.
Vancott *v.* Supervisors of Milwaukee Co., 18 Wis. 247.
Mechanics and Traders' Bank *v.* Deboit, 1 Ohio St. 591.
Baltimore *v.* Baltimore & Ohio R. R. Co., 21 Md. 50.
Ritter *v.* Patch, and Berri *v.* Patch, 12 Cal. 298–9.
Rockingham Savings Bank *v.* Portsmouth, 52 N. H. 17.
Susq. Bank *v.* Supervisors of Broome, 25 N. Y. 312.
Hoagland *v.* Township of Delaware, 17 N. J. Eq. 106.
Sheldon *v.* The Central School District, 25 Conn. 223.
Greene *v.* Mumford, 5 R. I. 472.

The cases to the contrary are distinguishable from this one either in that they were based on fraud or malfeasance of a public officer, or an illegal assessment which affected all parties alike, or that all the parties submitted themselves to the jurisdiction without objection.

The schools in question are not institutions of "purely public charity," and cannot therefore claim the exemption provided by Article IX. Sect. 1, of the Constitution and the Act of May 14, 1874.

The true test is to be found in the objects of the institution.

Donohugh *v.* Library Co., 5 Norris, 306.
Burd Orphan Asylum *v.* Upper Darby, 8 WEEKLY NOTES, 1.

These buildings are used as convents, and the primary object of such institutions is to afford a common residence for a certain class of religious people; and however charitable the lives of the inmates, it still remains a dwelling-house of persons, whether citizens or aliens, subject to the laws of the State of Pennsylvania, and under an obligation to pay a uniform rate of taxation upon their residences in the State. Religious purposes become charitable in a legal sense only when they have a public object.

Cocks *v.* Mauers, L. R. 12 Eq. Cas. 585.

But treating these buildings as schools purely, they are still not exempt from taxation, because—

1. The instruction is not merely such as is by general consent of public utility, and of such grade as is in no way in competition with the public schools (it having been always the policy of the people of Pennsylvania to control and direct all public schools).

2. It is not absolutely free from any kind of private and sectarian purpose.

The People *v.* Board of Education of Brooklyn, 13 Barb. 411.

3. It is not so managed that the public purpose is pre-eminently established, and that the individuals of the class proposed to be benefited shall be instructed of right and not by the grace of temporary managers.

Delaware Co. Institute of Science *v.* Delaware Co., 8 WEEKLY NOTES, 449.

Garrick M. Harding and *John McGahren*, for appellees.

Ever since the legislation of 1836, which invested our Courts with chancery powers so far as relate to "the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or individuals," the lower Courts of Pennsylvania have uniformly exercised jurisdiction in equity to restrain the collection of taxes illegally assessed and levied, and such jurisdiction has in every case been recognized by the Supreme Court.

Hughes *v.* Klines, 6 Casey, 231.
Speer *v.* School Directors *et al.*, 14 Wright, 150.
Borough of Petersburg *v.* Noss, 2 Smith, 448.
Shirk *et al. v.* Bucher, 3 Smith, 94.
Truesdell's Appeals, 8 Smith, 148.
Conyngham School District's Appeal, 27 Sm. 265.
Pittsburgh *v.* Roup, 1 WEEKLY NOTES, 254.
O'Donnell's Case, 1 Id. 339.
City of Philadelphia *v.* Cochran *et al.*, 4 Id. 222.
Miller *et al. v.* Gorman *et al.*, 2 Wr. 309.

This institution is purely public as respects the uses it subserves and the benefits it confers; its funds are derived mainly from public and private charity, its affairs are conducted for a great public purpose, without any expectation on the part of those immediately interested of receiving any compensation which will inure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity.

Humphries *v.* Little Sisters of the Poor, 29 Ohio St. 206.
McDonald *v.* Massachusetts, 120 Mass. 432.
Jackson *v.* Phillips, 14 Allen, 539.
Gooch *v.* Association for Relief of Aged Females, 109 Mass. 558.
Warde *v.* Manchester, 56 New Hamp. 508.
Gerke *v.* Purcell, 25 Ohio St. 229.

"When private property is appropriated to the support of education for the benefit of the public without any view to profit, it constitutes a charity which is purely public. When the charity is public, the exclusion of all idea of private gain or profit is equivalent, in effect, to the force of 'purely' as applied to public charity in the Constitution."

Gerke *v.* Purcell, *supra*.

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The following opinion was entered in both cases:—

March 21, 1881. THE COURT. The decree of the Court below is reversed, and the injunction dissolved at the costs of the appellee.

PER CURIAM.

Jan. '81, 238. March 21, 1881.

Church of Our Saviour v. Montgomery County.

Taxes and Taxation—Exemption—Parsonage on church lot not exempt from taxation—Constitution, Article IX. Sect. 1—Act of May 14, 1874, Sect. 1, P. L. 158.

Article IX. Sect. 1 of the Constitution empowers the Legislature by general laws to exempt from taxation "actual places of religious worship." The Act of May 14, 1874, Sect. 1 (P. L. 158), enacted that "all churches, meeting-houses, or other regular places of stated worship with the grounds thereto annexed, necessary for the occupancy and enjoyment of the same, etc.," should be exempt:

Held, That a parsonage, although erected on the church lot, was not exempt from taxation.

Error to the Common Pleas of Montgomery County.

Case stated, in which the county of Montgomery was plaintiff and the Rector, Church Wardens, and Vestrymen of the Church of our Saviour, a body politic in the law duly incorporated in the year 1858, for the purpose of worshiping God according to the rites and ceremonies of the Protestant Episcopal Church, was defendant.

From the case stated, it appeared that in 1858 one Newbold caused a church edifice to be erected on a certain lot of ground in the borough of Jenkintown, and on the completion thereof conveyed the same, together with two circumjacent acres of land, to defendant in pursuance of the objects of its incorporation. That in 1860 the corporation defendant further purchased twenty-nine square perches of ground adjacent to the lot above mentioned which was accordingly duly conveyed to it. That upon these lands now containing two acres and twenty-nine perches, said corporation forthwith proceeded to erect a parsonage or rectory, for the residence of the rector of the congregation and his successors in office; and that the said building had never been used for any other purpose than for the residence of the rector for the time being.

That the lands of the corporation defendant contained, as above stated, two acres and twenty-nine perches, and surrounded the church edifice forming one unbroken and undivided lot.

That no portion of the corporation's lands or buildings were rented or used for any purpose not germane to the corporate objects.

That the revenues of the church were derived exclusively from voluntary contribution, the pews and sittings being free.

That the salary of the rector was $1500 per annum, and that, as a further consideration for his services, he was allowed to occupy the above-named parsonage free of rent.

That the county of Montgomery claimed that the parsonage was liable to taxation, and in the year 1879, the tax collector of the borough of Jenkintown rendered a bill of thirty-two dollars and eighteen cents, of which he received payment under protest by the corporation on May 29, 1880, the said collector having threatened to levy upon the personal property, should the bill not be paid.

The corporation defendant claimed that under the Constitution of the State of Pennsylvania, and the Act of May 14, 1874 (P. L. 158), the said parsonage was exempt from taxation.

If the Court were of opinion that the said parsonage was liable to taxation, then judgment was to be entered for the plaintiff for the sum of thirty-two dollars and eighteen cents, but if not, then judgment was to be entered for the defendant, the costs to follow the judgment, and both parties reserving the right to sue out a writ of error.

The Court entered judgment for the plaintiff, Ross, P. J., delivering the following opinion:—

"The Constitution of 1873, in section 1 of article 9, provides that, 'all taxes shall be uniform upon the same class of subjects within the territorial limits levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property, used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of public charity.' This is certainly mandatory and may not be evaded. The Legislature is absolute on the subject of taxation, except as far as it is limited by constitutional restraint. State constitutions are limits on legislative power, whereas the Federal Constitution is a devolution of power (Hammett *v.* Phila., 15 P. F. S. 156).

"The citation of this section would seem to be conclusive. 'Actual places of religious worship' is a distinct phrase, clearly restrictive upon the legislative power of exemption.

"But the case is clear of all difficulties, if indeed the language can be considered questionable, when we examine the authorities which construed former legislation upon this subject. The Act of 1838 provided that all churches, meeting-houses, or other regular places of stated religious worship, with the grounds thereto annexed for

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the better enjoyment of the same . . . are hereby exempt from all and every county, etc., tax (P. L. 18, 38, §§ 29, 525). Under this most liberally framed legislation the courts adopted a strict construction; and after the passage of the Act of 1839 limited the ground referred to in this legislation, to five acres. PEARSON, J., in 3 Phila. R. 189, after reviewing all the cases, ruled that an Episcopal parsonage, belonging to an Episcopal church, is subject to taxation, when not locally annexed to the church edifice or its curtilage.

"It may be that this parsonage wonld be within the saving clause of this opinion, under the Acts of 1838 and 1839. But when the New Constitution is examined in the light of this authority, and in the still broader and clearer light of its own text, the question is clear of all doubt. An actual place of religious worship is clearly a church, and nothing but a church building, unless a graveyard be attached thereto, is now exempt; a parsonage or a rectory, or a dwelling house, which has the wall of the church as its party wall, is outside of the exempting clause in the Constitution.

"If a dwelling house form an integral part of the church building, so that the existence of the one depends upon the preservation of the other, the case might vary, but wherever there is no physical annexation—and the church building, as an actual place of worship, has a distinct existence from the residence of the priest, rector, or minister, the house in which the latter lives and its curtilage are taxable.

"Of this we think there can be no doubt, unless the disturbance of the one involves the disintegration of the other, and therefore, judgment must be entered for the plaintiff."

Defendant thereupon took this writ of error, assigning for error the entry of the judgment for plaintiff.

G. H. Fisher and *Richard S. Hunter*, for plaintiff in error.

The 29th section of the Act of April 16, 1838 (P. L. 525), is as follows:—

"All churches, meeting-houses, or other regular places of stated religious worship with the grounds thereto annexed for the occupancy and better enjoyment of the same, . . . are hereby exempted from all and every county, road, city, borough, poor, and school tax."

The Act of July 2, 1839, § 3 P. L. 576, limits the grounds annexed to a place of worship to five acres. Under these Acts it was held that parsonages on lots not annexed to the church premises were taxable, but the admission was fairly made that they would be exempt if "on the same lot with the church not exceeding five acres in extent."

Treasurer Dauphin Co. *v.* St. Stephen's Church, 3 Phila. 189.

Cumberland Co. *v.* Big Spring Church, 17 Leg. Int. 300.

Before the adoption of the Constitution of 1873, exemption for cases not within the Acts was obtained through special legislation, and against this species of legislation and not at charities as such, was the provision of Article IX. § 1 of the Constitution directed.

Donohugh's Appeal, 5 Norris, 306.

The Legislature was not, however, precluded from re-enacting the provisions of the Act of 1838 on this subject, except as regards places, not *actual* places, of public worship, and the Act of May 14, 1874, § 1, P. L. 158, exempted "all churches, meeting-houses, or other places of stated worship with the grounds thereto annexed, necessary for the occupancy and enjoyment of the same," etc. This is identically the language of the same clause in the Act of 1838 with the addition of the word "necessary" and the omission of the word "better," and obviously is intended to cover the same ground, unless the word "actual" in Article IX. § 1 of the Constitution can restrict the meaning. But this qualification is intended to apply to the *use* of the property, that it must be in actual use not merely past or future, or potential use.

Mullen *v.* Commiss. of Erie Co. 4 Norris, 289.

This construction having been given to this language of the Constitution, it is preferable to adopt it as the true one in testing the constitutionality of the Act rather than by adopting another to render a portion of the Act void.

George W. Rogers, for defendant in error.

The Act follows the language of the Constitution and requires the place sought be exempted, to be first a "regular place of stated worship," and second a place in actual use as such. Whatever cannot be so characterized is not within the exemption.

Mullen *v.* Commissioners, *supra*.

No method of interpretation can bring a parsonage within this description.

April 1, 1881. THE COURT. Upon the most liberal interpretation to be given to the ninth Article, Sect. 1, of the Constitution, we do not think that a parsonage can be considered as an actual place of religious worship, though erected upon ground appurtenant to a church but not a part thereof.

Judgment affirmed.

PER CURIAM.

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Jan. '80. March 1, 1881.

Batz's Appeal.

Vendor and vendee—Judgments for purchase-money—Interval of a day between the delivery of the deed and the entry of judgment—How far it affects lien—Tenants in common—Duties of, inter sese.

Where two tenants in common convey their estate to one who is a debtor of one of them, and take confessions of judgment for the purchase-money, which are entered of record the following day, the creditor grantor cannot, by having the amount of his existing debt included in the confession of judgment to him, participate in the proceeds of a sale of the land under his judgment to a greater extent than his former co-tenant.

In such a case the conveyance of the land on one day and the entry of judgment on the next, must, as regards the tenants in common, be considered as a continuous transaction.

Appeal from a decree of the Common Pleas of Berks County, distributing the proceeds of a sheriff's sale of the real estate of Gideon Batz.

The facts, as they appeared from the affidavits taken in the case, were as follows:—

George Batz and Jos. Brownmiller, being tenants in common of a tract of land, conveyed the same to Gideon Batz for $387.98. The deed was executed on June 2d, 1874. At the time of the conveyance Gideon Batz was indebted to George Batz in the sum of $418.78. No money was paid at the time of the conveyance, but bonds with warrants of attorney to confess judgment were given by Gideon Batz, one to Brownmiller for $193.99, being his one-half of the purchase-money, and the other to George Batz for $612.77, being for his one-half of the purchase-money, together with the amount of the prior indebtedness. The place where the transaction took place was distant twenty-four miles from the county seat, and the judgments were not entered of record until the following day.

The premises were afterwards sold at sheriff's sale for $414.95, under an execution issued by George Batz upon his judgment. Brownmiller thereupon filed a petition, setting forth the above facts, and praying for a rule to show cause why one-half the proceeds of the sale should not be paid to him. The rule was granted, and testimony having been taken, was subsequently made absolute by the Court in an opinion by SASSAMAN, A. L. J., which was, *inter alia*, as follows:—

"The two judgments were entered up in the proper office at Reading, twenty-four miles away from the location of the land, on June 3, 1874, the day following the transfer of title by deed of conveyance. Such a judgment for purchase-money would be a prior lien to any other judgment when entered with such dispatch, unless it should appear that, for good reasons, it would be estopped. No one could attach any other claim to a purchase-money lien, and thus make the attached portion good with what, between vendor and vendee, would be a good preferred lien. In this case it would be inequitable and unjust for the one co-tenant, with his larger judgment, to swoop away all the proceeds of the very land which they had sold to the exclusion of the other."

Thereupon George Batz took this appeal, assigning for error the action of the Court in making the above rule absolute.

A. G. Green, for appellant.

If the judgments can participate in the fund otherwise than *pro rata*, it can only be on the ground that they are liens for purchase-money. Now the lapse of a day between the conveyance and the entry of record is sufficient to deprive them of this character.

Watt *v.* Steel, 1 Barr, 386.
Stoner *v.* Neff, 14 Wr. 261.
Cake's Appeal, 11 Harris, 186.

The decision in Snyder's Appeal (9 WEEKLY NOTES, 177), was upon the special facts of that case, and is not in conflict with this view.

Cyrus G. Derr, for appellee.

The attempt of the appellant to obtain an advantage over his co-tenant, is an effort to escape from that duty of all tenants in common to deal "candidly and benevolently with each other," which the law will not allow.

Weaver *v.* Wible, 1 Casey, 272.

The principles asserted by the decisions cited upon the other side have therefore no application.

March 14, 1881. THE COURT. However it might have been had Brownmiller and Batz not been tenants in common, we agree with the learned Judge of the Court below that it would be inequitable for the one co-tenant, with his larger judgment, including his share of the purchase-money, to be allowed his judgment in full to the exclusion of the other. Certainly as to these two co-tenants, the conveyance of the legal title and the entry of the two judgments on the following day is to be regarded as one continuous transaction. The principle of Watt *v.* Steel (1 Barr, 386), does not apply to this case.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

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Common Pleas—Equity.

C. P. No. 4. May 21, 1881.

Magrath v. Cooper et al.

Equity — Injunction — Preliminary injunction, when continued—Building inspectors—Appeal —The Court will not dissolve a preliminary injunction pending an appeal from the Building Inspectors to the Board of Surveyors.

Sur motion to dissolve a preliminary injunction.

The complainant's bill alleged that the defendants were the owners of premises next adjoining those leased by complainant, and that they threatened and intended forthwith, without lawful authority, to enter complainant's premises and tear out a portion of the party-wall dividing the said premises from their own, whereby complainant averred irreparable damage would be done to his business. He prayed, therefore, for an injunction to restrain the defendants from taking down or intermeddling with said wall during the time said premises were demised to him.

From the affidavits filed, it appeared that defendants had applied to the building inspectors for permission to tear down the wall, and had been refused. They then proceeded to demolish the wall, when this injunction was granted. After the bill was filed, defendants again applied to the building inspectors, and their consent was obtained. Pending the hearing, complainant appealed from the decision of the inspectors to the Board of Surveyors under the provisions of the Act of 20 May, 1857, § 1.

L. R. Fletcher, for the motion, cited—

Helwig *v.* Schenck, 7 Ph. 389.

Henry S. Cattell and *J. Cooke Longstreth*, contra.

The appeal to the Board of Surveyors acts as a supersedeas, and the injunction should be continued until its decision is rendered.

THE COURT. No further order can be made until the appeal is settled.

C. P. No. 4. May 21, 1881.

Phila. Trust, etc., Co. v. Kelley et al.

Equity—Injunction—Threatened surrender of tenant to adverse claimant—Equity will not enjoin.

Sur motion for an injunction.

The Philadelphia Trust, etc., Insurance Co., executor and trustee under the will of Charlotte Rittenhouse deceased, filed its bill against Charles M. Kelley, and Catherine, his wife, and Christopher Rittenhouse, defendants, wherein it alleged that the predecessor in title of its testatrix had leased certain premises to said Charles M. Kelley and his wife at a monthly rent; that they were about to remove from the premises and threatened to deliver the possession of the same to Christopher Rittenhouse, who claimed title thereto adversely to complainant, and that Rittenhouse was about to receive the possession thereof. The bill therefore prayed that the defendants be severally enjoined from making surrender and receiving possession.

Sylvester Gavitt and *Rowland Evans* (*Richard L. Ashhurst* with them), for the complainant.

Unless an injunction issue, the injury to the complainant will be irreparable, for it will be driven to the position of plaintiff in an action of ejectment.

THAYER, P. J. The injury will not be irreparable. The law gives a remedy. Equity will not enjoin in such a case.

Bill dismissed.

Common Pleas—Law.

C. P. No. 4. May 14, 1881.

Wynkoop v. Hoffner.

Practice—Ejectment—Act of Dec. 14, 1863 (P. L. 1123)—Upon whom rule to bring second ejectment is to be taken—Who is in constructive possession after first verdict in ejectment.

Sur rule on plaintiffs in ejectment to show cause why they should not bring their second action in ejectment within two years, under the provisions of the Act of Dec. 14, 1863 (P. L. 1123).

The plaintiffs obtained, in ejectment, a verdict and judgment for one undivided fifth part of a certain tract of land. The judgment was affirmed in the Supreme Court (see 10 WEEKLY NOTES, 3), and the record was remitted April 14, 1881. No writ of habere facias was issued, and the defendants remained in actual possession of the whole tract.

C. Davis, for the defendants and for the rule.

The true construction of the Act of Dec. 14, 1863 (P. L. 1123) is, that before the title can be definitely settled, the plaintiffs must succeed in a second action.

A successful plaintiff may maintain a second ejectment without taking possession.

Rop *v.* Pleasants, 7 H. 157, 168.

Rambler *v.* Tryon, 7 S. & R. 95.

Therefore the plaintiffs should bring the next ejectment.

Benj. P. Wrigley, contra.

Under the Act, the plaintiffs only can apply for this rule, when they have taken possession under a writ of habere facias.

It was intended to force the unsuccessful

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party in the first ejectment to be satisfied with the result or to bring a second ejectment within the time limited.

THE COURT. Rule discharged.

Orphans' Court.

March 23, 1881.

Portuondo's Estate.

Guardian and ward—Guardian cannot be compelled to file an account unless funds are shown to have come into his hands—Fund collected after determination of guardianship—Principal and agent—Jurisdiction to determine questions in controversy between guardian and ward—Act of March 29, 1832—Injunction—Refused where property in dispute is out of the control of the Court—Act of May 19, 1874.

Petition for a citation on guardian for security, and for an account, and also for an injunction against said guardian and John E. Faunce, his attorney in fact.

The petition of Jose Antonio Portuondo, late a minor, represented that his uncle Jose N. Portuondo, had been appointed his guardian by this Court, without security, said minor at the time not being entitled to any estate, who upon his appointment instituted proceedings on behalf of his ward against the Spanish Government to recover damages for the murder of the minor's father, by the Spanish authorities in Cuba in January, 1870. The claim was presented to, and heard before the Commission organized under the treaty of February 12, 1870, between Spain and the United States. In May, 1879, an award of $60,000 was paid by Spain to the United States in satisfaction of this claim. The petition further set forth that the guardian had assigned in pursuance of an agreement, fifty per cent. of this claim to certain attorneys (John E. Faunce, John O'Byrne, and John A. Owens), for their professional services in said proceedings, the minor being at the time unable to meet the costs of the proceedings which were considerable; that the balance, $30,000, is now in the custody of the Department of State, the amounts assigned to counsel being paid them by the Department on the filing of the assignments thereof. Payment of the aforesaid balance is refused by the Department, except upon the joint receipt of the late guardian and ward. Petitioner, therefore, prayed that his late guardian be required to enter security and file his account, and that an injunction be issued to restrain the attorneys or agents of his late guardian from collecting any portion of the said award.

In pursuance of this petition the Court in November, 1880, issued an order in the nature of an injunction, restraining the late guardian from collecting any sum of money from the Department of State by color of his appointment as guardian. It was further ordered that a citation issue to said late guardian commanding him to appear and show cause why he should not file his account.

The answers of Jose N. Portuondo set out the following facts: That he never at any time rereceived any money or property belonging to the late minor; that he claimed commissions upon the amount awarded for the maintenance of his late ward, and to be reimbursed the moneys expended in his behalf; and that since the said minor became of lawful age, respondent had with his consent and approval acted as his agent in conducting the above claim against the Spanish Government.

There was also a suggestion of want of jurisdiction in the Court to adjudicate between them.

F. E. Brewster and *F. Carroll Brewster*, for petitioner.

Frederick Gaston and *E. Coppée Mitchell*, contra.

April 2, 1881. THE COURT. The facts gathered from the petition and answers appear to be that on February 14, 1870, Juan Francisco Portuondo, the father of the late minor, was wantonly murdered by the Spanish authorities in the Island of Cuba. He left surviving a minor son Jose Antonio. On April 16, 1870, Jose N. Portuondo, an uncle of the minor, was appointed his guardian, without security, the ward not then being entitled to any estate. Immediately upon his appointment the guardian employed counsel, and commenced the prosecution of a claim against the Spanish Government to recover damages on behalf of the ward for the murder of his father. The claim was presented to and heard before the Commission organized under the treaty of February 12, 1871, and its prosecution required not only the labor and services of counsel, and of the guardian personally, but also necessitated sending agents to Cuba to obtain evidence, and the expenditure of considerable moneys for these and other purposes. On March 15, 1876, the ward obtained his majority, while the claim of his guardian was still pending and undetermined. From the date of the appointment of the guardian until about August, 1877, a period of more than seven years, he had provided for the maintenance of his ward out of his private means, in addition to the expenditures in his behalf during the progress of the claim before the Spanish Commission. This had been without compensation or re-imbursement, and no moneys or other estate of the minor have ever been received by him. After a series of delays extending through nine years, the guardian ultimately succeeded in obtaining, on May 31, 1879, an award of $60,000 in favor of his late

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ward, which sum was paid by Spain to the Government of the United States. It further appears he had contracted with the attorneys employed to pay them fifty per cent. of the amount recovered as compensation for their professional services, and accordingly executed assignments to them of that proportion of the award, which are on file in the Department of State, and the same has been paid by the Department to the counsel. The balance, $30,000, is still in the custody of the Department of State, and payment thereof refused except upon the joint receipt of the late guardian and ward. The latter, however, is residing in Cuba, and has been since 1877. He now, by his attorney in fact, presents a petition setting forth, *inter alia*, certain of the facts recited, and praying that his late guardian be required to enter security; that meanwhile, he, his attorneys or agents, be enjoined from receiving or collecting the said award or any portion thereof; and further, that he be also required to file an account.

The respondent in his answers to the citation, and to the order in the nature of a writ of injunction granted upon the *ex parte* application of the attorney in fact, sets forth, *inter alia*, that he has never at any time received any money or property belonging to the late minor; that the Department of State still holds the balance of the award, and will not pay the same except upon the joint receipt of respondent and his late ward; that he has a claim for commissions upon the amount awarded for the maintenance and support of his late ward, and to be re-imbursed the moneys expended in his behalf; and that, since said minor became of lawful age, he has, with his consent and approval, acted as his agent in the continued prosecution of said claim against the Spanish Government. He, therefore, suggests that this Court has no jurisdiction as between principal and agent. In view of the facts thus presented, the truth of which is admitted by the pleadings, the first question presented is, whether the late minor is entitled to an account from his guardian. And here we are met by the practical obstacle that he has never received any money or other personal estate of his late ward. For what then is he to account? Certainly not for moneys never received by him.

But petitioner argues, that his late guardian presents certain claims against him, the correctness of which he disputes, as well as the *bona fides* of the assignments made to his counsel, and as he has had no opportunity of inquiring into or contesting their validity, the same should be afforded him by requiring an account to be filed, so that the several matters in dispute may be judicially determined. Admitting such to be the case, yet it has been already shown that no sufficient reason appears for the exercise of our undoubted authority, under a proper state of facts, of compelling an account to be filed by or stated against a recusant guardian. While, therefore, we cannot *compel*, we can suggest to the late guardian the course which we think he, in wisdom, should adopt. It is extremely unfortunate that any disagreement should arise between the only two parties interested, and who, thus far, seem implacable. The Government properly refuses to act as arbiter of their conflict, nor can this Court, so long as the late guardian refuses to submit to its jurisdiction. By the Act of 1836, the jurisdiction of the Orphans' Courts extends to and embraces "the appointment, control, removal, and discharge of the guardians of minors, and the settlement of their accounts." And by this is meant, not simply the settlement of the receipts and disbursements on behalf of their wards, but all transactions concerning the care, custody, and collection of their personal estate, the management of their real estate, expenditures for support and education, and final ascertainment of either the indebtedness of the guardian to his wards, or of the wards to the guardian. The familiar elementary rule is, that, as the guardianship by nature terminates upon the infant attaining majority, so statutory and testamentary guardianship ceases upon the ward reaching the full age of twenty-one years. Then the guardian "is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence." (Sharswood's Blackstone, Book I. *463).

This is the established law of this State, and, in addition, it has been settled by numerous authorities that the Orphans' Court alone has jurisdiction to determine, not merely the correctness of such accounts, but all questions in controversy between guardian and ward. It has exclusive jurisdiction to settle accounts between a guardian and ward, and in such settlement, the ward may contest a judgment recovered against the guardian as such, both as to its fairness and amount. (Morris *v.* Garrison, 3 Casey, 226; Commonwealth *v.* Roser, 12 P. F. Smith, 436; Royer *v.* Myers, 3 Harris, 89.) And assumpsit will not lie by a ward against a guardian to recover the amount alleged to be due the ward, until a settlement of the accounts of the guardian has taken place in the Orphans' Court; but the action is not the only remedy, for that Court can afford complete and much more expeditious relief. (Bowman *v.* Herr, 1 Penrose & Watts, 282; Nutz *v.* Reutter, 1 Watts, 229; Denison *v.* Cornwell, 17 Sergeant & Rawle, 374.) And upon the settlement, if a balance be ascertained to be due the guardian, he may have a *fieri facias* to collect the same out of his ward's estate. (Shollenberger's Appeal, 9 Harris, 337.) While thus a guardian is required to settle an account, yet if he denies having received any estate of his

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ward, then the mode of procedure is pointed out by the Act of March 29, 1832 (Purdon, 1106, pl. 27), and the Court will appoint an auditor to state an account. A mere dry or nominal trustee is not liable to account, except where funds are shown to have actually come into his hands. (Sharswood *v.* McClellan, 2 Am. Law Reg. 572.) And a guardian cannot raise an account merely to get commissions on a fund which does not pass through his hands. (Robart's Appeal, Brightly's Rep. 479.)

In the present case it is admitted that the guardian, during the minority of his ward, never received any money or other assets of his estate, and, as we have seen, he cannot, therefore, be called upon to account. And if he had since collected from the Department of State, either the whole or any portion of the award, it would not have been as guardian, but as agent of his late ward, and the fund would not be the proper subject of an account in this Court. The guardianship had terminated, and an account should not embrace any subsequent transactions. In like manner, upon the death of a guardian, the guardianship ends, and his executor or administrator has no authority to meddle with the estate of the minor, but should forthwith file the account of the deceased guardian, and pay out of his estate the balance due the minor to a new guardian, or directly to the ward, if then of full age. And if the minor die, the guardian's authority determines, and he should at once settle his account and pay the balance of the estate to an administrator of the deceased minor. (Bowman *v.* Executor of Herr, 1 Penrose & Watts, 282; Stewart's Estate, 3 WEEKLY NOTES, 476.) Prior to the Act of 1848, it was held that after a female ward comes of age, or marries, a guardian cannot rightfully receive any money for her; and money so received is held not as guardian, but to be paid over to her husband. A suit at law may be maintained for it, and the right of recovery is barred in six years. (Bull *v.* Towson, 4 Watts & Sergeant, 557.) And the marriage terminated the guardianship, though the ward was still in her minority, and her husband could require the guardian to settle his account, and pay him the balance. But not so since the passage of the Act of 1848, or Married Woman's Act; the guardianship of a female ward now continues until she attains twenty-one years although married, and her husband has no right to the possession of her estate. (Cumming's Appeal, 1 Jones, 272.) In Crowell's Appeal (2 Watts, 296), it is held that "goods sold and delivered to the ward after he arrives at full age, are not the subjects of credit, and transactions between a guardian and his ward during his minority, are alone the subject of settlement in a guardianship account. It is of some importance in the settlement of the accounts of guardians that nothing should enter into the account except what properly belongs to it. The less complex such accounts are the better; and nothing seems to confuse them more than an intermixture of accounts, which pertain to another relation. The guardian himself can be examined in regard to his account, in his trust character, but this could not be permitted as to transactions which take place after the minor attains full age. The relation changes from guardian and ward to debtor and creditor. Nor can any evil result from this, for any advances which a guardian may make to his former ward will be a set-off against the balance in his hands. The form is changed, but the substance remains." From what has been said, we think no reason has been shown either to compel the guardian to file an account or that any should be stated against him under the Act of 1832. But in order that his claims for services, rendered for the benefit of the late ward, for his maintenance, and for moneys expended in his behalf, may be judicially determined, he should file an account, wherein, although he cannot charge himself with moneys received, yet he can claim to be allowed as credits the various matters alleged by him as constituting the indebtedness to him of the former ward's estate. It should, as we have seen, terminate with his attaining majority, for all subsequent transactions must be settled in another forum. To this there can be no objection, and it is obviously to the advantage of the guardian, as he will have no remedy to recover from his late ward the amount claimed as due him until it is first settled and adjusted in this Court in the manner suggested.

The only remedy of a guardian for moneys expended for his ward is in the Orphans' Court; he cannot maintain a common law action therefor. (Carl *v.* Wonder, 5 Watts, 97.)

For the reasons stated, we must dismiss the petition for an account. Under the Act of May 19, 1874, the Court has "power to prevent, by order in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which they shall have jurisdiction:" but as we have no control over the property in dispute, the fund in the Department of State, and by reason of the relation of guardian and ward having ceased, no authority to prevent either the former guardian from receiving the fund, should the Department ultimately decide to pay the same to him upon his sole receipt, which is improbable, or any use or disposition of the money by the late minor, if paid to him individually, the order, heretofore made, enjoining and restraining the late guardian, must also be vacated.

Opinion by HANNA, P. J.

[See Portuondo *v.* Faunce, 9 WEEKLY NOTES, 539.]

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JUNE 30, 1881.* [No. 11.

Supreme Court.

July, '80, 14. Feb. 24 & 25, 1881.

In re Kensington and Oxford Turnpike Co.

Certiorari—Errors and appeals—Road cases, proceedings in, how far reviewable—Act of March 24, 1869 (P. L. 525)—Turnpike roads—Taking of, for public use—Attorney and client—Fraud—Damages—Court of Quarter Sessions—Mandamus—Filing exceptions in road cases—Records—Clerk's certificate—Practice.

Road cases in the Quarter Sessions are reviewable only by writ of certiorari, which brings up nothing but the record. The Supreme Court can, therefore, only examine and pass upon the regularity of the proceedings as disclosed by the record, and cannot look into the evidence, though incorporated in the opinion of the Court below.

In order to warrant the Supreme Court in affirming the proceedings of the Quarter Sessions in a road case where the record discloses the fact that said Court has, after the lapse of a term, opened its own judgment, set aside a writ of mandamus issued in accordance therewith, and awarded a writ of restitution for an amount paid in pursuance of said mandamus, in which case it is contended that such opening, setting aside, and writ of restitution have been made and awarded, because of fraud practised upon the Court in obtaining the first judgment, the record must distinctly disclose that the Court proceeded on this ground.

Where, in proceedings to take land of certain persons for a road or street, the report of the appraisers is filed assessing damages against a city, and judgment is entered accordingly, and, after the lapse of a term, the city presents a petition, which appears on the record, setting forth, *inter alia*, that the award was grossly excessive, and that the owners were willing to take much less for their property than the amount awarded, which fact, however, had been studiously concealed from the appraisers and Court, and thereupon exceptions are filed by the city to the award, not upon the ground of fraud, but for other reasons, in pursuance of which proceedings the judgment is opened:

Held, on certiorari to the Supreme Court, that the facts set forth in the above petition did not constitute an allegation of fraud, that the owners of the land were under no obligation to disclose the minimum price they would take for the same, and that, therefore, the proceedings could not be affirmed on the ground that the Court had acted regularly in opening its own judgment by reason of fraud perpetrated in obtaining said judgment:

Held further, that it must be presumed that the judgment was opened on the ground of the other exceptions filed, and that, as they were insufficient to warrant such opening, the record disclosed a manifest irregularity which called for reversal.

Under the Act of May 3, 1869 (P. L. 1247), the Courts of Quarter Sessions cannot set aside the verdicts of road juries for matter *dehors* the record.

Where, in a road case, the report of appraisers is filed and exceptions are filed thereto by the city, against whom the award has been made, at the same term as that in which the report has been filed, and then, by agreement of all parties, the exceptions are disposed of and judgment is entered during the same term:

Held, that these proceedings were binding on the city, and that she could not claim the right to file new exceptions at a subsequent term, on the ground that all parties have until the next term after the report of the appraisers is made to file their exceptions thereto.

The Courts of Quarter Sessions have a right to issue a writ of mandamus execution in pursuance of an award made by them. *In re* Sedgeley Avenue, 7 Norris, 509, followed.

In proceedings under the Act of March 24, 1869 (P. L. 525), to appropriate turnpike roads to the use of the public, a corporation owning such road will still be entitled to damages for the taking thereof, though its stock may have no market value, and the property itself be unproductive.

SHARSWOOD, C. J., TRUNKEY, J., and STERRETT, J., dissent.

Per TRUNKEY, J. [The majority of the Court not having passed upon the point.] Where a record is returned on certiorari to the Court of Quarter Sessions, whereby it appears that the proceedings were had before the Judges of said Court, a certificate of a clerk of said Court under seal thereof, subsequently given, is not sufficient to show that said Judges were not duly qualified. Nor will the addition to the record of some of the proceedings of the words "before the Judges of the Common Pleas" be deemed other than surplusage.

Certiorari to the Quarter Sessions of Philadelphia County.

The following are the facts of the case, those portions in quotation-marks being cited from the opinion of the Supreme Court.

"The proceeding below was instituted under the Act of Assembly of 24 March, 1869 (P. L. 525), the object of which was to provide a method whereby a turnpike road in the city of Philadelphia may be relieved from toll and thrown open to the public. We need not give in detail the provisions of the Act. It is sufficient to say briefly that it provides for the appointment of six viewers by the Court of Quarter Sessions, three of whom are to be nominated to the Court by the officers of such company, who shall proceed to view and appraise such road. The petition may be by either the managers of such road or by ten citizens. Before, however, the Court shall appoint viewers, it shall refer the petition to an examiner, who is required to take testimony and report to the Court upon the propriety of opening the road to public travel. The viewers or appraisers are required to make their report to the Court of Quarter

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Sessions, and if the same be approved by said Court, the appraised value of said road shall be paid by the City Treasurer in the same manner as road damages in other cases.

"With this brief explanation of the nature of the proceeding, I now turn to the record to see what has been done in the Court below. I there find that on June 4, 1877, the petition of fifty-four citizens was presented under the Act of March 24, 1869, above referred to, setting forth, *inter alia*, that the Kensington and Oxford Turnpike Company had constructed a turnpike road, which 'is an obstruction to the improvements of the city,' and that 'the public convenience now requires that said turnpike road shall be made free from toll,' and praying the Court to appoint an examiner according to the provisions of said Act, to take testimony, and report the facts in relation to said road for further order of the Court on the same. On the same day the Court below made the appointment of an examiner, as prayed for. On Nov. 30, 1877, an examiner filed his report with the testimony, setting forth, *inter alia*, 'that he believes it to be to the best interests of the citizens living in the neighborhood, and owning property in the vicinity of said road, and also to the city itself, in short that the public convenience requires that the prayers of the petitioners be granted, and that the said road should be made free from tolls.' This report was approved on Dec. 6, 1877, and the Court on the same day appointed the appraisers as required by the Act of Assembly." The appraisers proceeded to value the road, not taking into account, however, a portion thereof previously sold to the Philadelphia and Newtown Railroad Company.

"On Dec. 24, 1877, the report of the appraisers was filed, in which they say that 'after a careful consideration, they appraise the value of the said Kensington and Oxford Turnpike Road at $88,541.41.' On the same day the City Solicitor filed exceptions to the report of the appraisers, which exceptions are substantially as follows: 1. That the award is excessive. 2. That the appraisers erred in basing their award upon the value of the road-bed of the turnpike company. 3. That the award should have been based upon a capitalization of the average net income, to wit, $61,500. The Court below sustained these exceptions to the extent of $18,541.41, as appears by the following order: 'And now, Dec. 28, 1877, exceptions are dismissed and report confirmed, on filing remittitur for $18,541.41.' On the same day, the certificate of the secretary of the turnpike company, certifying the approval of report of appraisers by special meeting of stockholders called for that purpose was filed; also remittitur of the President and Managers of the Kensington and Oxford Turnpike Company of $18,541.41 of the award to them. On the same day an order, commonly called a mandamus execution, was issued by the Court below to the City Treasurer, commanding him to pay the amount of said award "out of any moneys unappropriated of the city of Philadelphia." This order was indorsed by the City Solicitor, as follows: "This writ is issued upon an award of appraisers, confirmed by the Court of Quarter Sessions, for the taking of the Kensington and Oxford Turnpike, and the amount thereof, $70,145.75, should be paid." Upon Dec. 31, 1877, the City Treasurer paid the above order, taking therefor the receipt of Henry C. Terry, the attorney of the turnpike company.

"Up to this point there is no difficulty. The Court had jurisdiction; it was acting within the scope of its powers and the record discloses no irregularity. I will now proceed to consider its subsequent action.

"On the 2d of February, 1878, the petition of the city of Philadelphia was presented," setting forth the proceedings as recited above, and averring that the notice of a stockholders' meeting contemplated by the Act of Assembly mentioned in the secretary's certificate filed, could not in fact have been given for want of time between the date of the award and of the meeting; that the report of the appraisers could not properly be confirmed until after the next term after filing the same, and the time during which exceptions to said report might lawfully be filed had not yet elapsed, though, indeed, it was confirmed by the Court on filing the remittitur only four days after the filing of said report; that the award so reduced should have been approved by the stockholders' meeting, and that the remittitur was without authority of law; that the award was grossly excessive, the sum of $20,000 being all that was claimed by the stockholders themselves to be the full value of the road, the most of them having been settled with at that rate; that they, or some of them, were informed that the city of Philadelphia was paying them at that rate for their stock, and that the fact that said stockholders were willing and had agreed to settle at that price was studiously concealed from the jury and from the Court at the time of said hearing, and "praying for the reasons therein set forth: 1st. That said decree of confirmation may be set aside and vacated. 2d. That said writ of mandamus may be set aside and that a writ of restitution may be awarded for the return to the treasury of the city of the said sum of $70,000. 3d. That the said Henry C. Terry, who is an attorney of this Court, be directed to pay said sum into Court, or to retain the same until the further order of the Court. Upon the filing of this petition, the Court granted a rule to show cause why the first and second prayers of the petition should not be granted,

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returnable on the next road list before the Judges of the Court of Common Pleas No. 4, and on the same day the City Solicitor filed the following exceptions to the proceedings and to the report of the appraisers: 1. Because the damages assessed by the appraisers are excessive. 2d. Because the road has ceased to be at all profitable to the stockholders, and no damages whatever have been or will be suffered by them by the giving up of the road. 3d. Because the great majority of the stockholders have agreed to give up their stock at a price or rate amounting in the aggregate of all the shares of the capital stock to the sum of $20,000 only. 4th. Because the proceedings are informal and irregular. On February 9, 1878, the Court ordered that the decree of confirmation be opened, that the writ of mandamus be set aside without prejudice to the City Treasurer, and that a writ of restitution be awarded. On the 12th of the same month a writ of restitution was issued returnable to the first Monday of March, 1878. On the 25th of March the Court granted a rule to show cause why the levy upon the turnpike road and franchises of the Kensington and Oxford Turnpike Road and franchises of the Kensington and Oxford Turnpike Company, under the writ of restitution in this case, should not be set aside, proceedings to stay in the mean time, returnable on Monday the 4th day of March next. On the 15th day of March, 1878, the answer of the turnpike company was filed," protesting that said petition was presented to the Judges of the Court of Common Pleas No. 4, for the County of Philadelphia, none of whom had been detailed to hold the Court of Quarter Sessions for the term of January, 1878, in accordance with Sect. 8, Article V., of the Constitution, and that the said Judges for said reason had not jurisdiction of the matters referred to in said petition; and further protesting that the report of the appraisers therein referred to was ready for argument in December Term, 1877, by reason of the exceptions filed thereto, and was duly disposed of during said term, and that any motion properly entertainable in regard to said report in January Term, 1878, was beyond the jurisdiction of the Judges of the Court of Common Pleas No. 4, or any one of them claiming to hold a Court of Quarter Sessions.

The answer further set forth that it was immaterial whether the meeting of December 27, 1877, was duly convened in accordance with the statutes under which the award was made, inasmuch as no complaint against the award had been made by the company or any shareholder thereof, but that in point of fact the action of the meeting was regular, and a majority in number and value approved thereof; that it was competent for the Court to approve of the report after exceptions had been filed by the City Solicitor, whenever and wherever it was convenient to hear and determine the same; that the remittitur filed by counsel was under authority obtained from respondents under their corporate seal, and had never been objected to by them or any stockholder; that it was now too late to inquire whether the award was excessive; that there being no averment in the petition that the appraisement or the confirmation was procured by fraud or artifice practised on said appraisers, and the city having been fully heard by counsel, the same was now conclusive on said city, and that it was wholly immaterial what agreements were made for the sale of any shares of the stock owned by the stockholders or whether the appraisers were or were not aware of the same.

Testimony was then taken by the Court, as to the facts alleged and denied in the petition and answer, "and upon April 6, the exceptions filed by the city were sustained; the report of the appraisers was set aside, and the matter referred back to the same appraisers to re-appraise the whole road, as set forth in the petition filed Nov. 30, 1877. It was to these subsequent proceedings that the writ of certiorari was specially allowed, and their regularity is the question this Court is now required to pass upon." The following are the assignments of error filed by the turnpike company who took this writ:—

1. The Judges to whom the petition of Feb. 2, 1878, was presented and who granted the rule to show cause thereon why the decree of confirmation should not be set aside and vacated were not Judges of the Court of Quarter Sessions for January Term, 1878.

2. The Court of Quarter Sessions in the term of January, 1878, did not grant the rule to show cause why the decree of confirmation should not be set aside and vacated.

3. The order of Feb. 9, 1878, that the writ of mandamus be set aside, and that a writ of restitution be awarded, was contrary to law.

4. The petition of Feb. 2, 1878, shows no cause sufficient in law to avoid a decree or judgment adversely made after argument and hearing.

5. The Court below erred in setting aside the report of the appraisers on the 6th of April, 1878.

6. There was no jurisdiction in the Court of Quarter Sessions after the lapse of the term, to set aside and vacate the decree on the ground of other evidence existing, whether known or unknown to the city.

7. The order of April 6, 1878, was contrary to law.

F. Carroll Brewster and *David W. Sellers*, for the turnpike company.

By the Act of March 13, 1867 (P. L. 420), the Judge holding a Court of Quarter Sessions

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must always have been assigned *before* or *at* the commencement of each term, never after. Unless, therefore, courts once lawfully organized, can be passed by litigants, and Judges resorted to from preference, the entire proceedings after December Term, 1877, were *coram non judice*.

Livingston's Appeal, 6 WEEKLY NOTES, 310.
Kilpatrick *v.* Commonwealth, 7 C. 210.

The mandamus on the City Treasurer to pay was lawfully issued by the Court of Quarter Sessions.

In re Sedgely Avenue, 7 Norris, 509.

Whether the award was excessive or not was passed upon by the Court when the first exceptions were presented.

The question was not the selling price of the stock, but the value of the road to be taken, and the stockholders, as such, had no relation to the case when it was before the appraisers. The concealment, therefore, of what they were willing to take was no fraud. On the contrary, it is the duty of the counsel not to divulge the instructions of his client as to the price he is willing to take.

Carpmael *v.* Powis, 1 Phillip's Chancery, 687.

The Court of Quarter Sessions cannot at a subsequent term reconsider their judgment.

Commonwealth *v.* Mayloy, 7 Sm. 292.
King *v.* Brooks, 22 Sm. 363.

C. E. Morgan, Jr., and *Wm. Nelson West, City Solicitor*, for the city of Philadelphia.

The record simply informs this Court that the Court of Quarter Sessions granted the rule to show cause and assigned the subsequent proceedings to those Judges of the Quarter Sessions who were Judges of the Court of Common Pleas No. 4. How then can any question of jurisdiction arise here? It cannot be seriously argued that when a cause is heard before Judges of one of the Courts of Common Pleas sitting as a Court of Quarter Sessions, and a decree is made at the close of their term, which thereafter is found to have been obtained by fraud, a motion to open it must be made before Judges other than those who entered the judgment, and were the subjects of imposition.

If then the act of the Quarter Sessions in opening its decree of December 28, 1877, was within the scope of its power, it is not the subject of review or reversal by the Court.

Bower *v.* Blessing, 8 S. & R. 243.
Hill *v.* Irwin, 8 Casey, 314.
Putney *v.* Collins, 3 Grant, 72.
Breden *v.* Gilliland, 27 Sm. 64.
Sheppard's Case, 27 Sm. 295.

Concealment of facts which, had they been known would have prevented a judgment, affords ground for relief, and that too even after the term in which the judgment is rendered.

Wanzer *v.* DeBaun, 1 E. D. Smith, 261.
Allen *v.* McClellan, 2 Jones, 328.
Stewart *v.* Agnew, 1 Shaw's Appeal Cases, 343.
Robson *v.* Eaton, 1 Term Rep. 62.
Bandon *v.* Becher, 3 Clark and Finelly, 479.
Smith *v.* Smith, 3 Phila. Rep. 490.
Dorney *v.* Mertz, 8 Phila. 533.
Booth *v.* Van Allen, 7 Phil. 401.
Cochran *v.* Eldridge, 13 Wr. 365.

The appraisers were governed in their action by the limits of the road contained in the original petition, yet they valued only a part thereof, entirely overlooking that part which had been previously sold to the Philadelphia, Newtown, and New York Railroad Company. The report should, therefore, be sent back to the jury to appraise the whole road, and to readjust their award if they found they were deceived in making it.

Catharine Township Road, 26 Smith, 189.

May 2, 1881. THE COURT. This was a certiorari to the Court of Quarter Sessions of Philadelphia County to review the record in a certain proceeding to assess the damages for the taking of the Kensington and Oxford Turnpike Road by the city of Philadelphia.

It is quite time it was understood that this Court has no power to review such cases upon the merits. The law gives neither a writ of error nor an appeal to the Quarter Sessions in road cases. The decision of that Court is final and conclusive upon all questions touching the merits. We can only review its action upon a writ of certiorari, which brings up nothing but the record, and our authority is limited to an examination of the regularity of the proceedings. This is settled law. (See Shenango Township *v.* Wayne Township, 10 Casey, 184. *In re* Church Street, 4 P. F. S. 353; Duff's Private Road, 16 P. F. S. 459; Philada. and Trenton Railroad Company, 6 Whart. 25; Road in Charter's Township, 10 Casey, 413; Road in Moore Township, 5 Harris, 116; Kirk's Appeal, 4 Casey, 185.) A certiorari brings up nothing, but the record and the Supreme Court is confined strictly to questions affecting its regularity (*In re* Thirty-fourth Street, 31 P. F. S. 27; Esling's Appeal, 8 Norris, 205); and this Court cannot look into the evidence, though incorporated in the opinion of the Court below (Mauch Chunk *v.* Nescopeck, 9 Harris, 40; Bradford *v.* Goshen, 7 P. F. S. 495; Derry *v.* Brown, 1 Harris, 389; 10 Casey, 231; 8 P. F. S. 209).

In such cases, if the Court below had jurisdiction and has proceeded in conformity with law, we have no power to reverse. It ought not to be necessary to repeat this so frequently, but the voluminous paper-books in this case, prepared as though upon an appeal or writ of error, including nearly four hundred pages of printed testimony, admonish us that our repeated attempts to mark the distinction between a writ of certiorari and a writ of error or appeal, have made but a slight impression on the professional mind.

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[Here follows the statement of the facts of the case already cited.]

This is certainly a remarkable record. It ignores everything like finality in judicial proceedings. We have here a confirmation of the appraiser's report on Dec. 28, 1877, after the city had been heard on its exceptions and the payment on Dec. 31, by the City Treasurer of the amount of the award. In the following February the Court below, upon exceptions which did not differ substantially from those formerly filed by the City Solicitor, opened its judgment and within one week thereafter set aside the writ of mandamus and awarded a writ of restitution. If it may thus vacate its executed decrees after the term has passed, it may do so after twenty terms have passed. That it has no such power is settled in the case of Comm. *v.* Mayloy (7 P. F. S. 291), where it was ruled that the Court of Quarter Sessions could not at a subsequent term reconsider their judgment. Nor does the case of Sheppard's Contested Election (27 P. F. S. 295) conflict with this ruling in the slightest degree. That was a case in which the Court below made a clerical error in its decree. A rule was entered during the term to correct the error, which rule the Court proceeded to hear and dispose of at a subsequent term. This Court affirmed the proceedings, but there is not a line in the opinion of the Court to shake the doctrine of the finality of judgments so vigorously asserted in Comm. *v.* Mayloy.

It was urged, however, during the argument at bar, that the decree of confirmation was procured by a fraud, and that the proceedings below were set aside for this reason. It is undoubtedly true that fraud vitiates everything it touches, and that a decree of the Court procured by such means, may be set aside by the Court which pronounced it. And if this record shows that the Court below proceeded upon this ground, its judgment must be affirmed for the reason that the evidence upon which the Court acted does not come up with the record, and we could not review such a question of fact.

If the fact be as asserted that a great fraud was perpetrated in this case, it is unfortunate for the city that such fraud was not distinctly and clearly averred upon the record. I do not wish to be misunderstood upon this point, when I say that there is not within the four corners of this record any positive averment of fraud. The nearest approach to it is the closing paragraph of the petition filed by the City Solicitor, Feb. 2, 1878, for the purpose of having the confirmation of the award set aside. I quote the paragraph in full:—

"Your petitioner is informed and believes and avers, that said award, even as the same has been reduced, is grossly excessive; that the sum of $20,000 is all that is claimed even by the stockholders, to be the full value of said road to them; that most of them have been settled with at a rate of $13 per share of their stock, amounting in the aggregate to about said sum of $20,000; that they, or some of them, were informed that the city of Philadelphia was paying them at that rate for the stock, and that the fact that said stockholders were willing and had agreed to settle at that price was studiously concealed from the jury and from this Court at the time of said hearing." This does not amount to a charge of fraud. At most it is an allegation that the road was not worth what it was appraised at; that the stockholders were willing to take a much less sum, and concealed that fact from the Court and jury. There is not even an averment that such fact was fraudulently concealed. It would be going too far to say that such concealment was a fraud either in fact or in law. The company were under no duty to disclose this fact to the city. They were not forcing their road upon the city as an involuntary purchaser. They occupied no relation of trust and confidence which rendered such disclosure necessary as a matter of good faith. On the contrary, for all that appears in this record, the city was taking the road, upon the petition of over fifty of her citizens, against the will of the company. They were dealing at arm's length. It was the business of the city to get the road as cheaply as possible. It was the business of the company to get as much as a jury would give them. Each had an equal opportunity before the jury to show its real value, and each called a large number of witnesses upon this point. It is not alleged that the award was procured by false testimony or by any art or fraud practised upon the jury. The proposition that a party whose property is about to be taken by a corporation is obliged to disclose to such corporation the minimum price he is willing to sell it for, is certainly novel. It would hardly be treated with respect were the complainant a railroad corporation. And yet the rule, if adopted, must be applied to all other cases. There is no distinction in this respect between municipal and other corporations. We cannot lay down a rule in the one case and refuse to enforce it in others. Had this road been taken for public use by a railroad corporation, it is not likely the award would have been less. In such case no one would have ventured even to suggest that it was a fraud on the part of the company to withhold its minimum price. The appropriation of the price after it has been paid by the city, is a matter with which the latter has nothing to do. That is a question which concerns only the stockholders of the turnpike company. If they have been wronged by any one, they have their remedy. At present they do not complain, and the city has no right to complain for them.

Not only is there no allegation of fraud upon

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this record, but we have a distinct statement which shows the precise grounds upon which the Court below must be presumed to have acted. I have already given at length the exceptions filed by the City Solicitor February 2, 1878. Those exceptions make no allegation of fraud. It is not even hinted at. All that we can properly know of the action of the Court below—all that the record shows—is that these exceptions were sustained. The entry of the judgment so reads. We must presume, it is our duty to do so, that the case was decided below upon these exceptions, and upon nothing else. The Act of 3 May, 1869 (P. L. 1247), provides that no report of viewers in the county of Philadelphia shall be set aside by the Court, except in pursuance of an exception filed to said report. The manifest object of this Act was to prohibit the Quarter Sessions from setting aside reports of road juries for matter *dehors* the record. This Court has decided in a number of cases, one of them at the last term, that under this Act it was error for the Quarter Sessions to set aside a report for a cause not specified in an exception. (See Norris's Appeal, 11 P. F. S. 422; Report in Delaware Avenue, 17 Id. 309.) If, therefore, this report was set aside upon the ground of fraud, it was for a matter which had not been made the subject of any exception, and which was *dehors* the record. Such action would have been in direct conflict with the Act of 1869, and, therefore, clearly erroneous.

It was urged, however, that the Court below were justified in opening the confirmation upon the fourth exception filed by the city, viz., "that the proceedings are informal and irregular." No informality or irregularity is pointed out by the exception, and we look in vain through the elaborate printed argument on behalf of the city for any such allegation. On the contrary, the right of the Court to open and set aside the confirmation is placed distinctly upon two grounds, viz., 1st. Fraud, and 2d. That the order of Dec. 28, 1877, was not a final disposition of the case, because the Court had no power to confirm the award finally until the same had been accepted by the stockholders, and the acceptance certified to the Court under the seal of the company. The first reason, as we have endeavored to show, has no support in the record. What support it may have outside of the record is a matter as to which we have no right to inquire. Nor has the second reason any better foundation. The record shows that the award of the appraisers was approved by a meeting of the stockholders called for that purpose, at which a majority were present or properly represented, which approval was duly certified to the Court under the seal of the company; also that a remittitur of the $18,541.41 was filed, signed by Henry C. Terry, Esq., the recognized solicitor of the company. It is not a sufficient answer to this to say that the stockholders' meeting was the result of collusion, and that Mr. Terry had no authority to sign the remittitur. This at once raises a question of fact outside of the record, which we have no right to pass upon. Besides, these are questions with which the city has no concern. The turnpike company might complain of this, but does not.

Another matter which does not appear by exception, and is not to be found in the printed argument, was referred to at the oral argument and will be mentioned here. It was said a portion of the road was not appraised, that it had been sold to the Philadelphia and Newtown Railroad Company, and was omitted by the appraisers for that reason.

How the appraisers in a proceeding to take the road of the Kensington and Oxford Turnpike Company, could appraise a piece of road belonging to the Philadelphia and Newtown Railroad Company, has not been made to appear. As it has nothing to do with the case, I will not consider it further.

It is evident that these matters were thrown into the case as makeweights. This sufficiently appears from the concluding paragraph of the printed argument of the City Solicitor, in which he says: "But we rest the case upon the ground upon which the Court below placed it, viz., fraud practised upon the jury in obtaining the award, and upon the Court upon the rendition of its decree of confirmation."

It was further suggested at the oral argument, that the confirmation of the report of the appraisers was premature; that the exceptions filed by the city February 2, 1878, were within time, and, therefore, the Court below had the power to open such confirmation. This point was not referred to in the paper-books, nor do we find any trace of it upon the record; as it has been suggested, however, it will be considered.

This proceeding was instituted under a special Act of Assembly, the third section of which provides: "The appraisers so appointed shall make report in writing to the said Court of Quarter Sessions; and, if their report be approved by the Court, the appraised value of said road shall be paid by the City Treasurer in the same manner as road damages now are by law made payable. *Provided always*, That the approval of such report by a majority in value of the stockholders of said company, voting in person or by proxy, at a special meeting called for the purpose, be first had and obtained, and duly certified to the said Court under the seal of the company." The fifth section of said Act declares that the provisions of the general road laws relative to the assessment of damages for the opening of

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streets and roads "shall apply to all cases arising under this Act, except when inconsistent with the provisions hereof."

No time is designated by the third section for the confirmation or approval of the report of the appraisers. As soon as the stockholders have approved the report in the manner designated in the Act, and have certified their approval to the Court under the seal of the company, the report is ripe for confirmation, provided the city, the only other party in interest, is satisfied. I concede if there were other parties, they would be entitled to come in and file exceptions at any time during the next term, as provided in the general road law. That length of time is given solely to enable interested parties to file exceptions. It is entirely competent for the Court to confirm the report of appraisers, under the Act of 1869, at any time, with the consent of all parties in interest. This was what was done in the Court below. There were but two parties, the city and the turnpike company. The report was filed and confirmed with the assent of each, and this appears of record. Under such circumstances it is immaterial when it was filed or when confirmed. Nor can any just criticism be made in regard to either act having been done out of time, or with undue haste. Both were in conformity with previous practice in the same Court. A precisely similar course had been adopted in the Ridge Road case, a proceeding under the same Act of Assembly. In that case the report was filed and confirmed on the same day by the agreement of the parties. No one ever thought of questioning its regularity. Nor could there be a well founded objection to such a proceeding, unless parties *sui juris* are incompetent to agree that a report in which no one but themselves is interested may be confirmed.

The law has wisely provided that in road cases the parties shall have until the next term of the Court to file exceptions. The parties are usually numerous, and such an extension of time is necessary to allow them all to come in. But in such case, if all parties see fit to come in at an earlier day, file their exceptions, and, after a hearing, agree to a confirmation of the report, it would be a waiver of any irregularity. This is what was done here. The city voluntarily filed her exceptions. They were heard and sustained. The award was reduced by the amount of $18,541.41, and this sum was remitted. The city then assented to the confirmation. This assent appears upon the face of the record. It is to be found in the indorsement on the back of the mandamus execution by the City Solicitor then in office, by whose efforts the award had been thus reduced. The right to issue this writ was put at rest by the decision in Sedgeley Avenue (7 Norris, 509), and it is idle to question its regularity in this case, in view of the fact that it issued with the approval and consent of the law officer of the city.

It may be conceded the assent of the city to the confirmation would have been of no avail as to other parties, had there been such interested in the report. They would have been entitled, as before stated, to file exceptions at any time during the next term. It was binding, however, upon the city. Having had her day in Court, she could not, after a decision in her favor, after the payment of the money and the expiration of the term, come in and have the confirmation opened, merely that she might be heard again upon the question of damages or any technical matter that might and ought to have been raised at the former hearing. Had there been an allegation and due proof of fraud, it would have been otherwise. But up to the present time the city of Philadelphia has not placed upon this record an allegation that she has been defrauded by any one.

The value of this road was a question of fact for the jury. If they have made a mistake, it is beyond our power to correct it. It may not be improper to say a few words in this connection upon one or two points as they appear of record. It was assumed, on behalf of the city, that the road was worth less because it had ceased to pay dividends. This appears by the second exception, filed February 2, 1878. Yet by its exceptions filed the previous December, the city admitted the road to be worth $61,500, which value was based upon a capitalization of the average net income. It was further assumed the road was worthless, or nearly so, because the stockholders were willing to accept $20,000 for their stock. This was a proceeding to take the property of the corporation, not its stock. There is no rule of law which authorizes one corporation to take the property of another corporation without making compensation therefor, because the stock of the latter has no market value, or the property itself is unproductive. The road of this turnpike company was a visible, tangible thing. It was property which necessarily cost said company a large amount of money. It was worth to them just what a jury would give them in this proceeding in the absence of any false testimony or improper conduct to influence the award. It was worth to the city the amount it would have cost the latter to have graded and macadamized the road as it was when taken. I say this without indicating what was the true measure of damages. That question is not raised by this record. The worth of the road to the city might not have been the proper rule for the jury in making their award. If, however, it was meritorious for the city to attempt to get the

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road for nothing, or at most for a nominal amount, notwithstanding the fact it had cost the company a large sum of money, it cannot be said to have been unconscionable for the latter to seek to get the cost or value of the road-bed in its place.

We have looked at this case in the light of the record only, and have endeavored to dispose of it upon purely legal principles. The opinion of the learned Court below and the testimony taken at the hearing are no part of the record, and do not come here upon a certiorari. (Mauch Chunk *v.* Nescopeck, 9 Harris, 46; Bradford *v.* Goshen, 7 P. F. S. 495; Derry *v.* Brown, 1 Harris, 389; Directors of Westmoreland *v.* Overseers of Conemaugh, 10 Casey, 231; Plunkett's Creek *v.* Fairfield, 8 P. F. S. 209; Oakland Railway Company *v.* Keenan, 6 P. F. S. 198.) As we have no power to review the testimony, and strictly no right even to look at it, any comment thereon would be improper. We decide cases as they are presented, and parties must stand or fall by the record. Were we to depart from this principle, the law would cease to be "a rule of action," and its judgments would become the mere reflex of the caprice of the Judges who pronounce them.

The proceedings in the Quarter Sessions up to and including the confirmation of the report of the appraisers and the return of the mandamus execution are affirmed, and all of the proceedings commencing with the petition filed February 2, 1878, including the subsequent orders and decrees, are reversed and set aside, at the costs of the city of Philadelphia.

Opinion by PAXSON, J.

Dissenting opinion by TRUNKEY, J., in which SHARSWOOD, C. J., and STERRETT, J., concurred.

After the expiration of the term in which the award of damages was confirmed, the Court vacated the decree of confirmation, set aside the writ of mandamus, and set aside the report of the appraisers. To this, seven errors are assigned, presenting three points: the first two, that the Judges who granted the rule were not Judges of the Court of Quarter Sessions in the term of January, 1878, and the rule was not granted by said Court; the third, that setting aside the writ of mandamus was contrary to law; and the last four, that the petition shows no cause for vacating the decree of confirmation and setting aside the appraisers' report. Of these in their order:

1. Article V., Sect. 9, of the Constitution provides that the Judges of the Courts of Common Pleas, learned in the law, shall be Judges of the Courts of Quarter Sessions. Sect. 8 of the same article requires the Courts of Common Pleas in Philadelphia, from time to time in turn, to detail one or more of their Judges to hold the Courts of Quarter Sessions, in such manner as may be directed by law. The Act of 1867 (P. L. 420) provides that the sessions of the Court of Quarter Sessions shall commence on the first Monday of each month, and the courts may decide, before or at the commencement of each term, which of the Judges shall hold said courts.

In obedience to the writ of certiorari, the record of the Court of Quarter Sessions has been returned, and it shows that the Court was held by the Judges thereof. It was truly said in argument that judicial notice will be taken of the Constitution and general statutes, and of the Judges who are qualified to hold the courts of record. The detail of the Judges out of the twelve who are qualified does not appear by statute, nor in any other way than as their names appear in the record, and it is not a matter of which judicial notice may be taken. A certificate of the clerk, who affixes thereto the seal of the Court, if evidence at all, is extrinsic. The presumption is that the Court was held by the proper Judges; it was held by Judges of the Court; and a mere certificate of the clerk, subsequently given, is not sufficient to show that they acted without authority of law. From this record it was as certain that the Court was held by the qualified Judges thereof in January and February Terms, 1878, as that it was in December Term, 1877. All are exhibited in the same light.

The rule granted on February 2, 1878, was rightly made returnable on the road list; it was granted by the Court of Quarter Sessions, entered in said Court, heard in and disposed of by said Court, all of which proceedings there appear; and the added words, "before the Judges of Common Pleas No. 4," are neither deceptive nor hurtful surplusage. It has not been alleged that the record is false, and it sets forth no proceeding outside the Quarter Sessions. There is no peculiar merit in this case to invite ruling on a clerk's certificate that one of the Judges, when the decree was made, was not a Judge of the same Court when the decree was vacated.

2. The writ of mandamus was not issued by order of the Court. What right had any one but the Court to order the issuing of the mandatory writ? If by Sect. 6 of the Act of April 15, 1834 (P. L. 538), such writ may be issued by the Quarter Sessions to enforce payment of damages, it must be allowed by an order of said Court, and not issued on the mere *præcipe* of counsel for the claimant of the damages. The Sedgeley Avenue Case (7 Nor. 509) does not decide that an attorney may order the writ without leave of the Court. In that case, after hearing a rule for the writ, the Court below made the rule absolute; and this Court decided that the Quarter Sessions had power to enforce its

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order by such writ, three of the Judges dissenting. There is not a dictum that the writ might be issued without an order of the Court. It is said that it had been the practice in the Quarter Sessions for attorneys to order the writ. If so, that does not legalize it. In some parts of the State, it was not the practice for these writs to issue at all out of the Quarter Sessions, and, when issued by the Common Pleas, it was by order obtained by motion in the Court. Whatever the practice, and however long, it is better to observe the statute, which declares it shall be lawful for the Court in which the judgment is, to issue thereon a writ commanding its payment, and to enforce obedience by attachment. Until the Sedgeley Avenue Case, this Court had not sanctioned the issue of mandatory writs by the Quarter Sessions. The assessment of damages in road cases was settled in that Court, and payment ordered. If the order was not obeyed, the practice was indicated by the cases of Price *v.* Commissioners (1 Whar. 1) and Com. *v.* Commissioners (2 Id. 286). In those cases, orders had been made by the Quarter Sessions for payment of road damages, which the officers neglected, and application was made in this Court, which then had original jurisdiction, for a mandamus to compel obedience by the officers to said orders. Nothing in the case suggests that it was supposed the Quarter Sessions had power to compel the county commissioners to pay the money, or that the writ, to be followed, if disobeyed, by attachment, could be issued on the *præcipe* of the claimant. If it has been settled by the Sedgeley Avenue Case that the Quarter Sessions may issue such writ, it has not been decided that the claimant's attorney may issue it. The only fitting correction of the improper issuing of the mandatory writ was to set it aside.

3. At January Term, 1878, February 2, upon petition and exceptions presented and filed, the Court granted a rule to show cause why the writ should not be set aside and the decree of confirmation vacated. The petition charges that the decree of confirmation was prematurely made, and the fourth exception is that the proceedings are informal and irregular. In December Term, 1877, the Court appointed appraisers to view the turnpike road described in the petition, and appraise the value thereof. The Act of March 24, 1869 (P. L. 525), Sect. 5, provides that the Act of June 13, 1836, and other general laws, "relative to the assessment of damages for the opening of streets and roads, shall apply to all cases arising under this Act, except when inconsistent with the provisions hereof." Sect. 8 of said Act of 1836 (P. L. 556) provides that "the viewers so appointed shall make report to the next Court of Quarter Sessions." Therefore the report of the appraisers in this case could not have been lawfully presented and acted upon till the next Court after their appointment. (Bridge over Smithfield Creek, 6 Whar. 363; Road in Baldwin and Lower St. Clair, 12 Casey, 9; Appleby Manor Road, 1 Grant, 443; Boyer's Road, 1 Wright, 257.) Sect. 16 of the Act of 1836 provides: "The damages sustained by the owners of land through which any private road may pass shall be estimated in the manner provided in the case of a public road." None but the petitioner and land owner is interested in the damages caused by a private road; yet in Boyer's Road (*supra*) viewers were appointed on June 14, 1858, to assess damages, whose report was filed the next day and confirmed by the Court, assessing Wilson's damages at $16.66, and this Court decided that the report should have been presented to the next Court, and then confirmed, after opportunity to object to the assessment had been given. I do not say that Wilson could not have waived the right to have till the next term to make his objections. The next term is the time fixed by law for presenting reports of appraisers of road damages to the Court. I shall not speak of reasons for such legislation, the result in this case is suggestive of reason enough. All interested persons had the right to wait till the proper term and then examine the report, and, if they had cause, file exceptions. But this report was filed in December Term, 1877; same day exceptions were filed by the City Solicitor, Mr. Collis. Four days thereafter the exceptions were dismissed on filing remittitur for $18,541.41, and the remittitur was filed immediately. So was the approval of the appraisers' report by the stockholders of the turnpike company, made before the remission, immediately filed, and a mandatory writ was issued on *præcipe* of Mr. Terry, attorney for the company, to the Treasurer of the city, commanding him to pay $70,000 and costs, which writ had thereon Mr. Collis's indorsement that "$70,145.75 should be paid." Thus twenty-five days from the appointment of appraisers, and within the same term, the extraordinary promptness of everybody connected with the transaction was rewarded by an apparent end of the case. On the 4th of June, 1877, upon the petition of fifty-four citizens of Philadelphia, the examiner was appointed, but the petition was not filed, and no record of the appointment was made till the examiner presented his report. The examiner began his duties on the 25th of October, and "Henry C. Terry, counsel for petitioners," was present. November 20, 1877, Mr. Terry for petitioners and Mr. Collis for the city accepted notice that the report would be filed on the 30th of the same month. After its filing, Mr. Terry was attorney for the turnpike company, and so appeared before the appraisers.

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The appraisers' report of damages was approved three days after it was filed, and one day before the exceptions were dismissed and remittitur filed by the stockholders of the company. Nothing appears of record as a reason for the summary dismissal of the exceptions and approval of the report—the consent or agreement of the City Solicitor is not there. There is nothing to show that he waived time, and, unless he did, he had until the next Court to file additional exceptions. However, these things are of as little account as the pointers to a landmark which itself is plainly visible. No waiver of time appears, and the record shows the bald irregularity of the presenting and approval of the appraisers' report at the same term of their appointment. Before the end of the next term, the Court was advised of this, and exculpated itself from connivance at its perpetration by vacating the order of approval. I see no error in that. It was a correction of error—a correction the Court had a clear right to make. And enough appeared to move the Court to vacate the untimely decree. Nearly five months elapsed before the appointment of an examiner and the filing of his report, and all the subsequent proceedings were crowded into a single term of the Court of one month. The city complained of injury in fact, and pointed to the irregularities. A judgment entered in default of an appearance before the return-day of the original writ is irregular, and will be struck off on motion after the lapse of a term. This would be so, had the defendant filed a plea or answer. And here filing exceptions was not a waiver of the right to be heard at the next Court.

Thus far I have considered the alleged errors from an examination of the record. But there is abundant reason for belief that the Court struck off the decree of confirmation on the ground of fraud as well as of irregularity. In my opinion, the petition substantially alleges fraud. Action on that ground is not reviewable on this writ. If the record shows fraud as a ground upon which the decree was vacated, then the order must be affirmed. The evidence and arguments are persuasive that the Court and parties acted as if the chief issue was, whether a fraud had been committed which led to the award and its approval. In strictness, the complainants are right in saying that the things not actually of record cannot be reviewed, unless the facts be agreed upon, on certiorari to the Quarter Sessions. The petition on which said rule to show cause was granted "avers that said award, even as the same has been reduced, is grossly excessive, that the sum of twenty-two thousand dollars is all that is claimed even by the stockholders to be the full value of said road to them; that most of them have been settled with at a rate of thirteen dollars per share of their stock, amounting in the aggregate to about said sum of twenty thousand dollars; that they or some of them were informed that the city of Philadelphia was paying them at that rate for their stock, and that the fact that said stockholders were willing and had agreed to settle at that price was studiously concealed from the jury and from this Court at the time of said hearing." To that petition the turnpike company filed an answer, protesting against the jurisdiction of the Judges and alleging that the cause was duly heard and disposed of at December Term 1877, admitting some of the alleged facts, denying or avoiding others, and averring facts tending to show good faith in the proceedings. The petition does not use the word "fraud," it brings to the view of the Court certain irregularities, that the time had not passed for filing exceptions, and that the stockholders valued their road at $20,000, which fact was concealed from the Court. A mere allegation of fraud without showing it by facts, is no ground for a rule. Facts specifically stated which lead directly to the inference of fraud may justly move the Court to act. The petition is not in the shape of an exception yet it avers facts as clearly as if by a formal exception. Under the rule to show cause, the petition and answer being a part of the record, voluminous testimony was taken. Entertaining no doubt that upon the face of this record the assignments of error should not be sustained, I would not allude to any part of that testimony but for a portion of the line of argument of the respective counsel. As it is, I shall only refer to a portion, chiefly that of persons closely connected with the complainant, as tending to show that the issue of fact raised was whether fraud had been committed.

By procurement of Joshua S. Fletcher, Henry C. Terry had several interviews with Mr. Gerhard, the regular solicitor of the turnpike company, Mr. Robbins the President, and Mr. North, the Secretary and Treasurer, which led to the retention of said Terry by the company as their counsel in these proceedings, upon a contingent agreement as to compensation dated Oct. 13, 1877. Terry bound himself to pay such sum as he should recover for the company not exceeding $20,000, and agreed to make no charge if he should not recover a larger sum, and the company agreed that he should have all recovered in excess of $20,000. The petition of the citizens was given to Terry a considerable time before the date of this agreement. Prior to its date, Robbins and Gerhard called at Terry's office, when Terry agreed, if the award should warrant it, to pay Gerhard $500 or $1000 out of his fee. Gerhard was a stockholder and member of the Board of Managers of the company.

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The company wanted to sell the road to Terry for $20,000, but he declined to purchase. Terry had no agreement with Fletcher as to compensation, something passed between them as to what Terry's compensation would be and it was understood that Terry would make Fletcher a gift if it resulted successfully, but a gift absolutely, the amount entirely for Terry to determine. Terry filed the petition and nominated to the Court the three appraisers on behalf of the company. Before execution of said agreement he represented no party but the petitioners, but he did not look to them for his fee. He informed none of the officers or stockholders of the amount of the award, because Robbins did not want to know the amount, so Robbins could say to the stockholders that $20,000 was the net amount recovered after payment of expenses. No officer of the company alleged to Terry that the road was worth more than $20,000, but Terry examined the Act of Assembly in presence of Gerhard and "assumed that the value of this road was what was termed the physical value of the road-bed," and thought that the arrangement might lead to a profit. On the day he received the money ($70,145.75) from the City Treasurer, Dec. 31st, he paid to the company $20,000, to Gerhard $1000, to the examiner $500, and to the appraisers $132, the balance he used to reimburse himself for outlays in connection with this case, or retained for professional services rendered his clients. These facts are stated by Mr. Terry. The force of some of them may be seen by comparing their dates with dates in the record.

Mr. Gerhard says he was authorized to mention to Mr. Terry $20,000 as the price at which the company would sell; but he declined to purchase, and the agreement was subsequently made; and also an arrangement to pay Gerhard for former and future services a fee of $1000. Gerhard had had considerable experience in the conduct of road cases.

The examiner testifies that Terry represented the petitioners before him, and he did not know Terry was counsel for the company.

Charles Robbins says Fletcher called and wanted to know what he would take for the road; he promised an answer by a specified time; concluded to take $20,000; that was the start of it; finally made arrangement with Terry. Cannot tell why they employed Terry when Gerhard was their counsel; Gerhard said it was all right to do so. "We expected using him as an instrument to get $20,000." Told Mr. Terry he did not want to know the award, because he did not want anything to do with it, and never had, except to sell the road on a conditional bargain. Did not ask more than $20,000, and did not want more. Do not think the road is worth more than $20,000, and no means of getting that unless they could get somebody else to sell it to the city. Did not previously know Mr. Terry, and was not acquainted with Mr. Fletcher. He did not care to know about the award, for "ignorance is bliss in some cases."

Mr. Fletcher testifies that he was in no way interested or connected with the company, nor did he live in the neighborhood of the turnpike road, nor was he personally acquainted with Robbins, nor had he spoken to Terry on the subject; but having learned the people in the section of the turnpike were wanting it removed, and knowing Mr. Terry, his mind turned to him, and then he called on Robbins, talked with him about the city taking the turnpike, afterwards called with him at Terry's office, and Terry being absent they left a note for him. At Robbins's request, Fletcher took Terry to see Gerhard, and when those gentlemen got talking about law, he left them. On New Year's day he got a note, asking him to call at Terry's office, which he did, and Terry gave him a check for $6250; whereupon he thanked Terry for the New Year's gift and left.

Terry, Gerhard, and the company became jointly interested nearly four months after the examiner was appointed, but the examiner did not act till after they had become so interested. Fletcher, the procurer of the combination, had no interest by contract, he expected a gift. He had been an appraiser in the Ridge Turnpike Case, referred to in the answer to the petition of the city, as a record in accord with this record. The Kensington and Oxford Turnpike had ceased to pay dividends, and to hold and keep up was as worthless to its stockholders as a canal left without business, because of the construction of railways near it. These parties knew that the road was not worth more than $20,000, and Robbins was anxious to sell for that. They did not intend to put it on the city at its value, that is, the sum the stockholders believed it was worth, and were willing to take. There was no arrangement for a contingent fee to be paid out of the value of the road; on the contrary, if no more than that, or less, should be recovered, no fee was to be paid. I shall not speak further of the transaction as exhibited in the testimony of the persons in interest, for the case is to be now disposed of on the record. Nor is this a time to discuss the propriety of counsel contracting for contingent fees. Nor need it be assumed that a recovery of an award for more than four times the value of the property, as estimated by its owners, is the natural outcome of such a contract.

It appears by the testimony that Mr. Collis orally consented to the dismissal of the exceptions and approval of the award in filing the re-

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mittitur, but he knew as little of the part he was playing as the Court did of the actual value of the road. Would he have consented had he known of the combination, and that the value of the road was only $20,000?

It does not appear that the allegations in the petition and exceptions, filed Feb. 2, 1878, were wantonly made. There was no unreasonable delay, they were filed the next Court after the appraisers were appointed, within the term allowed by law for filing exceptions. The whole case, as presented, appeals not for astuteness in searching out a technical defect in the record as ground for reversal, but rather, if there be no substantial error, that the proceedings should be affirmed.

July, '79, 35. Jan. 31, 1881.

Allen v. National Bank of Germantown.

Affidavit of defence law—Affidavit, insufficiency of—Evasive averments—Promissory note—Notice of protest not necessary—Proper course for a defendant who denies the execution of an instrument.

An affidavit of defence, containing averments that the defendant never, to the best of his knowledge and belief, signed or indorsed with his signature the note in suit; that he had no knowledge of it; that he received no notice of its protest, and that, to the best of his knowledge and belief, no such note existed, is evasive and insufficient.

The only proper course for a party who denies that he ever executed the instrument, a copy of which is filed, is to demand inspection of the original, and then deny that it was signed by him or by his authority.

No protest of a promissory note is necessary to charge an endorser thereon.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by the National Bank of Germantown against S. Austin Allen, upon the following promissory note:—

$300. PHILADA., Oct. 24, 1878.

Ninety days after date, I promise to pay to the order of S. Austin Allen three hundred dollars, payable at the National Bank of Germantown, without defalcation, value received.

[Signed] ISAAC LODGE.

Credit the drawer, S. Austin Allen.

[Indorsed] S. AUSTIN ALLEN.

The defendant in his affidavit of defence averred that he never, to the best of his knowledge and belief, signed or indorsed with his signature the note, a copy of which was filed in the above case; that he had no knowledge of the same; that he received no notice of protest of the alleged note; that to the best of his knowledge and belief no such note as that set out in the copy filed existed, and finally, that he expected to be able to prove all these facts and averments on the trial of the case.

The note was discounted by the plaintiff, and upon its non-payment, this suit was brought.

The plaintiff entered a rule for judgment for want of a sufficient affidavit of defence, which the Court made absolute, entering judgment for the plaintiff. The defendant took this writ, assigning for error the action of the Court in entering judgment for the plaintiff for want of a sufficient affidavit of defence.

Abram H. Jones, for plaintiff in error.

The defendant's averment that he never signed the note nor indorsed it with his signature; that he had no knowledge of it; that he received no notice of the protest, and believed that no such note existed, amounts to a flat denial of the execution of the indorsement of the note, and is sufficient to put the plaintiff on proof of its execution.

Hogg *v.* Orgill, 10 Casey, 347.

The affidavit is sufficiently positive, for the defendant affirms that he expects to be able to prove all the facts set forth therein. That is sufficient to send the case to a jury.

Black *v.* Halstead, 3 Wr. 71.

Walker *v.* Geisse, 4 Wh. 257.

The defendant need not set forth his mode of proof.

Eyre *v.* Yohe, 17 Sm. 477.

He may either state grounds of belief, or that he expects to be able to prove his averments.

Bronson *v.* Silverman, 27 Sm. 94.

A reasonable intendment should be made in favor of the affidavit.

Twitchell *v.* McMurtrie, 27 Sm. 383.

Where an affidavit contains legal grounds of defence which, if proven, would constitute a good defence, the defendant is entitled to a trial by jury.

West *v.* Simmons, 2 Wh. 262.

Wm. Rotch Wister, for defendant in error.

It is submitted that the judgment was properly entered. Defendant should have alleged that he neither signed nor indorsed the note.

Gill *v.* Cullen, 8 WEEKLY NOTES, 58.

Breuckmann *v.* Twibill, 7 Id. 188.

Harris *v.* Mason, 2 Miles, 270.

He should have gone further, and said that he did not authorize the note to be signed and indorsed on his behalf.

Kneedler *v.* Woodruff, 1 WEEKLY NOTES, 42.

Ephraim *v.* Pollock, Id. 102.

The affidavit is radically and fatally defective, because the defendant did not explicitly deny the execution of the note by himself or by procuration. He carefully avoided putting on record a denial of authority given to another to sign or indorse for him, which must be taken as conclusive against him.

Black *v.* Halstead, 3 Wr. 71.

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February 14, 1881. THE COURT. The affidavit was clearly evasive. The only proper course for a party who denies that he ever executed the instrument, a copy of which is filed, is to demand inspection of the original, and then deny it was signed by him or by his authority. The averment that he had received no notice of protest was clearly insufficient. No protest of a promissory note is necessary.

Judgment affirmed. PER CURIAM.

Common Pleas—Law.

C. P. No. 2. June 7, 1881.

Gallagher, to use, v. Thornley and Baxter, Exr's of William Kerrigan, deceased.

Pleading—Pleas in abatement may not be joined with those in bar.

Rule to strike off pleas.

Scire facias to revive judgment. The judgment had originally been entered against John O. Thornley and William Kerrigan.

The defendant Baxter pleaded, *inter alia*, payment, payment with leave, and two special pleas, as follows: "4. And the said defendant, John Baxter, for a further plea in this behalf, saith, that John O. Thornley is not now, and never was, an executor of William Kerrigan, deceased. And of this he puts himself upon the country. 5. And the said defendant, John Baxter, for a further plea in this behalf, saith, that John O. Thornley is deceased, and was, before the writ issued in this case. And this he is ready to verify."

Longstreth, for the rule.

The fourth and fifth pleas are in abatement, and should not be joined with those in bar.

Maitland *v.* McGonigle, 1 Tr. & Haly's Prac. 284, note 5.

Reimer *v.* The City of Philadelphia, 5 WEEKLY NOTES, 449.

Daniels, contra.

THE COURT. Rule absolute.

C. P. No. 2. Dec. 27, 1881.

Reichard v. Duryer.

Action for wages—Act of April 9, 1872—Security in cases of appeal.

Rule to show cause why the obligation of surety should not be reduced to costs only.

Appeal from the judgment of a magistrate in favor of the plaintiff. Adam Eckert had entered bail conditional for the payment of debt, interest, and costs.

The bill of particulars showed that the plaintiff's claim was for $98.50 for wages due him for services as clerk in defendant's drug store.

Tull, for the rule.

Tim, contra.

The first section of the Act of April 9, 1872 (P. L. 47), gives priority to wages for labor and services rendered by "any miner, mechanic, laborer, or *clerk*" employed by any persons engaged in the operation of "any works, mines, manufactories, or *business*." The fifth section provides that in all cases of appeals "for wages or moneys mentioned in the first section of the Act," the bail shall be bail absolute in double the amount of the debt, interest, and costs; it is submitted that this Act covers the case at bar.

THE COURT. The words "other business" must be held to refer to other business of the same general character as that specifically mentioned. That has been the uniform construction of the Act so far as we are informed.

Rule absolute.

C. P. No. 2. March 26, 1881.

Atwater v. Hagar.

Practice—Amendment of plaintiff's bill of particulars at the trial and professional surprise of defendant.

Rule for a new trial.

Assumpsit. The narr. consisted of the common counts with a bill of particulars.

On the trial an objection being made on the ground of a variance, plaintiff asked leave to amend his bill of particulars, which request was granted and the amendment made, consisting of the alteration of the amount named as received by defendant on a check. The defendant thereupon pleaded surprise and asked for a continuance which was refused. The plaintiff put in his evidence, and the defendant offered none. Verdict for plaintiff.

On motion this rule was granted, the defendant assigning, *inter alia*, as reason for a new trial, the allowing the plaintiff to amend his bill of particulars in Court without permitting the defendant to plead surprise.

George W. Biddle (with him *Coulston*), for the rule.

When the attorney who tried the case alleged surprise it should have been conclusive.

Francis Rawle, contra.

There could not have been any surprise, the amendment was merely in the amount of the check. There was no other check passed between the parties.

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[MITCHELL, J. This is merely a question of practice. Possibly plaintiff could have recovered under the original bill of particulars, but when he obtained the amendment it concluded him from asserting that the defendant had not to meet a different state of facts from that existing when he came to trial. Defendant's attorney chose to rely on his opinion that plaintiff would have to amend or be non-suited, and, therefore, did not come prepared to defend on the merits of the case. This was a risk that it was not perhaps wise to run, but since the event justified his confidence and plaintiff did elect to amend, defendant's counsel was entitled to aver professional surprise and have a continuance.]

THE COURT. Rule absolute.

C. P. No. 2. June 7, 1881.

Van Dusen v. Thomas.

Affidavit of defence—Promissory note—Fraudulent alteration of.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on promissory note.

The affidavit averred, *inter alia*, that the note when signed did not bear interest, but that subsequently the words "with interest" had been fraudulently interlined by the payee.

The copy showed the words "with interest" interlined, but a pen had been run through them.

Pile, for the rule.

We have struck out the alleged alteration, and the note now stands as it is alleged to have been when executed.

Fletcher, contra.

THE COURT. The circumstances under which a material alteration was made in a writing should be explained. The case must, therefore, go to a jury.

Rule discharged.

C. P. No. 2. March 26, 1881.

King v. The Permanent Exhibition Co.

Affidavit of defence—Instrument within the law—Averments by plaintiff.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on an instrument in writing.

The following is the material part of the copy filed, viz.:—

Professor S. A. KING, Philadelphia,

Dear Sir: I am authorized . . to engage with you for an ascension . . . on the following terms as proposed by you. The Exhibition Company will pay for the gas necessary to fill the balloon ($200), and will allow one hundred dollars ($100) for the contingent expenses.

. . . . . Very respectfully,

CHAS. W. GREENE, Manager.

The plaintiff averred "that he did in pursuance of the foregoing writing . . make the balloon ascension . . . and that he paid the expenses thereof excepting the gas, and that the sum of one hundred dollars to be paid him to cover said expenses had not been paid." The affidavit averred that the instrument was not within the affidavit of defence law.

H. G. Harris, for the rule, cited—

Sutton *v.* Baseball Club, 4 WEEKLY NOTES, 90.

THE COURT. Rile *v.* Worl (1 Phila. 45), and Sutton *v.* Baseball Club, *supra*, have been regarded as opposed to the settled practice of recent times, and have never been followed in this Court.

Rule discharged.

C. P. No. 2. March 18, 1881.

Boynton v. Isaacs.

Vendor and purchaser—Whether a partner is a purchaser for value as against an unpaid vendor who has parted with the possession but not with his title.

Sur motion for judgment on point reserved.

Trover, by Edwin N. Boynton against William Isaacs, for certain screw manufacturing machinery.

On the trial, before HARE, P. J., the following facts appeared: In July, 1877, the plaintiff, a resident of Worcester, Mass., sold the machinery to one Jonathan Pickering, under an agreement by which Pickering agreed to pay for the same in instalments covering a period of several years, the machinery to remain the property of Boynton until the last instalment was paid. Pickering failed to pay any of the instalments, but had the machinery at his place of business in Philadelphia.

The defendant William Isaacs and Jonathan Pickering entered into a copartnership on the 21st of September, 1878, under the name of Pickering & Isaacs. Pickering contributed to said firm of Pickering & Isaacs the machinery in question, and Isaacs agreed to contribute to said firm the sum of $800, which was subsequently paid by him to said firm in instalments.

The plaintiff had no notice or knowledge of this copartnership, and the defendant had no notice of the plaintiff's title to the machinery. Some time in 1879, Pickering, being largely indebted to Isaacs, his partner, left the city. Soon afterwards the plaintiff sent for the machinery, and found that it had been levied upon by the landlords of the factory building for rent. It was then agreed between the plaintiff's agent and the landlords that the question whether the machinery was subject to a distress for rent should be submitted to their respective counsel.

A day or two afterwards the defendant Isaacs

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paid the rent and removed the machinery, whereupon this suit was brought.

On the trial the Court reserved the following point:—

"It is mutually agreed by the counsel in the cause that the jury shall find a verdict for as much as in their judgment the property was reasonably worth, with leave to the Court to enter judgment for the defendant, if it shall be of opinion that there is evidence in the cause, from which the jury might properly have found that the defendant was a purchaser for value and *in good faith*, and as such had a right to remove the machinery."

The verdict was for plaintiff for $1180, subject to the point reserved.

J. O. Bowman, for the motion.

The title of Isaacs was the title of the firm of Pickering & Isaacs. He was not a purchaser; the relationship of vendor and vendee did not exist between him and Pickering; his possession was Pickering's possession; and it is difficult to see how his position could be in any respect better than Pickering's. But, in any case, Isaacs would be estopped from availing himself of his partner's fraud.

Story on Partnership, 6 Ed. § 108.

Conceding, however, that Isaacs is a *bona fide* purchaser, the goodness of his title does not necessarily follow, for it has been held that a conditional sale leaves the right of property in the vendor, as against subsequent *bona fide* purchasers from the conditional vendee, on the evident ground that the vendee can confer no better title than he has.

Sargent *v.* Gile, 8 N. H. 325.
Copland *v.* Bosquet, 4 Wash. C. C. 594.
Coggill *v.* H. & N. R. R. Co., 3 Gray, 545.
Hirschorn *v.* Canney, 98 Mass. 149.

J. M. Ridings, contra.

The law permits no device to create a lien upon personal property apart from the possession; it has therefore been universally held that a vendee in possession under a conditional sale has an indefeasible title in favor of creditors (on the ground of the credit which he has obtained through his possession), and of *bona fide* purchasers (on the ground of lack of notice).

Lehigh Co. *v.* Field, 8 W. & S. 241.
Martin *v.* Mathiot, 14 S. & R. 214.
Farrell *v.* Nathans, 1 Phil. 557.
Rose *v.* Story, 1 B. 190.
Euwer *v.* Van Giesen, 6 WEEKLY NOTES, 363.

Every one who gives value or changes his position for the worse, under the belief that the vendee is the indefeasible owner, is a purchaser within the rule.

Basset *v.* Nosworthy, 2 Lead. Cas. in Eq. 32.
Thompson *v.* Lee, 3 W. & S. 479.

C. A. V.

June 14, 1881. THE COURT. The defendant in this case entered into partnership as a manufacturer with one Jacob Pickering, the terms being that he should furnish the money, and Pickering the machinery requisite for the enterprise. The machinery was then in Pickering's possession, who represented himself as the owner, but it turned out that he had purchased it from the plaintiff and given part of the purchase-money, with a stipulation that the title should not pass until the price was paid in full. The plaintiff demanded payment or the return of the machinery, and, on the defendant's refusal, brought an action of trover. Pickering had in the mean time proved insolvent and absconded, so that the question was who should bear the loss.

It was agreed by the counsel on either side, at the trial which took place before me in February last, that a verdict should be rendered for the plaintiff for as much as the machinery was worth, with leave to the Court to enter judgment for the defendant, if there was any evidence from which the jury could reasonably have inferred that the defendant was a *bona fide* purchaser, and, as such, entitled to the machinery, notwithstanding Pickering's failure to pay the entire purchase-money.

In determining this point we must obviously consider and be guided by the principles which regulate conditional sales. The common law, as developed in the United States, and especially in Pennsylvania, is averse to secret liens, as tending to embarrass trade and mislead third persons who deal in ignorance of the facts. The record is the guide as regards real estate, but creditors and purchasers are entitled to require that the ownership of personal property shall, so far as the exigencies of life and business permit, be manifested by possession. Goods which have been sold and paid for, but not delivered, may consequently be taken in execution for the vendor's debts, and, by a parity of reasoning, the vendor cannot enforce his lien for the purchase-money after the goods have been handed over to the buyer. It is accordingly well settled that, while a condition that a sale shall be void if the purchase-money is not paid at the time prescribed, may be valid as between the parties, it will not be good against third persons who trust the buyer on the faith of his apparent ownership. If this is true of creditors, it applies with still more force to one who enters into partnership in the belief that his associate is the owner of specific goods, and will use them for the furtherance of the undertaking in which both are concerned. Although not a buyer in the ordinary sense of the term, he still acquires an interest in the property in question, with a right to insist that it shall be employed for the benefit of the firm and appropriated if need be to the payment of its debts, and is therefore a purchaser

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in the sense in which the term is used in equity to designate every one who parts with value in the belief that another has a title and will transfer it either absolutely or by way of pledge or mortgage.

It results from these principles that the defendant, as both creditor and purchaser, is entitled to judgment on the point reserved.

Opinion by HARE, P. J.

U. S. District Court. Admiralty.

May 6, 1881.

The Mary E. Long.

Salvage — Compensation — How determined — The measure of compensation is what both parties would have contracted for, and is proportionate to the risk run by the salvor in saving and that incurred by the saved vessel in declining assistance at the time of the peril.

Libel for salvage, by the owners of the steam tug Juno against the schooner Mary E. Long.

Early on the morning of Sunday, March 21, 1880, the libellants' tug, the Juno, discovered the schooner Mary E. Long ashore on the Brandywine shoal, with her flag flying "Union down;" went to her assistance, and succeeding in getting the schooner off the shoal, towed her to Philadelphia and docked her there. On these facts both the libellants and the respondent were agreed.

The libellants, however, further alleged that when the tug came to the schooner's assistance, she was thumping on the bottom and would soon have gone to pieces if she had not been helped off, that the men were at the pumps, and continued pumping for some time after the vessel came off, and that the wind was driving her further on the shoal. Evidence was also introduced to show that the character of the shoal and the force of the wind rendered the service done by the Juno dangerous to herself.

These allegations were, however, denied by the respondents, who declared that no risk at all was run by the Juno; that the wind was forcing the schooner over the point of the shoal, that her bows were clear, and that she would soon have been altogether free, even if the tug had not assisted her, that she was not leaking, and required no repairs at Philadelphia, and consequently that the service was only one of towage, not salvage.

H. R. Edmunds and *Theodore M. Etting*, for libellant.

The saving of the schooner, her cargo and freight from the impending peril by persons not bound to render the service, entitles them to compensation as salvors.

The Stetson, 1 Lowell, 119.

James B. Roney, for respondent.

To constitute the service rendered by the tug salvage service, there must have been an impending peril. It is not sufficient that there might be a possible future peril.

The Emulous, 1 Sumner, 215.
The Saragossa, 1 Benedict, 557.

Steamers whose regular pursuit is to tow and relieve vessels should not be regarded as meriting a reward out of all relation and proportion to what would have been accepted as satisfactory on a fair bargain for their services.

The H. B. Foster, 1 Abbott, 222.
The Steamboat Cheeseman *v.* The Two Ferryboats, 2 Bond, 375.
Adams *v.* The Bark Island City, 1 Clifford, 210.
The Rebecca Clyde, 5 Benedict, 103.

May 10, 1881. THE COURT. The libellants are entitled to compensation as salvors. I see no room for doubt of this. The respondent was in peril. That she might possibly have escaped without assistance is not important.

What compensation should be allowed? As in all similar cases, this question is embarrassing. While certain general rules may be appealed to for assistance, the measure of compensation must vary with the peculiar circumstances of each case. The subject is intelligently discussed in The Stetson (1 Lowell, 119), where the circumstances were much like those of the case in hand. The considerations which should govern the inquiry are: What would the libellants have contracted to perform the service for—taking the risk of failure—and what would the respondent have contracted to pay? This involves the danger of the service to the libellant, and the risk in declining to accept it, to the respondent, as the danger and risk appeared at the time. In The Stetson, above cited, the Court awarded five per cent. of the property rescued. Here a similar percentage would amount to $1300. In view of the limited extent of the danger encountered by the libellant, and the prospect of succor from other sources by the respondent, I believe $1300 to be a larger sum than the former would have demanded, or the latter have consented to pay. I am not unmindful of what Captains Randolph and Chester say of the situation; but their statements, when compared with those of other witnesses, seem somewhat exaggerated. After careful examination of the case, I think $1050 (one thousand and fifty dollars) a just compensation, and this sum will be awarded with costs.

Opinion by BUTLER, D. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JULY 7, 1881.* [No. 12.

Supreme Court.

May, '81, 155. May 16, 1881.

Philadelphia Contributionship for Insurance, etc., v. Commonwealth.

Taxation—State tax on net earnings or income—Tax on franchise of corporation—Acts of May 1, 1868, and January 7, 1879—Income derived from United States bonds and from non-taxable State loans—Loss on bonds purchased at a premium, subsequently paid off at par.

The tax on corporations, imposed by the 10th section of the Act of January 7, 1879 (P. L. 118), is a tax on the corporate franchise, to be measured by the annual net earnings or income.

Income derived from bonds of the United States or from non-taxable loans of the State of Pennsylvania, form part of the income of the corporation owning them on which the company is taxable.

In computing the annual tax on income, a corporation is not entitled to a deduction by reason of the fact that bonds which had been bought by them at a premium had been paid off by the government at par.

Error to the Common Pleas of Dauphin County.

Appeal from the settlement of the Auditor-General and State Treasurer on the corporation's account of net earnings and income for the year ending October 31, 1879.

The material facts, which were agreed upon in a case stated, were as follows: The above named corporation is a mutual fire insurance company of the State of Pennsylvania, organized in 1752, and incorporated in 1768. By the 6th section of the Tax Act of May 1, 1868, and the 10th section of the Tax Act of January 7, 1879 (the latter being a transcript of the former), it is provided that all corporations incorporated by or doing business in this Commonwealth, with certain specified exceptions, shall annually make report to the Auditor-General, setting forth the entire amount of net earnings or income received by said corporation from all sources during the preceding year; and upon such net earnings or income, the said corporation shall pay into the State treasury for the use of the State, within sixty days thereafter, three per centum upon such annual net earnings or income, in addition to the taxes imposed by the preceding sections of this Act.

By the settlement, the said corporation was taxed, *inter alia*, on income derived from loans of the State of Pennsylvania, which were, by the Acts authorizing their issue, made non-taxable; on income derived from United States loans and bonds in its possession; and on income received from other United States securities which the corporation had purchased above par, and which the government had paid off at par. The corporation appealed from the settlement, on the ground that income derived from said United States bonds and Pennsylvania loans was not taxable under said Acts, and because the settlement disallows the claim of the said company, in estimating its net income, to deduct from its gross receipts its loss on United States securities purchased above par and paid off by the government at par. The Court held, that the objections to the settlement were not valid; that the settlement was properly made, and therefore found in favor of the Commonwealth. In his opinion filed HENDERSON, J., said, *inter alia*:—

"But there is a further contention—the corporation defendant in estimating its net earnings claimed to deduct from its gross receipts its loss on United States securities, purchased above par and paid off by the government at par. This claim was disallowed by the accounting officers. The argument in form of this proposition is not without some plausibility. It is crude and difficult to answer. If a man gets less for a thing than he paid for it, he meets with a loss, and it impairs his capital. But it is the *annual* net earnings that are taxed. A diminution of capital does not necessarily diminish the annual net earnings. To adopt the rule here contended for would be to cast an uncertain factor into the account. For this is purely a matter of speculation. The tax is assessed upon the net earnings, it rises and falls with them, not with the capital; with the net earnings, not with the earning capacity. If the corporation is inactive, or its capital lies idle, it produces no basis of taxation.

"But it seems to me that the fallacy of the argument is in the assumption that a depreciation in the value of the bonds is a loss to be deducted from the gross receipts. Clearly not, except as the depreciation affects the *annual* net earnings. We should prefer to say that the premiums paid for the bonds *should* have been deducted when the investment was made, and might properly have been accounted for and taken from the gross receipts. But certainly the State cannot now settle a profit and loss account running through several years and many transactions. The law requires an *annual settlement* producing an annual tax, and upon an annual basis."

Judgment for the Commonwealth.

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Exceptions to this finding were overruled by the Court, whereupon the said company took this writ, assigning for error the dismissal of their exceptions and the entry of judgment for the Commonwealth.

W. W. Montgomery, for the plaintiff in error.

(1) It is admitted that the State cannot tax directly United States loans or non-taxable loans of the State of Pennsylvania, but the decision was put upon the ground that the tax is on the franchise of the corporation, to be measured by the net income received from all sources, including the above securities. This is accomplishing indirectly what cannot be done directly, and it equally violates the principle which forbids a State from legislating in such a manner as to affect the credit of United States securities, or of its own securities which it had declared shall be non-taxable. The distinction attempted to be drawn between a tax on income of such bonds, and a tax on a corporate franchise measured by income from such bonds, is illusory and purely in name. The effect is the same. As to the U. S. bonds, they are so much the less desirable as an investment, and as to the Pennsylvania loan, it is a repudiation, *pro tanto*, of the Commonwealth's contract with the holder. A tax on the income is a tax on the debt; for as soon as the interest is due, it becomes part of the debt. If the power of taxation exists at all, it is unlimited, and the value of the security could lawfully be depreciated to an indefinite extent. It is argued that the intent is to tax the franchise to the amount of the company's business—the extent to which it exercises its franchise. But if we had done no business during the year, we should still have received the income from the bonds. A long line of decisions establishes that in whatever form, or in whatever terms, or by whatever casuistry, a State law attempts to reach United States bonds for the purposes of taxation, it is void, and cannot be enforced.

McCullogh *v.* State of Maryland, 4 Wheat. 316.
Weston *v.* Councils of Charleston, 2 Peters, 448.
Bank of Commerce *v.* New York City, 2 Black, 620.
Bank Tax Case, 2 Wallace, 200.
Opinion of the Justices, 53 N. H. 640.
Bank of Kentucky *v.* Commonwealth, 9 Bush. 46.
Monroe Savings Bank *v.* City of Rochester, 37 N. Y. 365.

And the same thing, of course, is true of any other bonds exempt from taxation.

Newark City Bank *v.* Assessor, 30 N. J. L. 16.

The case of State Tax on Railway Gross Receipts (15 Wallace, 284), is, in its reasoning, contradictory and irreconcilable with the prior authorities, and should be confined to the point expressly decided in it.

(2) As to our claim to deduct loss on United States securities, paid off at par, from gross receipts in estimating net income. The "premium" paid in the market for purchase of bonds above par, may be regarded as capital invested in a security which yields a lower interest than the nominal rate on its par value. If we buy at 40, and sell (or the Government pay off) at 50, we make 10, and pay tax on that 10 as part of our net earnings for the year in which it was received; if we buy for 60, and sell (or are paid off) at 50, we lose 10, and why should we not deduct such loss from our gross receipts in estimating net earnings for the year? The tax on the excess over par, paid in former years, will equal the loss we now claim to deduct. Net revenue is that which a corporation may lawfully distribute as dividends on its share capital. But it could not distribute its revenue without first deducting the losses from actual sales or payment of investments at maturity.

Lyman D. Gilbert, Deputy Attorney-General (with him *Henry W. Palmer*, Attorney-General), for the Commonwealth.

There is no question that the tax Act is broad enough to include tax on income derived from the United States and Pennsylvania bonds in this case. The question, therefore, is not one of legislative intention, but of legislative power. This case depends on the principle that property which is not taxable at a certain stage in its existence, may become taxable in other stages of its existence. When certain changes are made in corporate property, a new subject of taxation is created, and the law will not inquire into the source from which the property came. Thus, freight transported from State to State may not be taxed by a State, as that would be a regulation of commerce among the States, but gross receipts of a carrying company, made up in part from freights received for transportation from State to State, are liable to State taxation. The company cannot earmark its receipts to relieve some of them from taxation.

State Freight Case, 15 Wallace, 232.
State Tax on Gross Receipts, 15 Wallace, 284.
Brown *v.* Maryland, 12 Wheat. 419, 441.
Waring *v.* Mayor, 8 Wallace, 122.
Pervear *v.* Commonwealth, 5 Wallace, 479.

The ground for the distinction is, that after the money has come into the treasury of the company, it has lost its distinctive character as freight, by having become incorporated in the general mass of the company's property. On the same principle, a change of net earnings into dividends creates a new kind of property, and a corporation which is not taxable on dividends, may be taxed on net earnings.

Jones & Nimick Manufacturing Co. *v.* Common'th, 19 Sm. 137.

(2) The company suffered no "loss" by the payment at par of bonds which they purchased at a premium. The premium was the price for the extra security of the investment. They

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knew what they purchased, and got all they bargained for. If it be a loss, it is a loss of capital, and cannot be deducted in computing a tax upon net earnings for any one year.

June 13, 1881. THE COURT. By the tenth section of the Revenue Act of 1879, which is substantially a re-enactment of the sixth section of the Act of May 1, 1868, certain individuals, companies, and corporations therein mentioned, are required to make report to the Auditor-General, setting forth the entire amount of net earnings or income received by them from all sources during the preceding year, and pay a tax of three per centum thereon for the use of the Commonwealth. (P. L. 118.)

The corporation plaintiff in error being clearly within the provisions of the Act, made its return of earnings or income for the tax year ending on October 31, 1879, and included therein $28,615.73, interest on United States bonds, and $15,375, interest on Pennsylvania bonds; both of which items, however, it claimed were exempt from taxation. It was also claimed, that in ascertaining its net earnings or income, the difference between the par value of $307,000, United States bonds which were called in and paid during the year, and the price at which they were purchased several years before, should be treated as a loss and deducted from its gross receipts. The accounting officers having refused to allow any abatement on account of either of these three items, the tax thereon amounting to $2068.19 was paid under protest, and an appeal taken from the settlement. The decision of the Court below was also adverse to the plaintiff in error on the points in controversy.

The questions thus presented by the record, are, whether the income derived from either class of bonds is exempt from taxation, and whether the difference between the price paid for the United States bonds and their par value, should be regarded as a loss and deducted from the gross receipts.

It may be conceded that the bonds, as such, are not taxable by the Commonwealth; but the tax in question is not laid on the bonds. It is a tax on the corporate franchise of the plaintiff in error, measured by its net earnings. The right of the State to impose a tax on the franchise of any corporation that is indebted to it for existence and protection, is too clear for argument. If the right exists, as it undoubtedly does, the manner of its exercise must be left to the wisdom of the Legislature; and perhaps no standard or measure of taxation can be adopted that will operate more justly and equitably than a per centum on net earnings or income.

The interest received by the company on the bonds undoubtedly formed a part of its income, and while the bonds themselves are exempt from taxation by virtue of the laws under which each class respectively was issued, it does not follow that the same immunity adheres to the money paid from time to time in discharge of the interest due on the securities. When so paid, it loses the non-taxable characteristic of the bond on which it accrued, and should thenceforth be treated as any other species of income derived from other sources. But, as already intimated, the tax is not laid on the money and other receipts of the company. Its net earnings or income is resorted to simply as a just measure of the tax to be paid for the enjoyment of its corporate franchise.

There is an obvious difference between a direct tax on the property of a corporation, and a franchise tax, measured by its earnings, which, proximately at least, represent either the value of the franchise granted, or the extent of its exercise. The distinction has been repeatedly recognized by both Federal and State courts. In Society for Savings *v.* Coite (6 Wallace, 594), corporations of the class to which the plaintiff in error in that case belonged, were required to pay annually a sum equal to three-fourths of one per cent. on the total amount of the deposits; and it was held that this was a valid franchise tax and not a tax on property, and that the society had no right to claim exemption therefrom to the extent of its deposits invested in non-taxable securities of the United States. Under a similar law in Massachusetts, it was held that a savings institution, having a portion of its deposits invested in Federal securities, was liable to a tax on account of such deposits as fully as on account of other deposits, notwithstanding the securities were declared by the Act of Congress, under which they were issued, to be exempt from taxation under State authority. (Provident Institution *v.* Massachusetts, 6 Wal. 611.)

A distinction somewhat similar in principle is made in the cases of State Freight Tax and State Tax on Railway Gross Receipts (15 Wallace, 232 and 284), in the latter of which it is held that a statute imposing a tax on the gross receipts of railway companies is not repugnant to the Constitution of the United States, though the receipts are made up in part of the freights received from inter-state transportation of merchandise.

The difference between the amount paid for the United States bonds and their par value cannot in any proper sense be regarded as a loss, but if it were otherwise, the plaintiff in error is not entitled to the deduction claimed. A decrease of capital does not necessarily diminish the annual net earnings. It is the latter that has been adopted as a just measure of the tax imposed on the franchise. The contention of the

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plaintiff in error on this point has been so fully answered by the learned Judge of the Common Pleas, in the concluding portion of his opinion, that further comment is unnecessary.

Judgment affirmed.

Opinion by STERRETT, J.

May, '81, 108. May 9, 1881.

The Chevington and Bunn Coal Co. v. Lewis, Admr., et al.

Corporations—Tax on corporate franchise—Act of April 24, 1874, Sect. 7—Construction of covenant in mining lease that lessees shall pay all taxes on the demised premises or upon coal produced therefrom.

The tax imposed on corporations by the 7th section of the Act of April 24, 1874 (P. L. 68) of three cents upon each and every ton of coal mined by such corporations, or by their lessees, is a tax upon the corporate franchises, to be measured by the number of tons so mined, and not a a tax upon the coal itself.

The lessees in a coal mining lease covenanted to pay all taxes and imposts whatsoever assessed or charged during the continuance of the lease, upon the demised premises, or any part thereof, or upon the coal produced therefrom:

Held, that this clause of the lease does not include the tax on the corporation, the lessors, imposed by the 7th Section of the said Act of April 24, 1874, which tax is payable by the corporation and not by the lessees.

Error to the Common Pleas of Bedford County.

Covenant, by the Chevington and Bunn Coal Co. against Lewis, administrator, *et al.*, to recover from the defendants, their lessees under a coal lease, certain taxes paid by the plaintiffs to the Commonwealth, for which the plaintiffs alleged the defendants were liable under the terms of the lease.

Upon the trial, before HALL, P. J., the following facts appeared: The Chevington and Bunn Coal Company, a corporation organized under the laws of Pennsylvania, being the owners of a tract of coal land situate in Broad Top Township, Bedford County, leased the same to the defendants for the term of fifteen years, by lease dated November 14, 1877, the defendants entering into the usual covenants for mining a minimum quantity of coal during every year, and paying a certain royalty upon each ton mined. The lease contained, *inter alia*, the following clause:—

"8th. That all taxes and imposts, whatsoever, assessed or charged during the continuance of this lease, upon the demised premises or any part thereof, or upon the coal produced therefrom shall be paid by the parties of the second part."

By an Act of the Legislature of Pennsylvania, approved April 24, 1874 (P. L. 68), entitled "An Act for the Taxation of Corporations," it was enacted, *inter alia*, as follows:

"Section 7. That every company . . . which possesses the corporate right or privilege to mine, or to purchase and sell coal, shall semi-annually, upon the first days of July and January, in each and every year, make report . . . to the Auditor-General, of the number of tons of coal mined during the six months preceding the said first day of July and January, by such company, and also of the number of tons of coal that shall be mined by any unincorporated association, partnership or individual, under any lease, contract, grant, or mining privilege, upon the property of which the company making such report is the owner or lessee, or has any mining or coal privileges or interest therein, and also of the number of tons not mined as aforesaid, which shall have been purchased during the same period by the said company, and shall pay into the treasury of the Commonwealth an additional tax upon its corporate franchises, created by or used within this Commonwealth, at the rate of three cents upon each and every ton of two thousand two hundred and forty pounds of coal so mined or purchased as aforesaid; . . ."

Up to the first day of July, 1878, the defendants under their lease had mined from the demised premises 31,159 tons of coal, upon which the tax at three cents per ton amounted to $934.77. The defendants refused to pay this tax to the Commonwealth, and the plaintiffs to save the penalty imposed by the third proviso of the above section, paid the $934.77 to the State Treasurer, on the 14th of August, 1878, and thereupon brought this suit to recover the said amount from the defendants.

The defendants presented the following points:

(1) That the taxes paid by plaintiffs were taxes imposed upon said plaintiffs for their corporate franchises, and not taxes upon coal produced. (2) That the plaintiffs had given no sufficient evidence of the liability of defendants for the payment of the said taxes, and that the verdict should, therefore, be for the defendants.

The Court directed the jury to find for the plaintiffs, subject to the opinion of the Court on the law raised by defendants' points, to be determined on a motion to enter judgment for the defendants *non obstante veredicto*.

Verdict for the plaintiffs accordingly.

Upon a motion to enter judgment for the defendants *non obstante veredicto*, the Court granted the motion and entered judgment for the defendants, HALL, P. J., delivering the following opinion, after stating the facts:—"That the tax in dispute is a tax on the corporation for its franchises and not a tax on the coal, is clear by the language of the Act imposing the tax (27 April, 1874, P. L. 68). The Act is entitled "An Act for the Taxation of Corporations," and the 7th section provides, that every company organized under the laws of this Commonwealth possessing the corporate right to mine coal, shall report semi-annually the number of tons of coal mined by the company, or by any lessee of the company, upon the property of the

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company, and shall pay a tax upon its corporate franchises at the rate of three cents per ton upon every ton of coal mined, etc.

"This Act has received a judicial construction in the case of the Kittanning Coal Co. *v.* The Commonwealth (29 P. F. S. 100), where the question of the constitutionality of the Act was raised, and in which the Court say, "the tax is a tax upon the corporate franchise measured by its business, to wit: the number of tons of coal mined or purchased or sold, and is not a tax upon the coal itself." This case was decided in 1875, two years before the date of the contract between these parties.

"If the plaintiffs intended to exact from the defendants a stipulation to pay this tax upon their corporate franchise why was it not plainly so expressed? And if they did so intend, the question remains, did the defendants so understand it, and did they undertake by the language of this contract to pay this tax?

"If the contract had contained a stipulation to pay the tax upon the corporate franchises of the plaintiffs at the rate of three cents per ton upon the coal mined by the defendants on the plaintiffs' property, there would be no room for doubt or uncertainty. *Verba chartarum fortius accipiuntur contra proferentem.*

"The argument of the plaintiffs' counsel that the language of the eighth clause 'upon the coal produced therefrom' has no application or meaning, except it means this tax, there being no other tax upon coal except this, is met by the counter argument that the proceedings of the Legislature show there had been an effort made to tax coal mined by individuals, and that this provision may well have been intended to cover a tax upon coal mined by individuals if any such should be imposed.

"These defendants are not to be held to pay a tax unless it is clear they contracted to pay it. The tax in dispute is not a tax on coal. It is a tax upon the corporate franchises. There is no stipulation that they are to pay the tax upon the franchises of the corporation, and we are of opinion that the judgment should be entered for the defendants *non obstante veredicto*, and it is so ordered."

The plaintiffs took this writ, assigning for error the construction by the Court of the eighth clause of the lease, and the entry of judgment for the defendants *non obstante veredicto*.

J. H. Longenecker and *J. M. Reynolds* (with whom was *Russell*), for the plaintiffs in error.

The Court below based its decision upon the case of Kittanning Coal Co. *v.* Commonwealth (29 Sm. 100), which is entirely different from our case. The Court there held that the seventh section of the Act of 1874 is constitutional and that the tax thereby imposed is not on the coal mined, but on the franchises of the corporation. The question in our case is, are the defendants bound by the terms of the lease to pay the tax? We admit that it is a tax on the franchises, but we claim that it is covered by the defendants' covenant in the eighth clause of the lease, "that *all taxes and imposts whatsoever* assessed upon the demised premises, *or upon the coal produced therefrom*" shall be paid by the defendants. The distinction attempted to be drawn between taxing the owners of coal, the tax to be measured by the tons mined, and taxing the coal itself is one without a difference. In the Kittanning Company case (*supra*), AGNEW, C. J., says: "What difference is there between saying that all horses and mules shall be taxed at a certain rate, and saying that the owners of these horses and mules shall be taxed at the same rate upon them? The distinction is evidently unmeaning." As between the parties, the expression, taxes imposed "upon the coal produced therefrom" is a popular phrase, and the intention of the parties, deduced from the entire lease, evidently was that all taxes imposed on the subject-matter of the lease, no matter by what words or in what manner, should be paid by the lessees.

John Cessna (with whom was *John P. Linton*), for defendants in error.

The Act of 1874 specifically says that this tax levied upon corporations is "an additional tax upon its corporate franchises created by or used within this Commonwealth;" and this Court has said, in Kittanning Coal Company *v.* The Commonwealth (29 Sm. 100), that the "tax is upon the corporate franchises . . . . and not upon the coal itself." If the lessors had been individuals instead of a corporation, it will not be pretended that the lessees could have been called upon by the terms of the lease to pay any tax upon the coal mined. This tax was upon the corporate franchises, but the number of tons mined was the measure of the tax upon the franchises—just as under the Acts of 1844 and 1859 there was no tax on dividends, but the amount of dividends was the measure of the tax on the capital stock.

Lehigh Crane Iron Co. *v.* Com'th, 5 Sm. 448.
Phœnix Iron Co. *v.* Com'th, 9 Sm. 104.

The lease in the case is carefully written by skilful hands, and was intended to and does express the intention of the parties. By including taxes on the lands, and on the coal mined, the tax on the corporate franchises is excluded. The words are not ambiguous, but if they were, the well-known rule of construction of deeds would require them to be construed most strongly against the grantors.

May 23, 1881. THE COURT. We think it very clear that the tax for which this action is

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brought was not within the eighth clause of the lease. It was not "upon the demised premises, or any part thereof, or upon the coal produced therefrom." It was a tax upon the corporate franchise of the plaintiffs, measured, indeed, by the quantity of coal produced, but that did not make it a tax on the coal. This is made very clear in the learned and able opinion of the President Judge, which we adopt as the opinion of this Court.

Judgment affirmed.

PER CURIAM.

Jan. '80, 337. March 25, 1881.

Ash et al. v. Guie to use.

Partnership—Masonic lodge not a partnership—Unincorporated society—Members of, not bound by seal—Sealed instrument evidence—Assignor of a thing or chose in action—Act of April 15, 1869 (P. L. 30)—Act of May 25, 1878 (P. L. 153)—Act of March 27, 1865 (P. L. 38)—Judgment—Pleading—Plea of former recovery—When admissible—Joint debtors—Survivorship—Act of March 22, 1861 (P. L. 186)—Construction of—Practice.

The members of a Masonic lodge appointed a committee to erect a building for the use of the lodge, and by resolution authorized this committee to borrow money for the construction of the same. This committee accordingly borrowed from various persons, giving to the lenders certificates of the lodge acknowledging its indebtedness signed by the officers thereof, and sealed with the seal ordinarily used in authenticating its communications with other lodges. The committee had no express power to issue these certificates but it was the custom of the lodge to do so. In a suit brought upon one of these certificates by the holder thereof against all the members of the lodge, wherein the plaintiff claimed that the defendants were liable as partners:

Held, that the defendants as members of the lodge were not liable as partners in their relations to third parties as individuals associated for carrying on a trade are, but that the members of the committee and all others who engaged in the enterprise, or had assented thereto, or who had participated in the erection of the building or the borrowing of the money, by voting for or advising it, or who had subsequent to such building or borrowing approved and ratified the same, were liable for the amount of the certificates so issued.

Held further, that the seal attached to the certificate must be held to be only the seal of those advising and issuing the instrument and that of the officers whose names were affixed thereto.

Where a judgment has been obtained against an unincorporated society and no execution issued, and subsequently the members of such society are sued for the same claims, a plea of "former recovery" on their part is a nullity.

The Act of May 25, 1878 (P. L. 153), providing that in all civil proceedings by or against surviving partners no party to the record shall be excluded from testifying to matters that have occurred between the surviving party and the adverse party on the record, is a remedial statute, and will be construed so as to embrace the case of a survivor of two or more who jointly contract, even though not strictly partners.

Semble, therefore, if two persons jointly execute a note, and one die, that in an action between the holder and survivor, this statute would apply as if the makers had been partners.

By the Act of March 27, 1865 (P. L. 38), a party is entitled in any civil proceedings to compel any adverse party to testify in his behalf, and this provision is not affected by the Act of April 15, 1869 (P. L. 30). Where the plaintiff therefore in an action upon a contract against several defendants, some of whom have died, calls on some of the defendants to testify on his behalf:

Held, that the witnesses were competent, and that their evidence was properly admitted.

Where a plaintiff sues several joint debtors, and some of them die after suit brought, he is entitled by a liberal construction of the Act of March 22, 1861 (P. L. 186), to bring in the personal representatives of those who have died, and proceed to judgment against them and the survivors at the same time. But he cannot be compelled to do this, nor can the representatives of the deceased defendants come in and be substituted, and have trial with the survivor without the plaintiff's consent.

In a suit against several joint debtors judgment was twice obtained against some of them for want of an appearance and twice stricken off, first without and second by the order of the Court. The other defendants made no motion to have the judgment reinstated but acquiesced in the striking off:

Held, that there was no error calling for reversal.

Error to the Common Pleas of Chester Co.

Assumpsit, by William H. Guie to the use of J. Alfred McCaughey against Phineas A. Ash and 109 others, alleged to have been lately trading as Williamson Lodge No. 309, A. Y. M., upon a certain certificate in the following form:

No. *This is to certify,* $100.

That Williamson Lodge, No. 309, A. Y. M., of Downington, Chester County, Pennsylvania, acknowledges itself indebted to William H. Guie, in the sum of one hundred dollars, payable in two years from November 11, 1870, with lawful interest for the same, payable annually.

In testimony whereof the Worshipful Master and Wardens have hereunto set their hands, and caused the seal of said lodge to be affixed, at Downington, this 11th day of November, A. D. 1869.

{ Williamson *Seal.* Lodge. } CHARLES P. KEECH, W. M.
CHAS. E. ELSTON, S. W.
THOS. B. SMITH, J. W.

Attest: R. D. WELLS, *Secretary.*

This certificate was afterwards assigned by Guie to the use of plaintiff.

The narr. filed was in debt. Judgment for want of an appearance was taken against seventeen of defendants after the return day, and more than ten days after service, but before the actual return of the writ. Judgment for want of an appearance was also entered after the return of the writ against twenty others of the defendants. Afterwards by the order of plaintiff's counsel, but without leave of the Court, this judgment was

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stricken off. The next day judgment for want of an appearance was again entered on motion of plaintiff against the same defendants. This judgment was, on motion of plaintiff, stricken off before trial by order of the Court.

Defendants pleaded "non-assumpsit, payment with leave, etc." One defendant, Charles E. Elston, pleaded a former recovery upon the instrument in suit against the Williamson Lodge, A. Y. M. The record of that suit showed that Elston had not been served with process, and that he had not appeared therein, and that the judgment thereon had never been satisfied, and that execution had never been issued thereon.

Defendants afterwards suggested of record the death of ten of their number.

On the case being called for trial, before FUTHEY, P. J., the plaintiff asked that the jury be sworn to try the case against the survivors of the defendants. To this defendants objected. The Court overruled the objection, and ordered the jury to be so sworn which was done. Exception by defendants.

On the trial the following facts appeared:

The defendants were the members of the Williamson Lodge No. 309, of Ancient York Masons, an unincorporated society organized for charitable, benevolent, and social purposes. The officers of said lodge consisted of, *inter alia*, a worshipful master, a senior and a junior warden, and a secretary. In 1868 or 1869 the lodge deeming it desirable that a building for their use should be erected, appointed a committee of five to carry the scheme into execution. This committee caused a suitable building to be constructed, and in order to pay for the same borrowed various sums of money from time to time, from various parties, among others from plaintiff Guie. To all persons so lending, the committee gave a certificate of indebtedness similar to that upon which suit was brought in this case. These certificates, of which that in suit was one, were duly signed by the officers of the lodge and sealed with the seal thereof.

It was in evidence that the lodge conducted all its transactions, with reference to the building, through this committee, that it had expressly authorized the committee to solicit loans, that it had not expressly authorized the issuing of certificates, like that in suit, but that it was the custom of the lodge to give such certificates whenever loans were made to it. It appeared also that the seal affixed to the instrument in suit was that ordinarily used by the secretary of the lodge for authenticating communications with other lodges, and that it had never before the issuing of the certificates of loan, of which that in suit was one, been attached to a pecuniary obligation.

The plaintiff called William H. Guie to testify in his behalf. Objected to by the defendants on the ground that witness was the assignor of the contract on which the suit was brought, some of the alleged contractors having died since making said contract.

Objection overruled and evidence admitted. Exception. Plaintiff also called Richard D. Wells, and Joseph Doan, defendants, to testify on his behalf. Objected to by the defendants, on the ground that they were incompetent by reason of being alleged co-contractors, others of such co-contractors having died since the making of the contract on which this suit was brought. Objections overruled and evidence admitted. Exception.

The defendants presented, *inter alia*, the following points:—

(1) "The defendants' association was not such a partnership as is chargeable for acts of any members of the association: and no person who was not present at the time that any of the actions bearing upon this matter were presented to the lodge, can be responsible in this suit."

(2) "The instrument in suit they allege is under the seal of the defendants. The proof shows that it is not a seal for transacting such business. It was a seal that was never used and is not authorized by the lodge to be used for such purpose. If it does not bind the parties defendant, there can be no recovery thereon against them."

(4) "The former recovery pleaded by Chas. E. Elston, one of the defendants, is a bar to recovery in this action."

The Court ordered a verdict for plaintiff for the amount claimed, reserving, *inter alia*, the points presented by defendants. Verdict accordingly. Subsequently the Court entered judgment on the reserved points for plaintiff. Defendants thereupon took this writ, assigning for error, *inter alia*, the striking off the original judgment for want of an appearance against thirty-seven of defendants on application of the plaintiff's counsel, and without leave of the Court, the subsequent striking off of the second like judgment against the same defendants by order of the Court, the action of the Court in directing the jury to be sworn in the issue against the survivors of the alleged joint-contractors alone without joining the personal representatives of such of said contractors as had died, the admission of the evidence of Guie, of Wells, and of Doan for the plaintiff, and the entry of judgment for the plaintiff on the reserved points presented by defendants.

R. E. Monaghan (with him *P. F. Smith*), for the plaintiffs in error.

Judgment for want of an appearance having been taken against some of defendants, the others

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were relieved from liability. This judgment should not have been stricken off without the order of the Court.

Prowattain *v.* McTier, 1 Phila. 105.

Nor even by the Court without the knowledge and consent of those interested.

Newcomer's Appeal, 7 Wr. 43.
Galbraith *v.* Galbraith, 6 Watts, 112.

The representatives of deceased defendants should have been substituted on the trial.

Dingman *v.* Amsink, 27 Sm. 114.
Brady *v.* Reed, 6 Norris, 111.

Guie should not have been allowed to testify. He was expressly excluded by the Act of 1869 as being assignor of a chose in action, some of his co-contractors being dead. The Act of May 25, 1878, sect. 1 (P. L. 153) does not cover his case.

Karns *v.* Tanner, 16 Sm. 297.

Wells and Doan were clearly incompetent to testify. When one of several partners has died, his fellow-partners cannot be witnesses against him to prove the partnership.

Brady *v.* Reed, 6 Norris, 111.
Standbridge *v.* Catanach, 2 Id. 368.
Hanna *v.* Wray, 27 Sm. 27.

The Act of 1878 was not intended to apply to such cases as the present one.

The defendants were not a partnership in any sense of the word. No one is bound except those who, directly or indirectly, participated in the borrowing of the money for which the certificate in suit was given.

Story on Part., Sect. 172.
1 Lindley on Part. 55.
Flemyng *v.* Hector, 2 M. & W. 171.
Todd *v.* Emly, 7 M. & W. 432.
Livingston *v.* Lynch, 4 Johns. Ch. 573.

If the defendants be not partners, then clearly the Act of 1878 applies neither to Guie, Wells, nor Doan, and they were not competent witnesses.

One partner without special authority cannot by his own execution of a paper under seal bind his co-partners jointly with himself, unless some previous authority or subsequent ratification is shown.

Gerard *v.* Basse *et al.*, 1 Dal. 121.
Overton *v.* Tozer, 7 Watts, 331.
Snyder *v.* May & Klosse, 7 Harris, 235.
Bewley *v.* Tams, 5 Harris, 485.
Johns *v.* Battin, 6 Casey, 84.
Hoskinson *v.* Elliot *et al.*, 12 Sm. 393.
Story on Partnership, 117.

The seal used in this case was, at any rate, not of the partnership, but amounted in effect to the private seal of the parties signing the certificate.

The former recovery against the lodge should have precluded recovery in this suit.

R. Jones Monaghan, for defendant in error.

The judgments for want of an appearance were properly stricken off.

It is clear, by a host of authorities, that the jury was properly sworn against the survivors in this case.

Walter *v.* Ginrich, 2 W. 204.
McCabe *v.* U. S., 4 Ib. 325.
Given *v.* Albert, 5 W. & S. 339.
Insurance Co. *v.* Spang, 5 Barr, 113.
Miller *v.* Reed, 3 Cas. 248.

The Act of March 22, 1861 (P. L. 186), produced no change in the law in this respect.

Machette *v.* Magee, 9 Phila. 24.
Hollenbach *v.* Moore, 1 WEEKLY NOTES, 192.
Hanna *v.* Wray, 27 Sm. 27.

The issue being wholly between living persons, Guie, Wells, and Doan were clearly admissible as witnesses under the Act of 1869.

Moore's Appeal, 10 Cas. 412.
Hogebrom *v.* Gibbs, 7 WEEKLY NOTES, 399.
Runkel *v.* Phillips, 9 Phila. 619.

The Act of May 25, 1878, at any rate, removes all doubt from the question.

The defendants constituted practically a partnership.

Lloyd *v.* Loaring, 6 Ves. 773.
Beaumont *v.* Meredith, 3 V. & B. 180.

The defendants were bound as partners by the seal annexed to the certificate, because an implied ratification of its uses may be inferred from the course of business of the lodge.

Sweetser *v.* French, 2 Cush. 310.
Wheeler *v.* Rice, 8 Ib. 208.
Person *v.* Carter, 3 Murphy (N. C.), 321.
Lee *v.* Onstott, 1 Ark. 206.
McCart *v.* Lewis, 2 B. Monroe (Ky.) 267.

The plea of former recovery could not avail defendants, as the record does not show that the former judgment was against the defendants in this suit. And parol evidence cannot be received to explain the record.

Wood *v.* Jackson, 18 Wend. 116.
Honore *v.* Colmesnile, 1 J. J. Marsh. 526.
1 Tr. & H. Pr. 87.

May 2, 1881. THE COURT. One of the defendants, called by plaintiffs, testified: "The full title of our lodge is Williamson Lodge No. 309, F. and A. M.; F. and A. M. means Free and Accepted Masons; the purposes of our lodge are charitable, benevolent, and social." This is the evidence as to the objects for which the association was formed, and without proof of its constitution or rules respecting admission of members and the management of its affairs, it was held to be a common partnership. A partnership has been defined to be a "combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit." It may be formed, not only for every kind of commercial business, but for manufacturing, hunting, and the like, as well as for carrying on the business of professional men, mechanics, laborers, and almost all other employments. It would seem that there must be a community of interest for business purposes. Hence, voluntary asso-

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ciations or clubs, for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. Parsons on Part., 6, 36, 42.

A benevolent and social society has rarely, if ever, been considered a partnership. In Lloyd *v.* Loaring (6 Vesey, p. 773) the point was not made, but Lord ELDON thought the bill would lie on the ground of joint ownership of the personal property in the members of a Masonic lodge; there was no intimation that they were partners. Where a society of Odd Fellows, an association of persons for purposes of mutual benevolence, erected a building, which was afterwards sold at sheriff's sale in satisfaction of mechanics' liens, in distribution of the proceeds, it was said that, as respects third persons, the members were partners, and that lien-creditors, who were not members, were entitled to preference as against the liens of members. (Babb *v.* Reed, 5 Rawle, 151.) Had the members been called joint-tenants of the real estate, the same principle in the distribution would have applied. In Flemyng *v.* Hector (2 Mees. and W. 172), Lord ABINGER stated the difference between a body of gentlemen forming a club and meeting together for one common object, and a partnership where persons engage in a community of profit and loss, and each partner has the right of property for the whole, and in any ordinary transactions may bind the partnership by a credit. He held that a club and its committee must stand on the ground of principal and agent, and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. After noting the rules of the club, in the case before him, he says: "It therefore appears, that the members in general intended to provide a fund for the committee to call upon. I cannot infer, that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound?" A mutual beneficial society partakes more of the character of a club than of a trading association. Every partner is agent for the partnership, and as concerns himself he is a principal, and he may bind the others by contract, though it be against an agreement between himself and his partners. A joint tenant has not the same power, by virtue of the relation, to bind his co-tenant. Thus, one of several co-adventurers in a mine, has not, as such, any authority to pledge the credit of the general body, for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of evidence, from which an implied authority for that purpose can be inferred. (Ricketts *v.* Bennett, 56 Eng. C. L. R. 685; 4 M. G. and S. 686.)

Here there is no evidence to warrant an inference, that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner, so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of members, had a right to contract debts for the building of a temple, which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking, or subsequently ratified it. Those who participated in the erection of the building by voting for and advising it, are bound the same as the committee who had it in charge. And so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons, in the same manner as individuals associated for the purpose of carrying on a trade.

This unincorporated association had a seal which the officers were authorized to use for certain purposes. Some of those who engaged in the business of borrowing money directed it to be affixed to the certificate of indebtedness. All who did, adopted it as their seal for the specific purpose. It was not the seal of a corporation, nor intended as such. The party borrowed the money in the name of the lodge, and gave the certificate in same name, and adopted a common seal. They cannot repudiate it, in good faith, to the lender. He loaned the money on a sealed instrument, in many respects better than a simple contract. Those who advised affixing the seal should be held the same as their officers, who signed the certificate. Were the members partners, without evidence of agreement between them that the seal should be affixed to contracts, those not assenting to its use in that way would not be bound by a sealed instrument, though given for a debt, for which all were liable. (Schmertz *v.* Shreeve, 12 P. F. S. 457.) The learned Judge was right in ruling that the certificate was a sealed instrument, but not, under the evidence, in holding that it was authorized by all the members.

Elston pleaded a former recovery in an action against "The Williamson Lodge, No. 309, A. Y. M." The Court properly remarked that if judgment had been recovered in that suit against any of these defendants, it would not have precluded recovery in a subsequent action against those not joined. That was not a recovery against any person, natural or artificial. The

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writ was not served against Elston, nor did he appear. It is not to the purpose to speak of the result, had property, held in the name of the lodge, been sold in satisfaction of the judgment. The plaintiff has received nothing, and Elston was not a party in that proceeding.

The Act of May 25, 1878 (P. L. 153), provides that in all civil proceedings by or against surviving partners, no interest or policy of law shall exclude any party to the record from testifying to matters having occurred between the surviving party and the adverse party on the record. This statute is remedial, enacted to enable parties to testify who stand on an equality, though a party in interest be dead. Its spirit embraces the survivor of two or more who jointly contract. If two persons jointly execute a note, and one die, in an action between the holder and the survivor, this statute should apply as if the makers had been partners. Otherwise, the mischief is only partially remedied. Those jointly concerned in a transaction are partners in the popular sense of the word, and, considering the obvious intendment of the statute, it should apply in case of a surviving partner, in the popular as well as the technical sense. Therefore, Guie was a competent witness to prove what occurred between himself and the defendants.

It was clearly competent for the plaintiff to call Wells and Doan. Any party, in any civil action, may compel any adverse party to testify in his behalf, in the same manner and subject to the same rules, as other witnesses. (Act March 27, 1865, P. L. 38.) This statute is not affected by the Act of 1869. Wells and Doan were not called to prove the liability of any deceased member of the lodge, and no objection was made on that ground. It is immaterial to the plaintiff in this trial whether the deceased members were liable. He has a right to prove everything, if he can, by the adverse party, which will establish his case. The adverse party is called against his interest, and the statute places him in a different position from a party proposing to testify in his own behalf.

The Act of March 22, 1861 (P. L. 186), provides that in no case on any joint obligation, shall a plea be entertained, on the part of any heir or personal representative, that one of the joint debtors has deceased since the commencement of the action, but the same shall be proceeded in against the estate of said decedent, as though the suit had been commenced against the decedent alone. Literally and strictly, upon the death of a party to the record, jointly sued with others, the further progress of the action against his estate is the same as if he had been sued separately. A liberal construction of the statute permits the plaintiff to bring in the executor or administrator, and proceed against him and the survivor at the same time to judgment. (Dingman *v.* Amsink, 27 P. F. S. 114.) But it does not follow that he is compelled to do this, or that the representatives of the decedent may come in and be substituted, and have trial with the survivor, against the plaintiff's consent; much less can the survivors claim delay till the representatives be substituted. There was no error in directing the jurors to be sworn as to the survivors.

Judgment was erroneously entered by the plaintiff against part of the defendants in default of appearance, which was afterwards struck off without leave of Court. The defendants made no motion to have it reinstated; they appear to have acquiesced in the striking off. Subsequently, upon motion, the Court granted judgment against same defendants, and these also were struck off by the Court, before trial. We are not convinced of any such error in these interlocutory judgments, and their vacation, as calls for reversal.

Without noticing *seriatim* the two dozen assignments of error, we have endeavored to express our opinion on every material point raised by them. This writ is by all the defendants, and they contend that none are liable. That the money was fairly loaned by the plaintiff and used by the borrowers, is not disputed. If any of the defendants had no part in the borrowing, either by previous assent and procurement, or by subsequent ratification, they have a meritorious defence, and the grounds on which the judgment is reversed will avail them. The question is one of fact, and must be determined by the jury from the evidence. It is difficult to conceive of a meritorious defence in those who actually got the money, some of whom signed the certificate, and others actively participated in the giving of it. They have a legal right to refuse payment until judgment be recovered according to law. But they cannot complain if the plaintiff fails to include every one in the action who is liable, or fails to discover proof against every one included. In the nature of the case, it is difficult for the plaintiff to determine in advance the precise individuals who are liable, though he be sure of some of them, and the Court below has not been, and will not likely be, slow to allow necessary amendments, authorized by the statutes.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

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Jan. '81, 219. March 31, 1881.

Milligan's Appeal.

Auditor's finding of facts—When will be reversed by Supreme Court—Agency—What does not constitute—Commission to executors, when properly disallowed.

An auditor's finding of fact, confirmed by the Court below, will be reversed by the Supreme Court, where there is no evidence to support it; and more especially where the finding is only an inference deduced from other facts about which there is no dispute.

A., an old woman in feeble health, employed B. as her nurse; she was the owner of $4000 invested in U. S. coupon bonds, which she kept in a tin-box usually under her bed. B. was in the habit of cutting off the coupons from these bonds, collecting the interest, paying bills, and generally attending to A.'s business for her. This continued for several years until A.'s death. A. left a will by which she appointed B. her executrix. B. filed an inventory, charging herself with only $1700 of these bonds; the evidence before the auditor accounted satisfactorily for $800 more of the bonds, but no explanation was rendered of the remaining $1500. There was no direct evidence of what had become of this latter amount, but there were certain circumstances in B.'s behavior, which the auditor thought of a suspicious nature, and her conduct as executrix had not been good. On these facts he surcharged her with $1500, the remainder of the bonds, and the Court below confirmed his finding:

Held (reversing the decree of the Court below), that this was error, there being no evidence to support the finding.

An executor, who converts the funds of the estate to his own use, and fails to account until compelled so to do, is not entitled to commissions for his services.

Appeal of Sarah Milligan from a decree of the Orphans' Court of Northampton County, dismissing her exceptions to and confirming the report of the auditor appointed to audit her account as executrix of Euphemia Dawes, deceased.

From the report of the auditor and the evidence taken before him, the following facts appeared: Euphemia Dawes died July 2, 1872, leaving a will dated Nov. 17, 1866, which was duly admitted to probate, and letters testamentary granted thereon to Sarah Milligan, appellant, the executrix named therein. The testatrix had been in bad health during the latter years of her life, and in February, 1869, proceedings in lunacy had been instituted against her by her relatives on the ground that she was unfit to manage her affairs by reason of feebleness, loss of memory, etc. Pending these proceedings, the appellant, then the nurse of Mrs. Dawes, took a box containing the securities owned by Mrs. Dawes to the office of the counsel for the petitioners in the proceedings in lunacy, who made a list of the securities contained therein and found, *inter alia*, U. S. coupon bonds of the face value of $4000. The proceedings in lunacy were subsequently discontinued under an agreement that all of Mrs. Dawes's securities should be deposited with a Mr. Stewart, she to receive the income. Mr. Stewart declined the trust, and the box containing the securities was accordingly returned back to Mrs. Dawes's residence, where it was usually kept under her bed. The auditor found as a fact that in February, 1869, Mrs. Dawes had in her possession $4000 of U. S. coupon bonds. From this time on, Miss Milligan acted as nurse, housekeeper, and financial agent of Mrs. Dawes, who was physically and mentally incapable of transacting her business alone; she was in the habit of cutting off the coupons, collecting the interest, paying bills, etc. It was in evidence that the testatrix had given $300 of the coupon bonds to a church and $500 to Miss Milligan for her services as nurse, etc., from 1865 to 1869. The inventory filed by appellant as executrix charged herself with only $1700 of the bonds, and it was contended before the auditor, on behalf of the legatees, that she should be surcharged with the remaining $1500 unaccounted for. There was no direct evidence as to what had become of this latter amount. The executrix herself gave no testimony on the subject. One Mary R. Dodd testified that in March, 1872, she had visited her and had seen under the bed the tin box in which the bonds were kept, that the appellant had brought either the bonds or the box (witness could not remember which) into the kitchen and had told witness that the amount of them was $1700, but witness did not count them herself.

One John Wall testified, that in October, 1872, after Mrs. Dawes's death, and the filing of the inventory of her estate, he had seen the appellant and talked with her about the estate. That he had said, "I understand, three years ago, there were $4000 of Government bonds. I see by the inventory there are only $1700 of them." That appellant thereupon told him that $300 were paid to the church, $500 were given by testatrix to appellant, and that $500 were appellant's own and that she had spent them. That he (Wall) had then said, "there is $1000 missing yet," to which appellant replied, "I guess it will be fixed up satisfactorily."

The evidence disclosed the fact that the appellant had, as executrix, transferred certain stocks of testatrix to herself, and that she had at her sale as executrix of certain real estate belonging to decedent procured bids to be made by another on her behalf. There had also been some difficulty in procuring an account from her, and none such had been filed until she was compelled so to do by adverse process. The auditor, commenting upon the evidence above given, reported, *inter alia*, as follows:—

"Upon the whole testimony in the case, the conduct of the accountant and the circumstantial

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proof adduced before the auditor, it is a moral certainty that the accountant either has these bonds or their proceeds, and under all the facts in this case your auditor is clearly of that opinion, and accordingly so finds."

Accordingly he surcharged the executrix with the $1500 of U. S. coupon bonds with interest from testatrix's death and refused her all commissions. To this report exceptions were filed by Sarah Milligan, which the Court (MEYERS, P. J.) overruled saying, *inter alia*, as follows:—

"The most important question of appeal raised by the record is the surcharge of the accountant by the auditor of $1500 United States bonds, interest, etc. The evidence on this branch of the case is wholly circumstantial, and, while we are of the opinion that the finding of the auditor is fairly sustained by the evidence, we are free to say that the circumstances are not very strong, and are of such a character as might fail to produce conviction in other minds."

Thereupon, Sarah Milligan took this appeal, assigning for error (1st, 2d, and 3d assignments) the decree of the Court surcharging her with the sum of $1500, and (5th assignment) in refusing her commissions.

B. F. Fackenthall, for appellant.

There was no evidence on which to base the conclusion that the accountant took these bonds; they were quite as much under the control of testatrix as of the accountant; the latter had not at all the exclusive possession of them. She did not at all act as the agent of testatrix, but merely as an aid to her in performing certain work, of which she did the greater part. Though it is a general rule that this Court will not disturb an auditor's finding of fact, yet it will not permit injustice to be done, and, where the auditor's findings are unsupported by evidence, the Court will disregard them.

Speakman's Appeal, 21 Sm. 25.
Moyer's Appeal, 27 Sm. 482.
Hindman's Appeal, 5 WEEKLY NOTES, 350.

The Court below expressed itself as so dissatisfied with the auditor's finding that its opinion amounted to an invitation to come to this Court. The finding being wrong on this point, the accountant should be allowed her commissions.

W. S. Kirkpatrick, for appellees.

The auditor's finding must be looked at as a whole, and not be examined piecemeal. From the whole conduct of the appellant and the evidence, the conclusion is irresistible that she took the bonds. The facts were complicated and involved; it is not a case for deduction from a few isolated facts; and in such a case the auditor's finding will not be disturbed.

Mengas's Appeal, 7 Harris, 222.
Speakman's Appeal, *supra*.
Whiteside's Appeal 11 Harris, 116.
Yohe's Appeal, 5 Sm. 122.

Her whole conduct shows that she should not be allowed any commissions.

May 2, 1881. THE COURT. We are called upon in this case, to review the rulings of the auditor and Court below upon questions of fact. The principal matter of contention was the surcharge of the accountant with $1500 of United States bonds and with the coupons and interest thereon. These bonds were shown to have belonged to and to have been in the possession of the testatrix prior to her death. The auditor, upon what he regarded sufficient evidence, surcharged the accountant with said bonds, as will appear by the following extract from his report: "Upon the whole testimony in the case, the conduct of the accountant, and the circumstantial proof adduced before the auditor, it is a moral certainty that the accountant either has these bonds or their proceeds, and under all the facts in this case, your auditor is clearly of that opinion, and accordingly so finds." The learned Judge of the Orphans' Court sustained this ruling, yet it is evident he felt the strain of this branch of the case when he said: "While we are of opinion that the finding of the auditor is fairly sustained by the evidence, we are free to say that the circumstances are not very strong, and are of such a character as might fail to produce conviction in other minds."

There was no direct evidence before the auditor that the accountant had either the bonds or the proceeds. The conclusion to which the auditor arrived, was based wholly upon circumstantial evidence. It is not a question whether he has found the facts correctly, but whether his inferences from facts, which in the main, are not disputed, were accurately drawn.

Much that was said about the accountant being the agent of the testatrix, may be dismissed, with the single remark that she was not liable to account *qua* agent. She had no such possession of the bonds as agent, as would render her liable for their non-production. As a matter of fact, and as a matter of law, the bonds were in the possession of the testatrix down to the time of her death. Nor was the accountant her agent in the sense of involving liability. She was the servant and nurse of the testatrix, and did what she was directed to do. Sometimes it was to collect a coupon, at others to nurse her mistress, and attend to household duties.

The only ground upon which this surcharge can be sustained, is that the accountant embezzled or stole the bonds. This is a serious charge. It ought not to be made lightly, nor without clear evidence to sustain it. When a person is charged with crime, it matters little what the form of the charge may be, or on which side of the Court. It is true the result is differ-

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ent, but the difference is only in degree. It may be more agreeable to be branded as a thief in the Orphans' Court or Common Pleas, than in the Quarter Sessions. Wherever the charge is made, its gravity requires a careful consideration of the evidence upon which it is founded.

We have examined the auditor's report, and all the testimony in the case with care, and are of opinion that the facts and circumstances from which the auditor draws his opinion are too weak and inconclusive to justify his inferences. Beyond the admitted fact of the opportunity to purloin the bonds, there is not a scintilla of proof that the accountant took them. And the presumption, if there be one, arising from the mere opportunity, is weakened, if not destroyed, by the fact that others had opportunities of stealing the bonds, and the testatrix of giving them away or otherwise disposing of them.

It appears reasonably certain, that in February, 1869, the testatrix had $4000 in United States bonds, which were kept in a tin box. At that time they were exhibited by the accountant to counsel, under circumstances not material to narrate. We have no trace of them subsequently until some time in 1872, when Mary R. Dodd testifies that the accountant showed them to her at the house of the testatrix, and informed her that there were $1700 of them. The witness saw the bonds, but did not examine them, and had no knowledge of the amount beyond what the accountant told her. The testatrix died during that year, and after her death the accountant, who was her executrix, produced $1700 of the bonds as all that there were remaining. When asked what had become of the residue, she accounted for $300, as having been used to pay a subscription to a church. This was shown to have been correct, and was allowed. She further claimed the testatrix had given her a $500 bond for her services as nurse, which the evidence shows were faithful, laborious, and of long continuance. This was allowed. The whereabouts of the balance of the bonds she did not attempt to explain. There was still a deficiency of $1500, and with this the auditor surcharged her.

Conceding these to be circumstances of suspicion surrounding the case, there is not enough to sustain the verdict of a jury against the accountant on either the civil or criminal side of the Court. It would be dangerous to infer guilt from the mere opportunity to commit a crime.

The first, second, and third assignments of error are sustained. We are unable to see any serious error in the remaining assignments. The principal one is to the refusal of the Court to allow the accountant commissions. After reflection, we have concluded not to disturb this ruling. While we have relieved the accountant from the surcharge of the bonds, there is yet much in her conduct in the management of this estate, that does not meet our approval. The ruling of the Court below upon this point, was not based exclusively upon the bonds. There were other matters, such as the conversion of the bank stocks to her own use; the attempt to buy a portion of the real estate at her own sale, and the admitted use of the trust funds. These matters, coupled with her general conduct in her dealings with the estate, are sufficient to prevent our disturbing the ruling of the Court below upon the question of commissions.

The decree is reversed at the cost of the apellees, and it is ordered that distribution be made in accordance with the foregoing views.

Opinion by PAXSON, J. GREEN, J., did not sit, having been of counsel.

Jan. '81, 105. March 9, 1881.

Jones v. Ellison.

Former recovery—Effect of another judgment for same cause of action pending suit.

In an action of assumpsit for goods sold and delivered, defendant gave in evidence the record of a judgment in another county, for the same cause of action, which had been entered during the pendency of the present suit, and relied on it as a bar. This judgment had been entered on a judgment note given by defendant and another to plaintiffs in settlement of the claim in suit, upon certain conditions which had not been complied with by defendant. No recovery was had upon it:

Held (reversing the judgment of the Court below), that the judgment merged the cause of action, and was an effectual bar to the suit.

The fact that the judgment was obtained after the commencement of the suit in which it was pleaded, did not prevent its being a bar. It is the first judgment for the same cause of action that constitutes an effective defence, without regard to the order of time in which the suits were commenced.

Evidence of former recovery, though not admissible under the plea of "accord and satisfaction," is admissible under the general issue in assumpsit.

Error to the Common Pleas of Luzerne County.

Assumpsit, by John B. Ellison & Sons against David Jones, for goods sold and delivered. The facts of the case were as follows:—

In April, 1874, the defendant, Jones, entered into an agreement with one Harris, by which he gave the latter authority to carry on business in his name, make contracts, sign checks, etc. Pursuant to this authority, Harris bought goods on credit from the plaintiffs to the amount of $1300, for which amount the plaintiffs brought this suit. After the suit was begun, an arrangement was made between the plaintiffs and Harris, by which

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the matter was thus settled: Jones gave to the plaintiffs his judgment note for the amount due, signed also by Harris, who agreed to pay fifteen dollars per month on the note until it was all paid, and also to deliver a policy of life insurance as collateral for the note; this policy was never delivered. The note was not to be entered as long as the fifteen dollars per month was paid. Only four payments were made, and on February 4, 1878, the plaintiffs entered judgment upon the note in Columbia County against the defendant. Two testatum fi. fas. were issued on this judgment to Wyoming County, both of which were returned *nulla bona*. No recovery being had upon this judgment in Columbia County, the plaintiffs resumed proceedings in Luzerne County, and on January 15, 1878, the case was referred to a referee under the Act of March 23, 1870, and its supplements. The defendant pleaded the general issue to the plaintiff's narr., and also entered the additional plea of "accord and satisfaction" before the referee, giving in evidence a certified copy of the record of the judgment in Columbia County, which, he claimed, was a bar to the present suit.

The referee reported in favor of the defendant. The plaintiffs filed exceptions to the report of the referee, which the Court (RICE, P. J.) sustained, entering judgment for the plaintiffs; whereupon the defendant took this writ, assigning for error, *inter alia*, as follows: "The Court erred in entering judgment in favor of the plaintiffs below, when the evidence clearly established the fact that they had already recovered a judgment for the same matter sued for in this case."

H. M. Hannah, for plaintiff in error.

Nemo debet bis vexari pro eadem causa.

Ferrer's Case, 6 Coke, 7.
Hitchin *v.* Campbell, 12 Wm. Bl. 827.
Sparry's Case, 5 Coke, 61.
Garvin *v.* Dawson, 13 S. & R. 246.

In Finley *v.* Hanbest (6 Casey, 190), it was held that a former recovery could be given in evidence under the general issue, and in Westcott *v.* Edmunds (18 Smith, 34), it was ruled that a final decree is a bar, whether pleaded or offered in evidence.

Cist *v.* Zeigler, 16 S. & R. 283.

It is not material that the judgment or decree was entered after the suit was commenced in which it is pleaded as a bar.

Finley *v.* Hanbest, Wescott *v.* Edmunds, *supra*.

And if the same right be determined, it is not material that the *form of action* or the object to be attained by it are different.

Betts *v.* Starr, 5 Conn. Rep. 550.

Whether the taking of a new note is an extinguishment of the former cause of action, is, in all cases, a question of intention.

Hacker *v.* Perkins, 5 Wharton, 95.
Briggs *v.* Forrester, 2 WEEKLY NOTES, 483.

Whether the giving of a new security is to be a satisfaction of the old debt, by substitution, depends on the intention of the parties. And this is a question of fact for the jury.

Reed *v.* Defebaugh, 12 Harris, 495.
Slaymaker *v.* Gundacker, 10 S. & R. 75.
Hart *v.* Boller, 15 S. & R. 162.
Stone *v.* Miller, 4 Harris, 450.
Brown *et al. v.* Scott, 1 Smith, 357.

J. M. C. Ranck, for defendants in error.

The accord must be perfect, complete, and executed. Satisfaction must be made of the whole of the original demand; and a party will not be discharged upon the performance of satisfaction of part of such demand, the residue remaining unperformed. The performance of one of two things stipulated by an accord is nugatory.

3 Shars. Bl. Com. 15, note.

The record shows that nothing can be realized from the judgment in Columbia County which can be treated as cumulative security, or collateral to the original cause of action.

The giving of the judgment in Columbia County without complying with the agreement of settlement, was not an extinguishment of the original cause of action.

Spuneberger *v.* Dentler, 4 Watts, 126.
Reed *v.* Martin, 5 Casey, 179.
Hearn *v.* Kiehl, 2 Wright, 147.
Blackburn *v.* Ormsby, 5 Wright, 97.

May 2, 1881. THE COURT. This was an action of assumpsit by the defendants in error for goods sold and delivered. The case was referred to a referee under the Act of 23d March, 1870, and its supplements. He found in favor of the plaintiff in error, on the ground of former recovery. On exceptions filed, the Court reversed the findings of law, and entered judgment in favor of the defendants in error.

That a former judgment was recovered for the same cause of action between these parties cannot be questioned. It is claimed by the defendants in error that they recovered it under such circumstances as to prevent its being a bar to this action. The referee found, *inter alia*, that after this suit was brought, the plaintiff in error gave to them his judgment note for the amount due them, signed also by one Harris, who had acted as his agent in the purchase of the goods. The defendants in error entered judgment thereon in the county of Columbia, and have issued execution, but the judgment remains unpaid.

The fact that the judgment pleaded was obtained after the commencement of this suit, does not prevent its being used as a bar here. (Duffy & Mehaffy *v.* Lytle, 5 Watts, 120; Finley *v.* Hanbest, 6 Casey, 190.) It is the first judgment for the same cause of action that constitutes an effective defence, without regard to the order of

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time in which the suits may have been commenced. (Casebeer *v.* Mowry, 5 P. F. Smith, 419. So the fact that the former judgment was obtained during the pendency of this action does not impair the conclusive effect. It is urged that the evidence of former recovery was not admissible under the plea of accord and satisfaction. Granted, if that was the only plea, but it was not long before the referee was appointed that the general issue had been pleaded. The action being assumpsit, the evidence of former recovery under the plea filed was admissible. (Carvill *v.* Garrigues, 5 Barr, 152; Finley *v.* Hanbest, *supra.*) The plea of accord and satisfaction was afterwards filed before the referee, and then as an "additional plea." There was no abandonment of the former plea, and the evidence of former recovery was given without objection. Having been so taken and considered by the referee, whatever the pleadings may have been, it was too late to object to the evidence thereafter. In the plea filed before the referee it was also averred that the claim of the defendants in error was merged in the judgment they had recovered against the plaintiff in error, thus substantially, although informally, pleading the former recovery. Although the name of Harris was added to the former judgment note, yet the real parties substantially were the same in both cases. (Peterson *v.* Lothrop, 10 Casey, 223.) And the former judgment was as effective evidence of a former recovery as if it was against the plaintiff in error alone.

It is further objected that the judgment note was taken, subject to some collateral agreement of the makers, which they failed to fulfil. That they agreed to pay not less than $15 per month on the note, and also to assign a life insurance policy for $1500 as collateral security for the monthly payments. The policy was never assigned. Only a few of the monthly payments were made. If the defendants in error had returned the judgment note, or had not recovered judgment thereon, there would be much force in this last objection. Instead of so doing, after the maker of the note stopped making payments thereon, they caused a judgment to be entered on the note, and it thus remains in full force. It is then a former judgment for the same cause of action, and conclusive effect must be given to it. The learned Judge, therefore, erred in entering judgment for the defendants in error.

Judgment reversed.

Opinion by MERCUR, J.

Common Pleas—Law.

C. P. No. 1. February 19, 1881.

Swezey and Dart v. Brown.

Practice—Act of March 17, 1869—Attachment—Affidavit in, when amendable—Evidence—Act of April 15, 1869.

Rule to show cause why attachment should not be dissolved.

Attachment, under the Act of April 15, 1869, issued by Swezey and Dart against James Brown surviving partner of the firm of James Brown and Robert A. Brown, formerly trading as John Brown's Sons. The affidavit in pursuance of which the attachment issued was made by Swezey, one of the plaintiffs, and charged that ——— Brown had at the time when he contracted the debt for which this suit was brought made certain false representations. After this affidavit was filed and the attachment was issued the name "Robert A." was inserted in the blank before the word Brown. This was done without leave of the Court, whereupon this rule was obtained.

J. Edward Ackley, for certain judgment creditors of defendant, and *George Northrop* (with him *William Bracken*), for defendant, for the rule.

The affidavit, as it neglected to set forth the Christian name of the party making the false representations, was void for uncertainty. The subsequent amendment, being without leave of the Court, was ineffectual.

The affidavit was insufficient in charging fraud on the part of the deceased partner only. Plaintiff was not competent to make affidavit against the surviving partner.

Karns *v.* Tanner, 16 Smith, 297.
Standbridge *v.* Catanach, 2 Norris, 368.

Geo. M. Dallas, contra.

The tendency is now to construe acts relative to attachment with liberality.

Drake on Attachment, Sec. 27.
Sharpless *v.* Ziegler, 8 WEEKLY NOTES, 190.
State Bank *v.* Shaw, 7 Ibid. 146.
Rheinstrom *v.* Green, 7 Leg. Gaz. 254.
Ferris *v.* Carleton, 8 Phila. 549.
Bozledorfer *v.* Hart, 7 WEEKLY NOTES, 487.
Barney *v.* Patterson, 6 Hart & Johnson, 182.

Amendments to the affidavit are allowable.

Rheinstrom *v.* Green, 7 Leg. Gaz. 254.
Ferris *v.* Carleton, 8 Phila. 549.
Drake on Attachments, Sec. 418.

The blank space occurred in an immaterial part of the affidavit, and did not affect it, as that which is omitted is surplusage. Surplusage does not vitiate.

Drake on Attachments, Sec. 105.
Sharpless *v.* Ziegler, 8 WEEKLY NOTES, 190.
Ferris *v.* Tarleton, 8 Phila. 549.

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Rheinstrom *v.* Green, 7 Leg. Gaz. 254.
Emmitt *v.* Yeigh, 12 Ohio St. 335.

The question of Swezey's competency does not affect the present motion. The question of the truth or falsity of the allegations contained in the affidavit is not before the Court.

Allen *v.* Meyer, 73 N. Y. 1.

Swezey was competent to make the affidavit. The Act of March 17, 1869, made him so. The Act of April 15, 1869, made no one incompetent who was competent before its passage. It is exclusively an enabling statute.

Sheetz *v.* Hanbest's Executors, 31 Sm. 102.

February 26, 1881. THE COURT. Rule discharged.

C. P. No. 2. June 7, 1881.

Baxter v. Seeley.

Practice—Non-pros. entered through negligence of attorney will not be taken off after the lapse of over three years.

Rule to take off judgment of non pros.

This suit was begun in 1878; and judgment of non pros. for want of a declaration was entered in March of that year.

In his affidavit, the plaintiff alleged that the omission was due solely to the negligence of his attorney, and that he had a valid and undisputed claim against the defendant.

Carr, for the rule.

THE COURT. Rule discharged.

Orphans' Court.

May 21, 1881.

Power's Estate.

Executors and administrators—Executor de son tort—Cannot be cited by Orphans' Court to file an account

Sur citation to file account.

The petition set forth, *inter alia*, that the decedent by his will bequeathed to petitioner a legacy of $500.00 which has not been paid. That his widow, Mary Power, although not the executrix of the will, interfered with the estate, converted a portion of the assets to her own use, and otherwise assumed to act as executrix. That she never accounted to the executors for the assets which she thus appropriated, or their proceeds. That she died about October, 1876, intestate, and that administration had been granted upon her estate, but that her administrator had filed no account of the moneys and goods belonging to the estate of testator, which she had taken possession of, and appropriated as stated. Petitioner, therefore, prayed a citation to said administrator, to file an account of the assets of the estate of testator, converted by his widow to her own use. To this the administrator answered that he had no knowledge of the truth or falsity of the statements made in the petition for an account of Mary Power deceased, alleged executrix *de son tort* of her late husband. That he had filed his account as administrator of her estate, but that he had no data whatever, nor means of obtaining any information whereby he could file the account requested in the petition. The petitioner and all parties interested, including the administrator of the widow of testator, united in a motion to the Court for the appointment of an auditor to state the account of the administrator of the assets of testator's estate collected by his widow and appropriated by her to her own use.

F. W. Patten and *H. F. Hepburn*, for petitioner.

J. L. Clifford and *W. H. Browne*, for respondent.

May 28, 1881. THE COURT. We are seldom called upon to cite an executor or administrator *de son tort* to file an account, and all such applications have been refused. But in the present instance from the multiplicity of business, the real purport of the petition was overlooked. It is well to be reminded that the Orphans' Court has no jurisdiction in such cases. He who interferes with an estate of a decedent without authority is responsible to the rightful executor or administrator, and may also render himself liable to creditors and legatees. (1 Williams on Executors Chap. V. page [257].) But he cannot be cited to account before the Register, or Probate Court. (Peebles' Appeal 15 Serg't and Rawle, 41; Stockton *v.* Wilson, 3 Penna. Rep. 129; Williams on Executors, note to [265].)

This petition is accordingly dismissed.

Opinion by HANNA, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JULY 14, 1881.* [No. 13.

Supreme Court.

Jan. '81, 125. February 24, 1881.

Lex's Appeal.

Orphans' Court—Effect of a decree of distribution—Attachment-execution from Common Pleas does not divest the jurisdiction of the Orphans' Court to make distribution—Remedy of claimant when decree made in his absence.

A legacy to testator's son was awarded at the audit of the executor's account to an assignee of the legatee, and a peremptory order subsequently made on the executor to pay the amount. The executor, by his answer, set up that an attachment-execution on a judgment against the legatee had been issued out of the Common Pleas against him as garnishee, and that he had been warned not to pay the sum to the assignee of the legatee:

Held (affirming the judgment of the Court below), that these facts did not constitute a sufficient excuse for non-compliance with the order, and that the decree of the Orphans' Court was conclusive.

In such case the Orphans' Court has jurisdiction over the executor and the fund, and its decree is conclusive, unless appealed from within the time specified by the Act. Any right to the fund asserted or decided in the Common Pleas must still be presented and passed upon by the Orphans' Court. If a claimant have no notice of the audit, his remedy is by application to open the decree.

Appeal from the Orphans' Court of Philadelphia County.

Edward H. Bonsall, by his will, appointed William Henry Lex as his executor, and bequeathed to his son, Jeremiah Bonsall, a legacy of $1000. At the audit of the executor's account, John Fallon, Esq., presented a claim to this legacy, founded upon an assignment from Jeremiah Bonsall to him for full value paid by him to said Jeremiah Bonsall. The claim was admitted, and the sum of $1000, with interest from July 1, 1880, awarded to him. This adjudication was confirmed on October 23, 1880. On November 27, 1880, on petition of Fallon, a peremptory order was granted upon the executor to pay to him this sum by December 11, 1880. On December 10, 1880, the executor filed an answer, averring his willingness to pay the sum in question, but setting up that an attachment sur judgment, obtained by one Dixey against Jeremiah Bonsall, had been issued out of the Court of Common Pleas No. 3, for the county of Philadelphia, in which the respondent, as executor, had been summoned as garnishee, which suit was still pending and undetermined; that the plaintiff in said attachment-execution denied the jurisdiction of the Orphans' Court to decide the matter, and though notified, did not appear in person or by counsel at the audit; that the executor had been notified that if he paid the legacy he did so at his peril; that he accordingly had demanded of Fallon a bond of indemnity or other security to protect him against any verdict, judgment, or costs that might be recovered against him in said suit before paying to Fallon the amount awarded to him, but that Fallon had declined to furnish the same. He therefore asked the protection of the Court in the premises, and prayed that the order of November 27th be stayed until the determination of the attachment suit, or until Fallon should tender him sufficient security or indemnity against a recovery by claimant in said suit.

On December 20, 1880, the Court dismissed the petition or answer, and made absolute their order of November 27, 1880.

The executor, William Henry Lex, thereupon took this appeal, assigning for error: (1) The action of the Court in granting the peremptory order; (2) their refusal to suspend it until the determination of the proceedings in the attachment-execution in the Common Pleas; (3) that they did not mould the decree so as to protect the rights of the appellant while the said attachment was pending and undetermined.

Frank Kelley and *Geo. W. Thorn*, for appellant.

The decree of the Court below, awarding the legacy of Jeremiah Bonsall to his assignee is not binding and conclusive upon the attaching creditor who did not submit himself, or his cause of action, to the jurisdiction of the Orphans' Court, and over whom it at no time had any control. The plaintiff in the attachment-suit was not a creditor of the estate of the decedent, but of the legatee, Bonsall, and hence could not be compelled, under the decision in Hammett's Appeal (2 Norris, 392), to go into the Orphans' Court to establish his claim, or be debarred from participation in the fund then in Court. The effect of the attachment was simply to tie up, in the hands of the garnishee, the legacy of Bonsall, until the determination of the attachment-suit. The Orphans' Court had no authority to adjudicate upon the attaching creditor's claim, it not being a claim against the decedent's estate.

Campbell's Estate, 9 Philada. 346.

In Otterson *v.* Gallagher (7 Norris, 355), the Court held that the proceedings and decree of the Orphans' Court were binding and conclusive upon the parties *who had appeared*. The decree cannot be binding upon the plaintiff in the attachment, as it deprives him of the right of trial by jury.

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John Fallon, for appellee.

The Orphans' Court had jurisdiction of the claim of ownership of the legacy in question, as against Bonsall, the legatee named in the will.

Otterson *v.* Gallagher, 7 Norris, 355.

Whether the attaching creditor appears or not, his interest is equally bound by the decree, which is substantially a decree *in rem*. The attachment of a legacy before settlement of the estate is an attachment of a contingent thing, and must necessarily wait the ascertainment by the Orphans' Court of the existence of a legacy payable to the defendant in the attachment.

May 2, 1881. THE COURT. This appeal is by the executor of Edward H. Bonsall, from a decree commanding him to pay to the appellee a sum of money previously decreed to him by said Court.

The money in contention arises from a legacy bequeathed by said Bonsall to his son Jeremiah. On an audit of the appellant's account, on the 18th June, 1880, before the Auditing Judge, the appellee claimed this legacy by virtue of an assignment from Jeremiah Bonsall, dated 22d April, 1879. It also appeared from the evidence there given that on the 13th May, 1879, Dixey sued an attachment-execution out of the Court of Common Pleas No. 3, of said county, against the appellant, executor, as garnishee of Jeremiah Bonsall, on a judgment against the latter. The attachment had been duly served, and was then pending. Although this attachment was given in evidence, yet it is averred in the appellant's history of the case that the plaintiff therein did not appear at the audit, either in person or by counsel, denying the right of the Orphans' Court to adjudicate upon his rights under the attachment, and claiming that the jurisdiction of the Common Pleas had attached before the account of the executor was filed. The Auditing Judge awarded the legacy to the appellee, and the adjudication was confirmed by the Orphans' Court. No appeal has been taken therefrom. The appellant now interposes that attachment pending against him as a sufficient reason for not paying the money to the appellee. This involves a consideration of the effect to be given to the decree of distribution made by the Orphans' Court. It is a Court of Record. It had jurisdiction over the executor and the fund. (Com. *v.* Judges, 4 Barr, 303; Culbertson's Appeal, 26 P. F. Smith, 145.) Its decree is conclusive unless appealed from within the time specified by Act of Assembly. It had an undoubted right to distribute the fund in the hands of the executor. It is objected that under the proceedings on the attachment the Common Pleas ousted the Orphans' Court from its jurisdiction over this fund; and by Dixey's declining to appear at the audit he is not affected by its decree. Both these positions are unsound. The proceedings in the Common Pleas did not divest the jurisdiction of the Orphans' Court to make distribution. Any right to the fund asserted or decided in the Common Pleas must still be presented and passed upon by the Orphans' Court. It is not only over the person of the claimants that the Orphans' Court has jurisdiction, but also over the fund. It alone can order its distribution. This necessarily gives it power to hear and determine all questions arising in the distribution. To decide not only between conflicting claims, but if there be none such, then who are entitled to the fund. The omission of any one there to present his claim does not impair the force and effect of the decree giving the fund to another. The presumption is, that due notice of the audit was given. It is not denied that Dixey had notice. It is substantially admitted that he had. If he had not, his remedy would be by application to open the decree, and not to resist its execution. We think the alleged apprehensions of the appellant, that the decree of the Orphans' Court will not fully protect him, are groundless.

Order affirmed, and appeal dismissed at the costs of the appellant.

Opinion by MERCUR, J.

May, '81, 154. May 24, 1881.

Fosselman v. Elder.

Wills—Codicil—Direction on envelope allowed to explain object of testamentary disposition inclosed.

A testatrix, having made a will in due form, died suddenly in January, 1880. After her death, there was found among her papers a sealed envelope containing a promissory note for $2000, and also the following paper in the testatrix's handwriting: "Lewistown Oct. 2, 1879. My wish is for you to draw this 2000 dollars for your own use should I die sudden. ELIZABETH FOSSELMAN." The envelope was indorsed in the testatrix's handwriting: "Dear Bella, this is for you to open." It was in evidence that one Isabella Fosselman, a niece of testatrix, had lived with testatrix for many years:

Held, that the paper and indorsement on the envelope were together entitled to probate as a codicil to the will, and that Isabella Fosselman was entitled to the note thereby bequeathed to her by testatrix.

Error to the Common Pleas of Mifflin County.

Amicable issue, framed to determine the ownership of a certain promissory note, given by T. F. McCoy, President of the Board of Trustees of the Presbyterian Church of Lewistown to Elizabeth Fosselman, for the sum of $2000, wherein Isabella Fosselman was plaintiff and G. W. Elder, executor of Elizabeth Fosselman deceased, was defendant. The following

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is extracted from the opinion of the Supreme Court.

"The facts upon which the question of law in this case arose were either admitted or established by the verdict.

"In the second item of her will, dated July 18, 1878, the defendant's testatrix (Elizabeth Fosselman) made the following provision for the plaintiff, Isabella Fosselman, viz., 'I do will, devise, and bequeath to Isabella Fosselman (who has lived with me many years), the house and lot wherein I now live, together with all the furniture and personal property that may be therein at the time of my decease; by furniture and personal property I mean everything I may have at my decease, except notes and bonds, and evidences of debt, and also one thousand dollars in cash, to be paid to her as soon as practicable after my decease, provided, nevertheless, the legacies herein bequeathed shall be forfeited if she claims any compensation, for services rendered me, from my estate.' The testatrix having died suddenly in January, 1880, the will was duly probated a few days thereafter and letters testamentary issued to defendant (G. W. Elder) the executor therein named. While he and the appraisers were engaged in making the inventory, a sealed envelope was found among the valuable papers of the deceased, on which the following words addressed to the plaintiff, were indorsed, viz., 'Dear Bella, this is for you to open.' The envelope was immediately handed to her, and being opened in the presence of the executor and appraisers, was found to contain a paper of which the following is a copy, viz., 'Lewistown Oct. 2d 1879. My wish is for you to draw this 2000 dollars for your own use should I die sudden. ELIZABETH FOSSELMAN.'

"It also contained a note for $2000, made by the trustees of the Presbyterian Church of Lewistown, dated October 2d, 1879, and payable to the order of testatrix one year after date with interest at the rate of five per cent.

"After a memorandum of these papers was made by the appraisers, the executor took possession of them; and the right of the plaintiff to collect the note or receive the proceeds thereof having been denied by the residuary legatee, an amicable issue was framed between her and the executor to test her right thereto. On the trial there was no dispute as to any of the material facts. It was conclusively proved by the witnesses that the indorsement on the envelope, and the paper of which the foregoing is a copy were both in the handwriting of Mrs. Fosselman, and there was not the slightest evidence to cast any suspicion on the integrity of the transaction. The learned Judge submitted the case to the jury with instructions to render a verdict in favor of the plaintiff unless they found that the said indorsement and paper were not genuine, or had been fraudulently altered; subject to the opinion of the Court on the question, whether the paper of October 2d, 1879, in connection with the accompanying note of same date, and the indorsement on the envelope is a testamentary disposition of the note or the proceeds thereof."

The jury found a verdict for the plaintiff accordingly, subject to the question of law reserved.

The Court subsequently, in an opinion by JUNKIN, P. J., entered judgment on the reserved question in favor of the defendant, holding that although the writing inclosed in the envelope was a testamentary paper, yet it was incapable of execution and void for uncertainty because the testatrix had not sufficiently designated the object of her bounty; and that parol evidence was not admissible to explain who was intended by the pronoun "you" contained in the said testamentary writing, and holding further that the indorsement on the envelope was no part of the will and could not be admitted to probate in connection with the inclosed writing.

The plaintiff took this writ, assigning for error the entry of judgment for defendant.

A. Reed, for the plaintiff in error.

The testamentary disposition of the note in question, taken in connection with the direction on the envelope in which it was sealed, constitutes a complete instrument. There can be no doubt as to whom the testatrix intended as the object of her bequest. We contend that extrinsic evidence was admissible to explain who "you" was intended for in this case. The true rule is that where the testator has fixed on any certain person as the object of his bounty, but from the generality or relative character of the words used, it is uncertain who the person is, extrinsic evidence will be admitted to identify the person, and then the will acts *in proprio vigore* and not from the extrinsic testimony.

2 Williams on Executors, 1238.
Shore *v.* Wilson, 9 Clark and Fin. 486.
Griscon *v.* Evens, 11 Vroom, 402.

Indorsements on letters have been admitted to probate in connection with the letters.

In re the goods of Jane Wedge, 2 Notes Cas. 84.
In re the goods of Jane Taylor, 4 Notes Cas. 290.

In both these cases the relative pronoun "you" was used in the bequest contained in the letter, and the person was identified by the address on the back. It is argued that these cases are not in point because our statute provides that the signature shall be at the end of the will, and that it is to be presumed that the address upon the envelope was written after the testatrix wrote the letter. This does not necessarily follow. It is not uncommon for persons to address an envelope before writing the letter. In either case it is all one and the same act.

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Frank R. Schell (with him *A. B. Wanner*) for the defendant in error.

A separate paper can only be proved as part of a will when expressly referred to and identified in the will as being then in existence.

1 Jarman on Wills (Ed. 1881), 38.
Castledon *v.* Turner, 3 Atk. 257.
Chambers *v.* McDaniel, 6 Ired. L. 226, 229.
In re the goods of Hunt, 2 Rob. Eccle. Rep. 622.
Sanford *v.* Raikes, 1 Mer. 646.

In this case the codicil does not refer to the envelope as then in existence. There is no proof that the envelope was written before the codicil was signed. As matter of law there is always a presumption against informal instruments sought to be used to revoke a legally executed will, and in addition, the presumption here is a violent one that the envelope was written last. The abbreviation "Bella" on the envelope identifies no one.

The very object of the Statute of Frauds was to prevent the fraud which might happen in just such cases as this. The envelope might be changed by a stranger without committing forgery, and thus the whole effect of the will would be changed.

June 13, 1881. THE COURT (after stating the facts, *ut supra*). In his opinion on the reserved question, the learned Judge has conclusively shown that the paper referred to is testamentary in its character, intended to take effect upon the death of Mrs. Fosselman, and clearly designates the accompanying note as the subject of the bequest. These conclusions are so fully sustained by both reason and authority, that it is unnecessary to add anything to what has been so well said, in the opinion of the Court below on that subject.

The only remaining question is whether the testatrix has sufficiently designated the plaintiff as the object of her bounty in the paper that is claimed to operate as a codicil to her will. The Court below held that she had not, and accordingly entered judgment in favor of defendant *non obstante veredicto*. In this we think there was error. It is true the testamentary paper of October 2, 1879, does not designate the plaintiff by name, and if we had no written evidence to show who was meant by the pronoun "you," the bequest of the note would be void for uncertainty; but it is a settled fact that the envelope is addressed to the plaintiff, and why should not that indorsement in the handwriting of the testatrix be taken as part of the testamentary disposition? It is well settled that a will may be written on several separate pieces of paper. It is not even essential to its validity that the different parts should be physically united; it is sufficient if they are connected by their internal sense, or by a coherence and adaptation of parts. (Wikoff's Appeal, 3 Harris, 281.) It was held in Ginder *v.* Farnum (10 Barr, 98), that where a will is written on several sheets of paper, fastened together by a string, proof by two witnesses of the signature of the testator at the end thereof is sufficient; and the question whether there has been a subsequent fraudulent addition to or alteration of the instrument is for the jury as in other cases. In the Goods of Wedge (2 Notes of Cases, 14), a portion of a letter was admitted to probate as the will of Jane Wedge, who on the third page of the letter wrote, and in the presence of two witnesses, as required by the English statute, subscribed her name to the following, viz., "When I dey I would like you to burry me and take all I got for your treatment to me and by somethin for your little girl." The subscribing witnesses testified that after the paper was signed and attested, the deceased folded up the letter and in their presence wrote the superscription it bore. In holding that the paper was clearly entitled to probate, the Court said: "The letter is addressed to Mrs. Henry Frost and by 'you' the testatrix could mean no other person to be legatee than the person she addressed. I am of opinion, therefore, that the person is executor according to the tenor, and that probate should pass to him." That case is cited with approval in the Goods of Taylor (4 Notes of Cases, 290) in which Mrs. Taylor made her will in form of a letter addressed on the outside to Sir George Simpson, and after bequeathing her personal effects to her daughter, added the following: "I hereby appoint you my executor to carry this my will into effect."

Administration with the paper annexed, was claimed by the daughter on the ground that no executor was designated in the will; but the address on the letter was admitted to show that by "you" the testatrix meant Sir George Simpson, the person to whom the letter was addressed, and probate was accordingly decreed to him as executor. In both these cases no envelope was used. The letters were in the form generally in use before the introduction of envelopes, but that fact cannot affect the principle. A separate paper inclosed and sealed up in an envelope is just as much a part of the letter as if the name of the person to whom it is addressed was indorsed on the paper itself. There is no room in either case to doubt that the writing inside is addressed to the person whose name is written outside; and so far as security against fraudulent alteration or substitution of one paper for another is concerned, the one is just as safe as the other before the seal is broken. Either of them is more secure than separate papers attached merely by a string, as in Ginder *v.* Farnum, *supra*.

It is also urged as an objection to considering the address upon the envelope as a part of the testa-

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mentary paper, that the former was written after the other was signed, and therefore the letter should not be considered as having been signed at the end thereof, as the statute requires; but the objection is without merit. It assumes what may or may not have been the fact. It is not an uncommon thing for persons to indorse the address before writing the letter; but if it were shown affirmatively that the address on the envelope was written last in order of time, it would be unimportant. The natural order of reading ought to control, that is, the name of the party addressed first, and then what is written to or concerning him. If the signature of the writer is appended to what is written, it fully meets the requirements of the statute. Without pursuing the subject further, we are of opinion that the inscription on the envelope should be read as the preface to and in connection with the paper inclosed therein, and that they together constitute a valid testamentary disposition of the accompanying note, operating as a codicil to the will of the testatrix.

Judgment reversed and judgment is now entered in favor of the plaintiff on the question of law reserved.

Opinion by STERRETT, J.

Jan. '80, 114. March 4, 1881.

Runkle v. The Commonwealth ex rel. Keppelman.

Municipal officers—Cities of the third class—City Controller—Powers of, under Act of 23d May, 1874—His functions are not merely ministerial but are discretionary—The exercise of a discretion not reviewable—Effect of pending writ of error to judgment of lower Court, in cases of title to office.

A., who had obtained, in a quo warranto against B., a judgment that he was the duly elected Clerk of the Select Council of Reading, pending a writ of error to said judgment, presented to the City Controller warrants for his salary to be countersigned; the Controller having, after consideration, refused to countersign the warrants, a peremptory writ of mandamus was issued to compel him to do so:

Held, to be error. The City Controller, under the Act of 23 May, 1874 (P. L. 230), is not merely a ministerial officer, but is invested with discretionary powers. When called upon to countersign a warrant, he must approve it as one having deliberative and discretionary powers, and as the guardian of the city treasury, and his judgment thereon is not reviewable by the Courts.

Where one clothed with discretionary powers refuses to exercise his discretion, or act at all, he may be compelled by mandamus to act; but where he has exercised his powers according to his discretion, mandamus will not lie to compel a revision or modification of his decision.

Per GORDON, J. The discretion here was, moreover, properly exercised, as, by virtue of a writ of error pending to the judgment in the quo warranto, the title to the office was still in doubt.

Error to the Common Pleas of Berks County.

Petition for a writ of mandamus by the Commonwealth *ex rel.* J. H. Keppelman against W. A. Runkle, Controller of the city of Reading, setting forth that, on April 7, 1879, the petitioner had been duly elected Clerk of the Select Council of the city of Reading, and the oath of office administered to him, and that, as such officer, certain other duties were *ex officio* cast upon him; but that, nevertheless, when the petitioner desired to enter upon his duties, he was obstructed by one E. A. Howell, who intruded himself into the office, and exercised it without authority of law; that thereupon the Court had awarded the petitioner a writ of quo warranto, directed against the said Howell, and, after full hearing thereon, it had been ordered and decreed by the Court that the petitioner should hold the said office, and that, in pursuance of said decree, E. A. Howell had been ousted, and that the petitioner was peacefully holding and exercising the said office. The petition further averred that an appropriation had been duly made to pay, *inter alia*, the petitioner's salaries, and that the petitioner had presented to the Controller warrants for the salaries due him for the months of April and May, 1879, but that the Controller refused and still refuses to countersign the said warrants, wherefore, etc. A writ of alternative mandamus having issued, respondent filed a return, setting up that a writ of error had been sued out and was still pending to the judgment in the quo warranto of Keppelman *v.* Howell, and that respondent was advised that so long as the title to the said office was in dispute, the city of Reading was not indebted to the relator. The return also set up that respondent was an officer duly elected by the people, and was, by the Act of Assembly of May 23, 1874 (P. L. 230), creating his office, invested with discretionary and judicial powers, which discretion he had exercised in regard to the relator's claim by refusing to countersign his warrants. The Commonwealth demurred to the return, and, after argument, the Court (SASSAMAN, J.) entered judgment for the Commonwealth, and issued a writ of peremptory mandamus; whereupon respondent took this writ of error, assigning for error the said action of the Court.

C. H. Ruhl, City Solicitor, for plaintiff in error.

The Controller is an officer invested with judicial discretion, which he is bound to exercise in all cases where the city is concerned. The provisions of the Act of 23 May, 1874 (P. L.

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230), clearly invest him with discretionary powers; therefore mandamus is not the proper remedy, as it only lies where the duty is purely ministerial.

United States *v.* Guthrie, 17 How. 304.

If the petitioner had a specific legal right to his salary, he was bound to sue for it, and mandamus was not the proper remedy.

People *v.* The Mayor, 25 Wend. 680.
People *v.* Thompson, 25 Barbour, 73.
Comm. *v.* Commissioners, 16 S. & R. 317.
People *v.* Wood, 35 Barbour, 653.
People *v.* Booth, 49 Barbour, 31.

If the Court were to reverse the decision in the quo warranto case, the relator would clearly not be entitled to his salary; and the city might be called upon to pay the salary twice.

R. L. Jones, for defendant in error.

The writ of error in the quo warranto case was not a supersedeas, and therefore the judgment in that case establishes the relator's right to his salary. Mandamus was our proper remedy.

McCullough *v.* The Mayor, 23 Wend. 458.
People *v.* The Mayor, 25 Wend. 680.

March 14, 1881. THE COURT. The Court below seems to have regarded the Controller of the city of Reading as a merely ministerial officer, otherwise it would not have sustained this writ of mandamus. There is no doubt but that the orders drawn by the relator in his own favor on the City Treasurer were properly drawn and countersigned, so far as mere form went; but it by no means follows that he was thereby entitled to the money. Before he was so entitled, the Controller must pass upon and approve them, and this, not as a mere ministerial officer, but as one having deliberative and discretionary powers, as the guardian and protector of the city treasury. The Act of 23d of May, 1874, clothes him with judicial powers; he must not only countersign warrants drawn on the city treasury, but he is also required to pass upon their rectitude, and for this purpose he may not only make personal inquiry, but may require the production of evidence. In other words, he must be fully satisfied: 1st. That the warrant is proper and right; that the city has received consideration therefor; and 2d. That a proper appropriation has been made to meet it. Moreover he has authority "to administer oaths or affirmations, in verification for the demands made for his signature."

Upon him also is imposed "all the duties now enjoined on county auditors by the laws of this State, and he shall scrutinize, audit, and settle all accounts whatever in which the city is concerned."

But the powers of county auditors are as full and complete, within their jurisdiction, as are the powers of Courts. They may issue subpœnas for parties and witnesses; they may compel the production of books and papers, administer oaths, compel the attendance of witnesses, and punish contempts by attachment. With all this judicial and deliberative power, the Controller of the city of Reading is clothed, and of necessity he must be left free to exercise his own judgment. But how can he exercise these important functions if he is to be controlled in his judgment by the Court of Common Pleas, or by any other Court?

In the present case, Controller Runkle, for reasons satisfactory to himself, refused to approve the warrants drawn in favor of Keppelman; this he had a right to do; this it was his duty to do, if he believed the interests of the city would be protected by the refusal of such approval, and we know of no power in the Common Pleas to substitute its judgment for that of this officer. Had the Controller refused to act in the matter at all, the Court by its mandamus might have compelled him to act, but this was all it could do, but after he had acted, and had refused to sanction the warrants, it was a mere piece of usurpation on the part of the Court to attempt to compel him to revise his decision, and adopt its judgment in preference to his own.

The rule governing cases of this kind may be stated as follows: Where a person or body is clothed with judicial, deliberative, or discretionary powers, and he or it has exercised such powers according to his or its discretion, mandamus will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, though, in fact, the decision may have been wrong. (Griffith *v.* Cochran, 5 Bin. 87; Commonwealth *v.* Perkins, 7 Barr, 42; Commonwealth *v.* Mitchell, 1 Nor. 343.)

But the Court was wrong, not only in treating the Controller as a mere ministerial officer, but also in treating his act in rejecting the warrants as unsound and improper.

The warrants were drawn for the pay of Keppelman as Clerk of the Select Council; but whether he was so entitled as such Clerk, was as yet in abeyance and undetermined.

Though his title to that office had been adjudged valid by the Court below, yet, as the case was still pending in the Supreme Court, it was altogether proper for the Controller to refuse the claim of Keppelman until the superior Court had rendered its judgment.

The judgment is reversed.

Opinion by GORDON, J.

[*Cf.* next case.]

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July, '79, 65. March 4, 1881.

Howell v. Commonwealth ex rel. Keppelman.

Municipal law—City of Reading—Ordinances of, relating to Clerk of Select Council and ex officio City Clerk—Bond of City Clerk, prescribed by ordinances, when must be filed—Filing of it a condition precedent to entering upon office.

The ordinances of the city of Reading provide that the Clerk of the Select Council, who is *ex officio* City Clerk, "shall give bond to the city in the sum of $10,000, with two sufficient sureties, to be approved by Councils, conditioned for the faithful performance of his duties; and before he enters upon his office, shall also take and subscribe an oath or affirmation" to act with fidelity. A. was, in April, 1879, duly elected to the office of Clerk, and took the oath prescribed. He also presented to the Councils a bond with two sureties, which was disapproved by them. In a contest for the office between A. and his predecessor in the office, who claimed to hold over until his successor was duly installed:

Held (reversing the judgment of the Court below), that the filing of a duly approved bond was a condition precedent to entering upon the office, and that A.'s predecessor was entitled to the office.

Per MERCUR, J. Public policy requires that no security required of a public officer should be waived.

Error to the Common Pleas of Berks County.

Quo warranto, by the Commonwealth *ex rel.* J. H. Keppelman against E. A. Howell, commanding him to show by what warrant he held and exercised the office of Clerk of Select Council and *ex officio* Clerk of the city of Reading.

Plaintiff, upon filing his suggestion, obtained a rule on defendant to show cause why a writ of quo warranto should not issue, and commanding defendant to show by what authority he held said office. An answer was filed, and afterwards the rule was made absolute, and the writ issued. Thereupon respondent filed a plea, to which the relator demurred. The following are the facts of the case as contained in the opinion of the Supreme Court: "The relator sought by this writ of quo warranto to oust the plaintiff in error (Howell) from the exercise of the office of Clerk of the Select Council of the city of Reading, and *virtute officii* City Clerk, in and for said city, and to put him, the relator, therein. The question presented by the plea and demurrer is, whether the relator was duly qualified in law to assume the duties of the office.

"Sect. 2, of the ordinance of said city, declares 'the Clerk of the Select Council shall give bond to the city in the sum of $10,000, with two sufficient sureties, to be approved by Councils, conditioned for the faithful performance of his duties, and before he enters upon his office shall also take and subscribe an oath or affirmation before the President of the Select Council to support the Constitution of the United States and of this Commonwealth, and honestly to keep an account of all public moneys and property entrusted to his care, and to discharge the duties of his said office with fidelity.' The Clerk is elected by the joint action of the City Councils. The ordinance of 14th February, 1876, provided that the Clerk should hold his office for the period of one year and until his successor shall have been duly elected and qualified. The plaintiff in error had been duly elected and qualified for the previous year which had expired. The relator had been duly elected, taken the oath of office, and presented a bond which was rejected by the Select Council. After its rejection the relator did not present nor offer to present any other or sufficient bond in lieu thereof. He nevertheless claimed a legal right to assume the duties and enjoy the emoluments of the office."

The Court (SASSAMAN, J.) entered judgment of ouster against the respondent, and installing the relator in office, saying, *inter alia*, as follows: "Now as to the bond, is this a condition precedent? The ordinance says, 'the Clerk of Select Council shall give bond to the city,' in a sum certain, 'with two sufficient sureties to be approved by Councils.' It does not say that the bond is to be approved, but 'two sufficient sureties to be approved' by them. The duty of the parties is plain. The Clerk must 'give bond with two sufficient sureties.' The Councils' office is, like the office of the Court in similar matters, if the sureties are sufficient in their estimation to approve them, if not, then to return the bond with their disapproval. It is then the duty of the Clerk to furnish acceptable sureties, and if he does not, the second section of ordinance of 14th February, 1876, provides the remedy by a two-thirds vote to remove him 'for incompetency, official misconduct, or neglect of duty.' The ordinances of 24th December, 1875, and 21st February, 1876, make the oath of office an antecedent condition to entering upon the duties of office, and the ordinance providing for an official bond of the Clerk, makes the giving of a bond to the city only a duty to be performed, and the sureties to be approved by the Council as to sufficiency. This seems to us to comprehend the entire duty of the Clerk of Select Council as to his bond, and for the non-performance of it he can be ousted from office at any time, as for the non-performance of any other duty, whether the same arise from incompetency or actual malfeasance or misfeasance. We are of the opinion, however, that it is the duty of Councils, upon disapproval of the sureties, with all possible dispatch to hand back to the Clerk his bond, so that, if he do not promptly perfect it before any mischief may be done, they may, in a legal

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manner, remove him from office, for cause to be shown to the satisfaction of the members of Councils, who are in such matters the legal representatives of the city.

The respondent thereupon took this writ, assigning for error the judgment of the Court.

D. H. Wingerd and *C. A. Farr*, for plaintiff in error.

The relator mistook his remedy; mandamus was his proper procedure. He could not become Clerk until the condition precedent of filing a bond approved by Councils was performed.

State *v.* Lewis, 10 Ohio St. 128.
Com. *v.* Cluley, 6 Sm. 270.
Com. *v.* Slifer, 1 Casey, 23.

The words of the ordinance clearly show that this was a condition precedent; and the result of the decision below is that the functions of an important office are now being performed by a person who has given no security to the city.

R. L. Jones, for defendant in error.

The ordinance was not intended to keep a duly elected officer from assuming the duties of his office, but was simply for the purpose that Councils might see that the city is amply protected. The question of when the bond is to be filed is unimportant, as it is only to be filed to protect the city, and Councils have control over the Clerk by their right to expel him by a two-thirds vote. The uniform practice has been not to require the Clerk to file a bond before entering on his duties.

May 2, 1881. THE COURT (after stating the facts, *ut supra*). It is contended on his (the relator's) behalf that the ordinance does not require the bond to be given and approved before he enters on his office. The manifest object of requiring the bond is more fully to protect the public, and to obtain the additional protection given by the sureties against any improper conduct of the Clerk. If the bond shall not be given before he enters on the duties of his office, when shall it be given? It is conceded that it shall be at some time. Shall it be at the middle of his term, or on the last day thereof. When given, shall it relate back to the beginning of his term, and cover past transactions, or shall its protective power be restricted to subsequent acts? Sound reason requires the security to extend over the whole term, and to commence with the first act of the officer. Public policy forbids that any security required of a municipal officer should be waived. It should not be postponed until irreparable mischief may have been done.

Looking at the language of the ordinance, he shall "also take and subscribe an oath." The definitions of "also," given by Worcester, are "in the same manner," "likewise," "too," "in addition." The command is not merely that he take the oath alone, but that he shall take it in addition to doing some other act. That other act is to give the bond. If this word "also" did not refer to the bond as well as to the oath it would not only be useless, but senseless. Every reasonable presumption connects the two together; then he shall give the bond and "likewise" take the oath. It is unquestioned that he must take the oath before he enters on the office. If it must be "in the same manner" of time that the bond must be given, then both acts must, in like manner, be performed before he enters on the office. Thus we think a reasonable construction of the language shows it to be in harmony with the true intent and spirit of the ordinance. As, then, the relator had not duly qualified himself to fill the office, it follows he had no right to invoke the aid of this writ to put himself therein. It is no answer to say he had entered a bond with two sureties. It was not approved by the Councils, to whom the sole power of approval was given. They are presumed to have acted justly and prudently in rejecting it. If their conduct was illegal, the remedy of the relator was against them. The motives influencing their action cannot be inquired into in this case, to which they are not a party. The learned Judge, therefore, erred in entering judgment in favor of the relator, and the assignments are sustained.

Judgment reversed, and judgment in favor of the plaintiff in error on the demurrer; and it is ordered that the said Edward A. Howell be restored to his office as Clerk of Select Council of the city of Reading, unless his term has expired by its original limitation. It is further ordered that the relator, John H. Keppelman, pay the costs in this Court and in the Court below.

Opinion by MERCUR, J.

[See preceding case.]

Oct. & Nov. '79, 136. Nov. 5, 1879.

Stadtfeld v. Huntsman & Co.

Contract—Whether bailment or sale—Sale and delivery of furniture on instalments, vendor reserving right of property—Rights of bona fide purchaser from vendee.

A delivery of personal property on credit, at stipulated prices, to be paid for by instalments, under a written agreement that the goods shall remain the property of the vendor until paid for, is a sale, not a bailment; and a *bona fide* purchaser from the vendee, without notice of the agreement, takes a good title as against the vendor.

Enlow *v.* Klein (29 P. F. S. 488), distinguished.

Error to the Common Pleas No. 1, of Allegheny County.

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Replevin, by D. W. Huntsman and W. R. Hamilton, trading as D. W. Huntsman & Co., against Moritz Stadtfeld, for certain household furniture. On the trial, before STOWE, P. J., the following facts were shown: In October, 1877, one O. B. Carpenter went to the furniture store of Huntsman & Co. to purchase furniture. He selected such articles as he desired, which were charged to him on the books of Huntsman & Co., and under the entry of said charge was entered the following agreement:—

"The above goods are received by the undersigned Otis B. Carpenter, upon the following conditions, to wit: I hereby agree to pay not less than five dollars for each succeeding week until the above amount is paid; the goods above enumerated to be and remain the property of D. W. Huntsman & Co, subject to removal by them or their order, upon my failure to make any or all of the above payments.

O. B. CARPENTER.

"Witness: W. MCFADDEN."

Huntsman & Co. delivered the goods to Carpenter at his place on Fourth Avenue, Pittsburgh. Carpenter made no payment for the furniture, and within a day or two removed it to his residence on Magee Street. A few days later Carpenter went to Moritz Stadtfeld, who was a furniture dealer in Pittsburgh, stating that he desired to sell him some furniture. Stadtfeld examined the furniture, then at Carpenter's residence, purchased it *bona fide* and for value, without notice of the agreement between Carpenter and Huntsman & Co. Carpenter failed to make any payments under the agreement, and on November 15, 1877, Huntsman & Co. issued a writ of replevin, and replevied the furniture in possession of Stadtfeld, at his place of business.

The Judge directed the jury to find a verdict for the plaintiffs, subject to the opinion of the Court on the question of law reserved, "whether the defendant, a purchaser for value without notice, is affected by the agreement between the plaintiff and Mr. Carpenter." The Court subsequently entered judgment upon the verdict for plaintiff on the question reserved, STOWE, P. J., saying: "We think, under the principle of Enlow *v.* Klein (29 P. F. S. 488) and many other cases, cited in Benjamin on Sales, at page 274 and note, the plaintiff is entitled to recover in this suit." The defendant took this writ, assigning for error the entry of judgment as above.

Duff and *Alcorn*, for plaintiff in error.

The arrangement between Carpenter and Huntsman & Co. was not a bailment, but was a conditional sale. The goods having been delivered to the vendee, a reservation of lien or right of property in the vendor will not protect the property from the vendee's creditors, and a *bona fide* purchaser from the vendee, for value without notice, will take a good title as against the vendor.

Euwer, Assignee in Bkcy., etc., *v.* Van Giesen, 6 WEEKLY NOTES, 363.
Martin *v.* Mathiot, 14 S. & R. 215.
Mitchell *v.* Com., 1 Wright, 187.
Rose *v.* Story, 1 Barr, 190.
Jenkins *v.* Eichelberger, 4 Watts, 121.
Waldron *v.* Haupt, 2 P. F. Smith, 408.
Heppe *v.* Speakman, 7 Phila. 117.
Farrell *v.* Nathans, 1 Phila. 557.
Lehigh Co. *v.* Field, 8 W. & S. 241.
Henkels *v.* Brown, 4 Phila. 299.
Haak *v.* Linderman & Skeer, 14 P. F. Smith, 499.
Becker *v.* Smith, 9 P. F. Smith, 469.
Welsh *v.* Bell, 8 Casey, 12.
Wait *v.* Green, 36 N. Y. 556.
Smith *v.* Lynes, 1 Selden, N. Y. 42.
Mirch *v.* Wright, 46 Ill. 487.

This agreement was nothing more than a chattel mortgage, which is not sanctioned in Pennsylvania.

Kennedy and *Doty*, for defendants in error.

The real question here is, did the agreement constitute a bailment or a sale? The writing was for the Court to interpret, and it was rightly held to be a bailment.

Enlow *v.* Klein, 29 P. F. S. 488.
Rose *v.* Story, 1 Barr, 190.
Christ *v.* Kleber, 29 P. F. S. 290.
Rowe *v.* Sharp, 1 P. F. S. 26.
Chamberlain *v.* Smith, 8 Wright, 431.
Brown *v.* Wilmerding, 5 Deru, 225.
Clark *v.* Jack, 7 Watts, 375.
Sterling *v.* Goodrich, 23 Pitts. L. J. 174.
Myers *v.* Harvey, 2 P. & W. 481.
Becker *v.* Smith, 9 P. F. S. 469.
Henry *v.* Patterson, 7 P. F. S. 346.
Lehigh Co. *v.* Field, 8 W. & S. 232.

January 5, 1880. THE COURT. It has long been an established rule in Pennsylvania that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, is fraudulent and void as to the creditors of the vendee and innocent purchasers. Yet there are exceptions to the rule that possession must accompany the ownership of chattels. It was said by TILGHMAN, C. J., in Martin *v.* Mathiot (14 S. & R. 214), that "There are certain necessary and lawful contracts by which the owner parts with the possession, and yet fraud cannot be presumed. Such are the contracts of lending and hiring, both very useful, and without which society could not well exist. It is of the essence of these that the owner should give up the possession for a time." Various devices have been resorted to at times to evade the above rule, but it is believed, in the long line of cases upon this subject, it has not been substantially departed from. There have been numerous cases of bailment, some of them, perhaps, very close upon the border, where no present contract of sale is made, that have been excepted from the operation of the rule. Any apparent conflict between decided cases is doubtless owing to the difficulty

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of applying the principle referred to to the facts of a particular case.

The transaction between the plaintiffs below and O. B. Carpenter was not a bailment either in form or substance. It was not a lending of the goods, nor was it a contract of hiring. It was a sale of the furniture for a stipulated sum or price, and was so charged upon the plaintiffs' books. The delivery, however, was made upon an agreement signed by Carpenter to pay "not less than five dollars for each succeeding week until the above amount ($113.75, the price of the articles) is paid, the goods above enumerated to be and remain the property of D. W. Huntsman & Co., subject to removal by them or their order, upon any failure to make any or all of the above payments." The purchaser having received the furniture under this agreement, placed it in his house, and failed to make any of the stipulated payments, and finally sold it to the defendant below, who took it without notice of the agreement. The Court below held, under the authority of Enlow *v.* Klein (29 P. F. S. 488), that the defendant took no title, and the plaintiffs were entitled to recover.

A number of authorities were cited as sustaining the ruling of the Court. A brief reference to them may not be out of place. Clark *v.* Jack (7 Watts, 375), was a loan of personal property, subject to be turned into a sale at a future time upon compliance with certain conditions. It was said by the Court: "Properly speaking, there was not a sale, but a contract to sell at a future day; and the delivery in the mean time was a loan subject to be turned into a sale by compliance with certain conditions." Myers *v.* Harvey (2 Penrose & Watts, 478) was a clear case of bailment. The personal property in question had been purchased at a sheriff's sale, and left in the possession of the defendant under a lease from the purchaser. In Lehigh Co. *v.* Field (8 W. & S. 232) there was merely an agreement for a future sale. There was no present sale between the parties; the boatmen were the servants of the company; the boats in question remained in the ostensible ownership of the company; they retained their places on the company's register, and were not distinguishable from their other boats; the men had merely the privilege of buying them at a future time when a bill of sale was to be made therefor. Rose *v.* Story (1 Barr, 190) is an authority so strongly the other way that we need not discuss it. No fault is found with the principle cited therefrom, that "where, by the terms of the contract, the vendee receives a chattel to keep for a certain time and then to become owner of it, if he has paid the stipulated price, otherwise to pay for its use, he receives it as bailee, and the property is not changed until the price is paid." This principle does not apply here, for we have no such facts. Rowe *v.* Sharp (1 P. F. S. 26) was a bailment. Sharp, by writing, let to Goff two billiard tables for nine months, Goff to use them at his place of business, pay a certain sum for their use, and at the end of the term to redeliver them, and if then Goff had complied with the covenants of the agreement, Sharp was to make him a bill of sale of the tables, the consideration for which was to be the sum paid for their use. This was held to be a bailment for the use of the tables, with a provision for sale in case of the payment of the price. In Chamberlain *v.* Smith (8 Wright, 431) there was a contract by which a yoke of oxen was delivered to a hirer "to keep and work in a reasonable farmer-like manner for the term of one year; said cattle to be returned in one year. But the said Mr. Wharter (the hirer) has the privilege, by paying forty dollars and legal interest at the expiration of the year, to keep said cattle." Mr. Justice STRONG, who delivered the opinion of the Court, in speaking of this contract, said: "It was a bailment, not a sale; a bailment with a refusal of the cattle for a stipulated time. The bailee received them to keep and use. He engaged to keep and use them in a reasonable farmer-like manner, and to return them at the end of a year. All this looks to a contract of hire, and nothing else. Then followed the provision that if the bailee would pay a definite sum at the end of the period for which the cattle were let, they should be his, but without any obligation on his part to buy them. No doubt a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, enables creditors of the vendee to seize and sell for the payment of his debts." Henry *v.* Patterson (7 P. F. S. 346) was a case of bailment, as was also Becker *v.* Smith (9 Id. 469). Enlow *v.* Klein (29 P. F. S. 488), relied upon by the Court below, and the last of this series of cases, is an admittedly close case, and comes nearer sustaining the contention of the plaintiffs than any of those commented upon. Yet we regard it as rightly decided and easily distinguishable from the one in hand. An examination of the facts shows that it was a case of hiring; that two dollars per week of the sum to be paid was for the *use* or hire of the horses. This clearly appears in the report of the facts, and is also referred to in the opinion of our lamented brother WOODWARD. This was an important feature of the case in our consultation, and is referred to now that it may not be misunderstood hereafter. Enlow *v.* Klein was justified by the authorities, and we do not propose to disturb it; but we will not take one step beyond it. We stop just where it ends.

The force of the argument for the plaintiff was

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spent in showing that a case of bailment is not within the rule laid down for conditional sales. The principle is conceded, but it has failed in showing the existence of a bailment. On the contrary, it was a sale, and comes directly within the ruling of Clow *v.* Woods (5 S. & R. 275); Babb *v.* Clemson (10 Id. 419); Martin *v.* Mathiot (14 Id. 214); Jenkins *v.* Eichelberger (4 Watts, 121); Rose *v.* Story (1 Barr, 190); Mitchell *v.* The Com'th for use (1 Wright, 187); Waldron *v.* Haupt (2 P. F. S. 408); Haak *v.* Linderman (14 P. F. S. 499), and similar cases.

The judgment is reversed, and judgment *non obstante veredicto* for the defendant upon the reserved point.

Opinion by PAXSON, J.

[See next case.]

Oct. & Nov. 1880. Oct. 21, 1880.

Brunswick v. Hoover.

Vendor and vendee—Conditional sale—Bailment—Lease of chattels—Debtor and creditor.

A sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, will enable the creditors of the vendee to seize and sell the same for the payment of his debts.

A. agreed to furnish B. with certain chattels for which payment was to be made in instalments, said payment to be secured by lease, and the property to remain in the vendor until the settlement was completed. The chattels were delivered to B., and a lease and notes executed in pursuance of the terms of the above agreement. Said chattels having been levied upon and sold by B.'s creditors as the goods of B., and trespass having been brought by A. against such creditors and the sheriff selling the goods:

Held, that the contract amounted to a sale on credit, accompanied by a lease as security for the payment of the price, that such an agreement, while good between the parties, could not keep B.'s creditors at bay, and that, therefore, they were not trespassers.

Error to the Common Pleas of Venango County.

Trespass, by John M. Brunswick and others, trading as The J. M. Brunswick and Balke Company, against C. M. Hoover and J. H. and J. W. Windsor.

On the trial, before TAYLOR, P. J., the following facts appeared: On January 28, 1878, The J. M. Brunswick and Balke Company, plaintiffs, by their agent, H. F. Corbin, entered into the following contract:—

OIL CITY, PA., January 28, 1878.

Andrew E. Russell has this day ordered of The J. M. Brunswick & Balke Co., through H. F. Corbin, agent, subject, however, to the approval of The J. M. Brunswick & Balke Co., four (4) carom billiard tables. Terms ($375) three hundred and seventy-five dollars, cash, balance in twelve payments of $75.00 each, payable in the twelve following consecutive months, with interest at the rate of ——— per annum. Payment to be secured by first lease and fire insurance on said tables. It is understood that the title to the property described in this contract shall remain with The J. M. Brunswick & Balke Co., until the notes and chattel leases are fully executed by the purchaser, and that under no circumstances shall any claim be made as owner until the settlement is so completed.

Tables to be shipped to Oil City, the freight payable by the purchaser. Settlement to be made on delivery of tables at office of Express Company, Oil City, Pa.

THE J. M. BRUNSWICK & BALKE CO., [SEAL.]
per H. F. CORBIN, Agent. [SEAL.]

The tables were accordingly duly forwarded to Oil City, where they arrived on February 16, 1878, Russell paying the freight and removing the tables to his billiard-room. On February 19, 1878, an agreement was entered into between The J. M. Brunswick and Balke Co. and Russell, whereby it was witnessed that the company had leased the billiard tables to Russell for the term of twelve months for the sum of $967, with interest (in addition to the sum of $375 that day paid for rent), which amount was to be payable in twelve payments of $80.58 each, the first note falling due on March 19, 1878, and the remaining eleven notes on the nineteenth day of each consecutive month thereafter. The company further entered into a covenant in the nature of a covenant for quiet enjoyment. Russell covenanted to pay the rent stipulated, not to assign the lease, to insure, etc. etc., and on breach of any of said last-named covenants it was agreed that the company might enter on the premises, and have and possess the property leased as of their former estate therein, the company further covenanting that on payment of the whole of said rent they would give to Russell a bill of sale of the property leased.

The cash spoken of in the foregoing lease was paid by Russell and the notes drawn. Only two of the notes were paid. On May 28, 1878, J. H. & J. W. Windsor, defendants, obtained judgment against Russell, and issued a fi. fa. thereon, in pursuance of which Hoover, the defendant, as sheriff, levied on the billiard tables in question as the property of Russell, and sold the same to J. H. & J. W. Windsor, whereupon The J. M. Brunswick and Balke Company brought this suit.

The Court instructed the jury, *inter alia*, as follows: "After certain preliminary arrangements were made between them, certain negotiations looking forward to a final sale, on the 28th of January, 1878, a paper is executed which, in our opinion, states the contract between these parties, when it was approved, submitted to the plaintiffs in the suit, and approved by them. That it was done is evidenced by the fact that under the contract the possession of the property

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was changed. The billiard tables and fixtures were sent, in pursuance of this contract, to Oil City. This contract, in our opinion, is the contract between the parties. Although it provides upon its face for certain matters to be performed thereafter, to wit: The execution of a lease which the plaintiffs here claim was the final contract between the parties. We cannot agree with them in that; we think that this was the contract between the parties, and that the lease was executed in pursuance of this contract therefor, as well as the delivery of the possession of the property. That being so, gentlemen, we instruct you that,—under the papers in this case, as the parties have chosen to make this a question of law for the Court,—we instruct you that, under the papers in this case, this was a conditional sale, and that the title to the property passed at the time of its delivery in Oil City, and the consummation of the contract by the delivery of the property and the execution of the lease therefor; the title to the property passed, so far as creditors were concerned; . . . and the defendants having levied upon it as the property of Russell, and sold it as his property, plaintiff cannot recover in this action. They were not trespassers. Your verdict, gentlemen, will be for the defendants."

Verdict and judgment for defendants, whereupon plaintiffs took this writ, assigning for error, *inter alia*, the portion of the charge above cited.

William McNair, for plaintiffs in error.

The lease embodies the final agreement of the parties, and not the former agreement of Jan. 28. The case is not that of a conditional sale, but of a bailment with a superadded agreement to vest the title in the bailee on payment of a sum certain.

Myers *v.* Harvey, 2 P. & W. 479.
Rowe *v.* Sharp, 1 Smith, 30.
Clark *v.* Jack, 7 Watts, 375.
Christ *v.* Kleber, 29 Smith, 290.
Henry *v.* Patterson, 7 Smith, 351.
Enlow *v.* Klein, 29 Smith, 488.
Becker *v.* Smith, 9 Smith, 470.

The cases of Martin *v.* Mathiot (14 S. & R. 214), and Rose *v.* Story (1 Barr, 190), are readily distinguishable.

Dodd and *Lee*, for defendants in error.

The case is one of a conditional sale. There is no stipulation as to the return of the property which will make the transaction a bailment.

Rose *v.* Story, 1 Barr, 190.
Euwer *v.* Van Giesen, 6 WEEKLY NOTES, 363.
Krause *v.* Commonwealth, 9 Id. 61.

November 8, 1880. THE COURT. In the recent case of Stadtfeld *v.* Huntsman [preceding case], we endeavored to point out, with some care, the distinction between a conditional sale and a bailment, and the line of cases commencing with Clow *v.* Woods (5 S. & R. 275), and ending with Enlow *v.* Klein (29 P. F. S. 488), was considered and commented upon. We need not repeat what was there said.

The case in hand comes precisely within the ruling of Stadtfeld *v.* Huntsman. The transaction was a conditional sale. The attempt to disguise it under the cloak of a bailment was too clumsy even to have the merit of being clever. The contract of Jan. 28, 1878, was a sale of the billiard tables upon a credit, with a stipulation that payment should be secured by a lease of the tables, and an insurance thereon. When the tables were delivered, the subsequent agreement of 22d of February, 1878, was executed. This paper is in form a lease, and it was not denied that it was executed in pursuance of and in strict compliance with the contract of sale of the preceding January. The feeble attempt to prove that the tables were delivered under the lease, and not under the contract, will not avail, for the reason, among others, that the two papers must be regarded as one transaction. Taken together, they amount to a sale of the billiard tables upon credit, accompanied with a lease thereof as a security for the payment of the price. Such a contract, while good between the parties, will not keep creditors at bay. It is worthless as to them. There is no principle of law better settled in Pennsylvania than that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, enables creditors of the vendee to seize and sell the same for the payment of his debts. It would be a needless labor to cite the numerous cases in which this doctrine has been asserted.

It was urged, however, that the case in hand is upon all fours with Rowe *v.* Sharp (1 P. F. S. 27), and that we cannot affirm this judgment without overruling that case. Rowe *v.* Sharp, like Enlow *v.* Klein, was a close case, and stands upon the border. It differs from the present one in two important particulars. While in Rowe *v.* Sharp there was evidence of a sale of the billiard tables by Sharp to Goff a few days prior to the lease, there was no agreement for a lease or security; and again, in Rowe *v.* Sharp there was an express stipulation for a return of the property at the end of the bailment. This important part of a contract of bailment is wholly omitted in the lease between the parties to this contention. The lessors may re-enter and take possession of the property upon a breach by the lessee of the covenants contained in the lease. But if the lessee fulfils his covenants, that is to say, if he pays the several instalments as they mature, the lessors cannot reclaim the property, nor is the lessee bound to restore it after the bailment is over.

There is not a single element of a bailment in

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this transaction. It is immaterial what the parties call it, the law pays little heed to the label; it looks beneath and examines the nature and character of the contract between the parties.

Judgment affirmed.

Opinion by PAXSON, J.

[See preceding case.]

Common Pleas—Law.

C. P. No. 2. March, 1881.

Campbell v. City of Philadelphia.

Contract—Proposal or advertisement may be withdrawn before acceptance, but after acceptance the terms of the contract are so far fixed that neither party can vary the essential conditions.

Motion for injunction upon bill and answer.

The bill set out that the Board of Health, a department of the city of Philadelphia, having advertised for proposals or bids for cleaning certain streets, upon the condition named in the advertisement, *inter alia*, that security must be given by the contractor in double the amount of the contract, the plaintiff offered a bid, which was formally accepted by the said Board of Health, and a contract ordered to be put in writing and signed; that the complainant tendered sufficient and satisfactory security in the proper amount, and otherwise stood ready and willing to perform all the requirements of the advertisement and bid, but that the defendant had inserted in the written contract a condition that "fifty per centum of the payments of January, February, and March shall be retained until the end of the year," and threatened unless complainant would sign with that condition, that a new advertisement would be made and the contract awarded to a new bidder. The prayer was for an injunction against such threatened action, and a decree that complainant was entitled to the contract on the conditions of the bid.

The answer admitted the facts as set forth in the bill, but claimed that the rights of the parties were not fixed until the written contract should be signed, and that the proposed condition was within the discretion of the Board of Health.

Archer, for complainant.

Morgan, Assistant City Solicitor, for defendant.

THE COURT. Complainant argues that as Section 5 of the Act of 18th March, 1869, directs that "contracts shall be paid by the City Treasurer *in equal monthly payments*," the provision that "fifty per cent. of the payments of January, February, and March be retained to the end of the year," is in violation of the law, and therefore void. We cannot, however, assent to this view. The third section of the same Act provides that the "contractors shall enter into such security for the faithful performance of the said work, in such sum, and in such manner as shall be approved by the Board." "Such security," clearly must mean such *kind* of security; "such sum," leaves the amount to the absolute discretion of the Board; and the expression "such manner," must refer to the mode of entering it, including the terms as well as the forms of the contract. How far this discretion, given in Section 3, is limited by the direction of Section 5, it is not necessary now to inquire, but we are clearly of opinion that the latter section is not so strictly mandatory as to make void the proposed condition retaining the fifty per cent., if it were properly a part of the contract between the parties.

But we are also of opinion that this condition was not one of the terms of the contract, and cannot now be imposed upon the complainant against his will. The Board invited proposals upon the announced condition that "the successful bidder would be required to give security in double the amount of the contract." Complainant made his bid upon that condition, and the Board accepted his bid and awarded him the contract. It is true that both parties contemplated that the contract should be put into writing in due form, but it was to be a writing in accordance with the agreement already arrived at. By the acceptance of the complainant's bid the substantial *aggregatio mentium* was reached, and the rights of the parties were so far fixed that neither could afterwards vary any of the essential conditions of the proposal. That the provision now sought to be imported into the contract, whereby, after complainant has given the full security stipulated for in the advertisement, one-eighth of his entire compensation is to be locked up till the end of the year, is a substantial variance of the contract, does not need argument. Such a provision is no doubt a good one; the testimony is that it has been found so in the experience of the city departments; and if the contractor had made his bid with notice of it, he could not be heard now to complain, but not having had notice it cannot now be imposed upon him.

The injunction prayed for is awarded.

Opinion by MITCHELL, J.

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C. P. No. 3. June 18, 1881.

Fillman v. Fillman.

Practice—Divorce—Service of subpœna when respondent is in another county.

Rule to set aside service of subpœna in divorce.

The subpœna was served by the sheriff of Montgomery County.

Yocum, for the rule, did not appear.

Edwards, contra.

The subpœna may be served on respondent wherever found.

Act of March 13, 1815, Purd. Dig. 510, pl. 12.

A personal service on respondent when out of the jurisdiction is a mere matter of grace, publication being all that is required.

Harvey *v.* Harvey, 2 WEEKLY NOTES, 225.
Keen *v.* Keen, Ibid. 492.

THE COURT (LUDLOW, P. J.). The practice has been, ever since the time of Judge KING, to get an order from the Court of original jurisdiction before service can be made by the sheriff of another county.

Rule absolute.

C. P. No. 4. June 11, 1881.

Reinhart v. Vaux et al.

Commutation of sentence for good behavior—Act May 21, 1869—Successive sentences.

Rule to take off nonsuit.

This was an action for damages against the Board of Prison Inspectors of the Eastern State Penitentiary.

On the trial the following facts appeared. The plaintiff was sentenced in the District Court of the United States on June 14, 1873, on two bills of indictment for uttering counterfeit bank notes, to the term of eighteen months' imprisonment on each bill, the second term to commence on the expiration of the first term. The Act of May 21, 1869, allows a deduction for good conduct of one month on each of the first two years of a sentence, two months on each succeeding year to the fifth year, etc. It also appeared that on February 7, 1876, the plaintiff, claiming that under the law he should be discharged on the 14th of that month, obtained from CADWALADER, J., a writ of habeas corpus. After several hearings he was finally remanded to the custody of the warden by the Judge, and the case was submitted to the Attorney-General of the United States, who directed that the prisoner should be retained in custody until the 14th day of April, according to the commutation adopted by the Board of Inspectors. He was discharged on the last mentioned date.

The Court entered a nonsuit for plaintiff on the following grounds: (1) that the two sentences could not be aggregated or treated as one, but that they were, in law and in fact, separate and distinct, and that the commutation was to be calculated on each one separately and successively; (2) that the inspectors had large discretionary power in the matter of discharge for good behavior, the discharge in such cases not being a matter of strict right, but rather of favor.

George K. Cross, for the rule.

The two sentences should be treated as one term, and plaintiff should have been allowed commutation on a term of three years which would be four months, instead of two months which was allowed, that is that the two sentences should be aggregated and treated as one. There can be no discretionary power with the inspectors where the performance of a duty is declared by law.

Com'th *ex rel. v.* Wardens and Inspectors, S. C. Jan. T. 1871, No. 215.

Furman Sheppard, contra.

THE COURT. Rule refused.

C. P. No. 4. June 13, 1881.

Millard v. Greeves's Administrator.

Practice—Parties—Scire facias sur judgment must conform to the original judgment—Death of one of several joint judgment debtors.

Sur motion for judgment for defendants *non obstante veredicto* on point reserved.

Judgment was entered on a transcript of record from the Court of Common Pleas of Chester County against John Greeves and Alex. Greeves. By a writing filed October 2, 1880, the death of Alex. Greeves was suggested, and, *eo die*, sci. fa. quare executionem non issued against Sylvester Gavitt, administrator of Alex. Greeves, deceased.

At the trial the plaintiff offered in evidence the transcript of record of the Common Pleas of Chester County, showing a joint judgment note made by John and Alex. Greeves to Millard. It was admitted under objection, and as no other evidence was offered the jury were directed to find a verdict for plaintiff subject to the point of law reserved, whether, under the above facts the plaintiff was entitled to recover.

Sylvester Gavitt, Jr., for the motion, cited—
McCabe *v.* United States, 4 Watts, 325.
Stoner *v.* Stroman, 9 W. & S. 85.
Grenell *v.* Sharp, 4 Wh. 344.
Richter *v.* Cummings, 10 Sm. 441.

(No counsel appeared contra.)

C. A. V.

June 25, 1881. THE COURT. The question upon which this case depends has been several

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times expressly ruled in this State. Where there is a joint judgment against several defendants, and one of them dies, a scire facias will not lie against the personal representatives of the deceased defendant alone without joining the surviving defendant also (Stoner *v.* Stroman, 9 W. & S. 85; Commonwealth *v.* Miller's Administrators, 8 S. & R. 452; Commonwealth *v.* Mateer, 16 S. & R. 416). At common law, where one of several joint defendants dies, the plaintiff could have execution against the goods of the survivor only, but by the statute Westminster 2d, he might have a scire facias against the survivor and the heirs and terre tenants of him who is dead, the land remaining bound, although the personal estate was not. According to our practice, as lands are assets for the payment of debts, and subject to sale on a judgment against the personal representatives, the executor or administrator is substituted for the heir, and in Brown *v.* Webb (1 Watts, 411), it was held to be error to omit the executors and to sue the scire facias against the heir alone. By the Act of 11th of April, 1848 (Brightly's Purdon, 827), when judgment is obtained against two or more joint obligors, promissors, or contractors, the death of one does not discharge his estate, whether real or personal, but both the real and personal estate remain liable, as if the judgment had been several. Gavitt, the administrator of Alexander Greeves, was therefore properly a defendant in the scire facias, but the plaintiff had no warrant for omitting John Greeves, the surviving defendant in the judgment, and bringing his scire facias against the administrator of Alexander alone. His error in doing so is fatal, for such a scire facias cannot be maintained. A scire facias to revive a judgment must issue against all the original defendants. The plaintiff cannot drop one and proceed against the others (Gernell *v.* Sharp, 4 Wh. 344; Richter *v.* Cummings, 10 Smith, 441).

Judgment for the defendant on point reserved.

Opinion by THAYER, P. J.

C. P. No. 4. June 15, 1881.

Pond v. Cruse.

Evidence—Party in interest—Admission of defendant in execution after levy that he was not owner incompetent evidence at trial of interpleader.

Sur rule for a new trial.

Sheriff's interpleader to determine the ownership of two carloads of potatoes levied on as the property of F. J. Roberts & Co., but claimed by Pond. On the trial three witnesses testified that they were present at a conversation held March 13th, the day after the teste of the fi. fa., when Roberts, one of the defendants in the execution, said that he had no interest in the goods, that neither he nor his firm owned them, and that his firm and Pond had settled all previous matters. Roberts himself was not produced at the trial as a witness; it was stated by the counsel for defendants that he had been present but left before the issue was tried. The evidence was admitted, and the verdict was for the claimant.

W. H. Lex, showed cause.

The declarant's admissions were against his interest, because if the goods belonged to his firm they would have gone to satisfy the judgment. If the sale produced more than enough to satisfy the judgment the balance would belong to them.

Starkie on Evidence, p. 82.
Towar *v.* Barrington, Bright. 253.

J. M. West, for the rule, cited—
Souder *v.* Schechterly, 10 Norris, 83.
Weidensaul *v.* Reynolds, 13 Wr. 73.

C. A. V.

June 16, 1881. Rule absolute.

Orphans' Court.

May 18, 1881.

Hoopes's Estate.

Auditor's report—The finding of an auditor upon a question involving matters of fact as well as of law, having been confirmed by the Court and being unappealed from, is conclusive in subsequent proceedings—Res adjudicata.

Sur exceptions to adjudication.

Thomas P. Hoopes, the decedent, by his will devised a certain portion of his estate to his nephew, Thomas H. Chandler, who assigned and transferred to his father, William Chandler, all his estate, including therein his interest in the estate of his uncle. In January, 1879, William Chandler died, having by his will appointed the exceptant, Lindley Chandler, his executor.

At the audit of the second account of the executors of Thos. P. Hoopes, the fund, or a portion of the fund accruing under the terms of the will to Thomas H. Chandler, was claimed by Lindley Chandler, as executor of Wm. Chandler, assignee of Thos. H. Chandler, and also by J. Calvin Hall, assignee of a judgment entered on a judgment-note given by Thos. H. Chandler, some six or seven weeks after the assignment as above to Wm. Chandler, to one Dr. Stubbs, upon

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which judgment Hall had issued an attachment-execution, and claimed that he was entitled to recover upon the ground that as against creditors the assignment to Wm. Chandler was fraudulent and void.

The auditor to whom the matter was referred reported in favor of Hall, holding the assignment as against creditors void, and his finding was confirmed by the Court. No appeal was taken from the decree.

At the audit of the third account (the present one) of the executors of Thos. P. Hoopes, a similar question arose between Lindley Chandler and Wm. M. Hayes, assignee of a judgment entered upon another judgment-note given to Dr. Stubbs by Thomas H. Chandler at the same time and for the same purpose as the one before mentioned.

The Auditing Judge (HANNA, P. J.) held that the question of the validity of the assignment to Wm. Chandler as against creditors was *res adjudicata* in this Court, and therefore awarded to Wm. M. Hayes the amount of his judgment, declining to consider the question *de novo*.

To this adjudication Lindley Chandler, executor of Wm. Chandler, assignee of Thos. H. Chandler, filed exceptions.

Francis I. and *James E. Gowen*, for exceptant.

A decree of the Orphans' Court, making a partial distribution of the estate of a decedent, is not conclusive on that Court, as to matters therein litigated, in all subsequent distributions. It is conclusive only as to the funds then distributed.

Kline's App., 5 Nor. 363.
Guenther's App., 4 WEEKLY NOTES, 41.

J. B. Townsend, *G. T. Bispham*, and *W. MacVeagh*, contra.

Where the question has been decided by a competent tribunal, it is conclusive in another litigation between the same parties or privies, although the cause of action be different.

The general rule laid down in the Duchess of Kingston's case is thoroughly well recognized.

2 Sm. Lead. Cases, 786 (Ed. 1873).
Doty *v.* Brown, 4 Comstock, 71.
Alison's Case, L. R. 9 Ch. App. 24.

Kline's Appeal and Guenther's Appeal, cited on the other side, do not, when properly considered, conflict with the general rule. There the point decided was simply as to the status of an individual towards a particular fund.

May 28, 1881. THE COURT. Kline's Appeal (5 Norris, 363), and Guenther's Appeal (4 WEEKLY NOTES, 41), merely decide that a distribution of a fund, based upon an erroneous construction of a will, is, after the time for an appeal has passed, conclusive only so far as that fund is concerned, and that it cannot affect the rights of the parties with regard to another fund passing under the same will.

A very different question is presented in this case. Whether the assignment of his legacy by Thomas H. Chandler was not fraudulent and void as against his indebtedness to Dr. Stubbs, involved matters of fact as well as of law, and was the precise point of controversy before the auditor of the previous account filed by the executor. His finding thereon was confirmed by the Court, and the decree then made, unappealed from, is conclusive.

Exceptions dismissed and adjudication confirmed.

Opinion by PENROSE, J.

April 18, 1881.

Bentley's Estate.

Legacy—Proof of payment—When less than twenty years have elapsed from the time the legacy was demandable the onus is on executor—Evidence of declaration of deceased executor that he had paid the legacy not sufficient in the absence of any receipt or voucher.

Sur exceptions to adjudication.

The facts of this case are reported in Bentley's Estate, 8 WEEKLY NOTES, 455, *q. v.* An account was filed in pursuance of the opinion in that cause, and an examiner appointed in the matter, before whom one Julia Ann North testified as to declarations by the deceased executor, that the legacy had been paid.

The Auditing Judge found that the deceased executor had died within twenty years after the legacy became payable, and there being no voucher or receipt produced, held that, notwithstanding the evidence of Julia Ann North, payment could not be said to have been made. He therefore awarded the legacy to Anna E. Daly, testator's sister.

To this allowance exceptions were filed by William H. Bentley, executor of David Bentley, deceased, who was appointed executor under testator's will.

John G. Johnson, for exceptant.

Richard J. Williams, contra.

May 28, 1881. THE COURT. Had the presumption of payment arisen in this case, we think the testimony of Julia Ann North, as taken by the examiner, could scarcely have been sufficient to overcome it.

As the Auditing Judge found, however, that twenty years had not elapsed from the time when the legacy became payable until the death of the executor, his disallowance of the credit was based not upon the testimony of the witness, but upon the fact that there was no evidence of payment, and the effect of the adjudication would not be changed if all reference to what the witness had said should be stricken out.

Exceptions dismissed and adjudication confirmed.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JULY 21, 1881.* [No. 14.

Supreme Court.

May, '81, 173. May 25, 1881.

Leiter's Appeal.

Attachment as for contempt to enforce civil remedies—Failure of guardian to pay over ward's money under decree of Orphans' Court—Subrogation—Right of surety to be subrogated to ward's remedies.

Where a guardian mingles his ward's funds with his own property, and subsequently becomes insolvent, and unable to comply with a decree for the payment of the balance due the ward, he will be attached as for contempt.

Where a surety on a guardian's bond was compelled to pay the amount due by the guardian, he is entitled to be subrogated to all the ward's rights, including the right to invoke the jurisdiction of the Court to enforce by attachment a decree for the payment of money to his use.

Under what circumstances a defaulting guardian may be discharged from imprisonment, not decided.

Appeal from a decree of the Orphans' Court of Juniata County, awarding an attachment against Henry Leiter, guardian of Catherine Zellers, as for contempt in disobeying a decree commanding him to pay Catherine Zellers, for the use of George Zellers, the sum of $275.

The facts were as follows: In December, 1865, Henry Leiter, guardian of Catherine Zellers, then a minor, applied for and obtained an order of Court to sell his ward's real estate, and George Zellers became his surety on the bond for the faithful application of the proceeds. The sale produced about $375, and after deducting costs, etc., the final account filed by Leiter, and confirmed April 20, 1871, showed a net balance due his ward of $298.40. No part of this balance has ever been paid by Leiter. George Zellers, the surety on the bond, being sued thereon, paid to Catherine Zellers over $200 of the above sum, and made an arrangement for the payment of the balance.

On petition of George Zellers, the Court granted a rule on Leiter, to show cause why Zellers, the surety, should not be subrogated to the rights of the ward against Leiter, and on July 14, 1879, the Court decreed subrogation to the amount of $275, which sum the Court directed Leiter to pay to Zellers within sixty days after notice and demand. Upon default of payment, the Court awarded an attachment against Leiter, to which he filed an answer, protesting that George Zellers, as surety, could not legally be subrogated to the rights of the ward as regards the remedy by attachment. He averred that, at the time he received the ward's money, he owned $7000 worth of real and personal property over and above his debts. That he did not wilfully appropriate the ward's money to his own benefit, but that, by reason of depreciation in value and his failure in business, all his property was sold by the sheriff and applied to the payment of liens. He further averred his utter inability to comply with the order of the Court for the payment of the said sum of $275.

The Court adjudged the answer to be insufficient, and on April 29, 1881, entered a decree "that the said Henry Leiter, guardian of Catherine Zellers, be and he hereby is committed to the jail of the county of Juniata, as for contempt in disobeying the decree of this Court, which commanded him to pay to Catherine Zellers, for the use of George Zellers, the sum of $275, as per decree dated July 14, 1879." Henry Leiter thereupon took this appeal, assigning the decree for error.

Edmund S. Doty (with him *Edmund S. Doty, Jr.*), for the appellant.

The decree commits the defendant to jail for an indefinite period—it may be for life. All the cases of attachment in proceedings as for contempt to enforce civil remedies were either where the defendants could pay but would not, or because of some actual fraud or wilful loss of the fund. The spirit of the Act of 1842 is, that unfortunate debtors, who are unable to pay, and who were not guilty of actual fraud, should not be perpetually imprisoned. The contempt in not obeying the decree is purely technical, which should be considered as purged where there is no wilful disobedience, and imprisonment would be fruitless.

Stevenson's Estate, 7 WEEKLY NOTES, 65.
Hamilton's Estate, 4 Ibid. 204.
Ex parte Hilles, 8 Ibid. 419.

The surety has not the right to be subrogated to the extent of this extraordinary remedy.

Lewis E. Atkinson, contra, presented no paper-book.

[MERCUR, J. We think that a case that is worthy of an argument is always worthy of a paper-book].

It was not denied that the guardian used the money in his business. This was equivalent to fraud.

June 6, 1881. THE COURT. Prior to the Act of 1842 it was a well-recognized power of a court of equity to enforce civil remedies against a trustee by attachment, as for a contempt, when

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he refused to pay money in obedience to its decree. The Act of 1842, abolishing imprisonment for debt, expressly excepts from its provisions proceedings as for contempt to enforce civil remedies. This appellant, as guardian, received the money of his ward, and in clear disregard of his duty applied it to his own use. On final confirmation of his account, it was adjudged to be due from him; it did not thereby become a debt on contract to which the Act of 1842 applies. He was guilty of a breach of trust, and liable to imprisonment for not paying the money when the same was legally demanded. His surety, having been compelled to pay it, is clothed with all the rights, and is given all the remedies possessed by the original debtor. (Wright *v.* Grover & Baker S. M. Co., 1 Norris, 80.) When or under what circumstances and conditions he may be discharged from imprisonment, are questions not now before us.

Decree affirmed, and appeal dismissed at the cost of the appellant.

PER CURIAM. SHARSWOOD, C. J., absent.

Jan. '81, 251. March 23, 1881.

Cross and Gault's Appeal.

Equity—Resulting trust—Money spent on improvement of lands will not create resulting trust—Equitable liens.

A resulting trust in lands must arise, if at all, at the inception of title either through fraud in the acquisition of that title or through the payment of the purchase-money by which it is obtained.

The fact that one acting in a fiduciary capacity applies money in his hands belonging to his cestuis que trustent to the improvement of his real estate will not entitle such cestuis que trustent to set up any resulting trust in their favor of such real estate.

Under these circumstances such cestuis que trustent cannot claim an equitable lien against the real estate. Such a lien is unknown to Pennsylvania jurisprudence.

Appeal of Anna J. Cross and A. W. Gault, guardian, etc., from a decree of the Court of Common Pleas of Chester County, confirming the report of an auditor appointed to distribute the balance appearing by the account of Job Keech, assignee, etc., of John Y. Woodward, among the creditors of said Woodward, and ordering payment in accordance therewith.

From the report of the auditor the following facts appeared:—

John Y. Woodward was the owner of a tract of land made up of several parcels, which he had purchased at different times, and for which he had paid with his own funds. Subsequently to the purchase of the land, he was appointed guardian of two minor children, Anna J. Cross and Mary E. McCreary, and received from time to time money belonging to them, which he spent in improving the land, and in building a common country house and some sheds thereon, intending this, the auditor found, *as an investment for his wards*. No portion of the wards' money was used in the *purchase* of the land. In 1879 Woodward having several judgments against him, made an assignment to Job Keech for the benefit of his creditors. His accounts as guardian being subsequently filed in the Orphans' Court showed that he was indebted to his wards in the sum of $1269.19. The assignee sold Woodward's real estate by order of Court, and filed his account, and an auditor was appointed to distribute the proceeds. These proceeds amounted to less than the sum due to the wards. The wards, Anna J. Cross, now of age, and Mary E. McCreary, still a minor, by her guardian, A. W. Gault, claimed before the auditor that the fund being clearly traced and identified as their money, was theirs by virtue of a resulting trust, or that at the least they had, under the facts of the case, an equitable charge or lien on the real estate before mentioned, and were entitled to receive the balance for distribution by virtue thereof.

The auditor reported unfavorably to claimants on the ground that the trust moneys were not used in the purchase of the land, but only for its improvement, and hence that a resulting trust in favor of claimants did not arise; and because the doctrine of equitable liens did not exist in Pennsylvania. He therefore awarded the fund to the judgment-creditors.

Exceptions were filed, which the Court dismissed, confirming the report and entering a decree accordingly.

Anna J. Cross and A. W. Gault, guardian, thereupon took this appeal, assigning for error the decree of the Court.

R. Jones Monaghan, for appellants.

The general rule of equity is that "wherever property has been wrongfully misapplied or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form, liable to the rights of the original owner or cestui que trust."

2 Story's Eq. §§ 1258–1262–5.
1 Perry on Trusts, § 128.
2 Ibid., §§ 835–6–7–8–9–841–2.
Hill on Trustees, Am. ed. 142.
Bispham's Equity, 127–8.
Rossiter's Appeal, 2 Barr, 371.
Marshall *v.* Hoff, 1 Watts, 440.
Robb's Appeal, 5 Wr. 48.
Sadler's Appeal, 6 Nor. 158.
Farmers and Mechanics' Bank *v.* King, 7 Smith, 205.
Bank *v.* Bache, 21 Ib. 216.
Sheffer *v.* Montgomery, 15 Ib. 335.
Kirkpatrick *v.* McDonald, 1 Jones, 393.

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Pierce *v.* McKeehan, 3 W. & S. 284.
Harrisburg Bank *v.* Tyler, 3 Ib. 378.
Hopper *v.* Conyers, Law Rep. 2 Eq. 549.]

That the trust money may have been mingled with the individual estate of the faithless trustee will not interfere with the resulting trust. The familiar rule in the case of a wrongful confusion of goods will apply, and the cestui que trust may reclaim his trust moneys before the trustee's rights are considered.

1 Perry on Trusts, 128, and other authorities, *supra*.
Sheetz *v.* Marks, 2 Pearson, 302.

In Thompson's Appeal (10 H. 16) the evidence did not trace the money. It is clear that Woodward's children being merely judgment-creditors, have no rights which will interfere with our claim. They are mere volunteers. They take what the assignor had, and are bound where he was bound. They have not placed themselves within the protection of the recording Acts. See authorities collected in—

Sheetz *v.* Marks, 2 L. Cas. in Eq. 89–90.

But have we not at least an equitable charge or lien for our trust moneys invested in this real estate? See—

Wallace *v.* Duffield, 2 S. & R. 528.
2 Perry on Trusts, § 837.
Bispham's Equity, 128.
2 Story's Eq. Jur. § 1265.

The general expression in the per Curiam opinion in Hepburn *v.* Snyder (3 Barr, 78) can hardly be deemed to establish that no equitable lien or charge will be allowed under our liberal system of equity.

Sadler's Ap., *supra*.
Pinch *v.* Anthony, 8 Allen, 539.
Wallace *v.* Duffield, *supra*.

W. B. Waddell and *A. P. Reid*, for appellee.

No portion of this money was used in the purchase of the land; hence no trust arose. The money was used for improvements; then the land was sold, and the proceeds brought into Court for distribution. It cannot now be ascertained what part of the general property the trust fund went into. So long as a fund can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it. . . . But the right of pursuing it fails when the means of ascertainment fails. This is always the case where the subject matter is turned into money, and mixed and compounded in a general mass of property of the same description.

Thompson's Appeal, 10 Harris, 16–17.

The resulting trust must arise, if at all, at the time of the execution of the conveyance.

Rogers *v.* Murray, 3 Paige, 390–398.
Forsythe *v.* Clark, 3 Wendell, 638, 651.
White *v.* Carpenter, 2 Paige, 218, 238.
Sayre *v.* Townsend, 15 Wendell, 647–650.
Freeman *v.* Kelly, 1 Hoffman, 90–96.
Evans's Estate, 2 Ashmead, 470–482.
White and Tudor's L. Cas. in Eq. 337–8–9–40.
Botsford *v.* Burr, 2 Johnson's Ch. 405, 414–15.

Payment or advance of the purchase-money, before or at the time of the purchase, is indispensable. A subsequent payment will not, by relation, attach a trust to the original purchase.

Nixon's Appeal, 13 P. F. S. 279.
Bispham's Equity, secs. 82–86.
Barnet *v.* Dougherty, 8 Casey, 371.
1 Perry on Trusts, sec. 133.
Bickel's Appeal, 5 Norris, 204.
White and Tudor's Ldg. Cas. in Eq. 337.

If the *trust fund* has been used by the trustee to pay his own debts, the cestui que trust cannot be subrogated to the rights of those whose debts have been paid.

2 Perry on Trusts, sec. 842.

Since the Act of April 12th, 1856, no other trusts in lands can be established by parol.

Danzeisen *v.* Miller, 1 Leg. Gaz. Rep. 215.
Seichrist's Appeal, 16 P. F. S. 237.
Maffitt's Adm'r *v.* Rynd, 19 P. F. S. 386.

Equitable liens arise from implied or constructive trusts.

Story's Eq. Juris., sec. 1217.

The statute of April 22, 1856, sect. 4, declares that no such implied trust can be created by parol, and there was no constructive trust, as already shown.

The doctrine of equitable liens has not been engrafted on our jurisprudence.

Hepburn *v.* Snyder, 3 Barr, 72.

May 2, 1881. THE COURT. The money in Court for distribution was raised from the sale of the real estate of John Y. Woodward, which he had previously assigned for the benefit of his creditors. This fund was claimed by judgment creditors to whom it was awarded by the Court below; it was also claimed by the appellants, for whom Woodward had been appointed guardian sometime in the year 1865. Their claim upon the fund arises in this manner: the account of Woodward as guardian was settled in the Orphans' Court on the 28th June, 1880, and he was found to be indebted to the estate of the minors in the sum of $1269.19, which sum he was unable to pay. Furthermore the auditor has found that Woodward used this money of his wards in the improvement of the real estate from which the fund for distribution was raised. The claim now put forward by the appellants, is, that as Woodward used these trust moneys belonging to them, in the improvement of the land which produced the money in controversy, the land itself, and hence the fund raised from it, was, and is impressed with that trust, and that it ought in the first place, to be used in the liquidation of their claim. Clearly if the premises thus stated be correct, the conclusion follows as of course, for it is too well settled for discussion, that the law will follow the trust fund through any number of transmutations if it can be recognized clearly in those transmutations. But the auditor and

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the Court below thought that this money of the appellants was not so impressed upon the Woodward lands; it certainly was not used in the purchase of those lands. Hence there was no resulting trust in favor of the appellants, for a resulting trust in lands must arise, if at all, at the inception of title, either through fraud in the acquisition of that title, or through the payment of the purchase-money by which it is obtained. (Barnet *v.* Dougherty, 8 Cas. 371.) As neither of these things happened in this case, the claim of the appellants cannot be sustained on the ground of such a trust. As, therefore, the money of these minors was not used in the acquisition of the title, it cannot be pretended that they have any direct interest in the lands covered by it. Neither, then, as owners or part owners, legal or equitable, have they a standing to claim the fund in controversy, or any part of it. If then, the appellants had no such interest in the lands as to give them a claim upon the fund in Court, by what right do they seek to be preferred to judgment-creditors?

There is no doubt that their money went to improve the lands of Woodward, and hence, may have given them a value they would not otherwise have had, but as we have seen, that did not give them a right in the title by which those premises were held, and they cannot on this ground successfully claim the fund in controversy.

But it is said, the money of these beneficiaries has been used to improve this property, and that they ought, therefore, to have a lien upon it to the extent of the moneys so expended. But what kind of a lien? Not a statutory one, for the Act of 1832, which would have given them a lien, was not pursued. A lien arising from the equitable circumstances of the case? But such a lien is unknown to Pennsylvania jurisprudence; it has not been as yet engrafted upon our legal system, and it is to be hoped never will be. (Hepburn *v.* Snyder, 3 Barr, 72.) This is, no doubt, a hard case, but were we to establish the doctrine of equitable liens for the purpose of meeting this hard case, it would be like the letting out of water, disaster and confusion would be the result. In vain would the unfortunate judgment-creditor depend upon the dockets and records provided for his protection. Debts that he thought secure would be swept away by the insidious operation of secret equitable liens. With the utmost confidence might he bid in a tract of land to cover his judgment, only to find in the end that he had involved himself, and that perhaps hopelessly for the benefit of some one else. Nor would a mortgagee be in a much better situation, for though he is in a better position than a judgment-creditor, in that he is partially protected by the recording Acts, yet he would always be exposed to the danger of having sprung upon him proof of notice of some hidden lien for which he was wholly unprepared. How easily such notice can be proved since the Act of 1869, we all understand.

We think, therefore, it is better for us to adhere to the old paths, with which we are well acquainted, rather than to try new ones which may lead us to unexpected disaster.

The judgment of the Court below was right, and its opinion is so thoroughly logical and well considered, that we do not profess to have anything of value to add to it except our approval.

Decree affirmed at the costs of the appellants.

Opinion by GORDON, J. SHARSWOOD, C. J., dissents.

May, '81, 80. May 17 and 18, 1881.

Lycoming Fire Insurance Company v. Commonwealth.

Taxation—Corporations—Insurance companies—What are purely mutual insurance companies—Act of March 20, 1877—Capital stock—Accumulated reserve.

The Act of March 20, 1877 (P. L. 10), imposes a tax upon the gross premiums received by all insurance companies, incorporated in Pensylvania, "except companies doing business upon the purely mutual plan, without any capital stock or accumulated reserve." The Lycoming Mutual Fire Insurance Company was originally incorporated as a purely mutual company. By a supplement to its charter, it was authorized, in its discretion, to make insurance for cash premiums, which should not entitle the insured to membership in the company, nor subject them to assessment:

Held, that the Lycoming Insurance Company, by accepting and acting under the supplement, ceased to be a "company doing business upon the purely mutual plan," and was therefore liable to the tax imposed by the above-mentioned Act.

Character and powers of purely mutual insurance companies considered by GORDON, J.

Appeal from the settlement made by the Auditor-General and State Treasurer against the above-named company for taxes on gross premiums from March 20, 1877, to December 31, 1878.

The case was, by agreement, tried without a jury, before HENDERSON, J., who found, *inter alia*, the following material facts: The tax in question is claimed under section 6 of the Act of March 20, 1877 (P. L. 10), which provides, that it shall be the duty of the officers of every insurance company incorporated under any law of the Commonwealth, "*except companies doing business upon the purely mutual plan, without*

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any capital stock or accumulated reserve" . . . to report semi-annually to the Auditor-General, the entire amount of premiums received by such company, during the preceding six months, whether the said premiums were received in money or in the form of notes, credits, or any other substitute for money; and to pay into the State treasury a tax of eight-tenths of one per centum above the gross amount of said premiums. The company claimed that it was within the above quoted exception, and not liable to the tax.

The said company was incorporated by Act of March 20, 1840 (P. L. 180), with all the powers and privileges, and subject to all the restrictions and limitations of the Bradford County Mutual Insurance Company.

This latter company was incorporated by Act of April 13, 1838 (P. L. 363), which provided, *inter alia*, that all who insure in the company thereby become members thereof.

By a supplement to the charter of the Lycoming Mutual Insurance Company, approved May 1, 1861 (P. L. 632), it is provided, *inter alia*—

"That hereafter it shall be lawful for the Lycoming County Mutual Insurance Company to make insurances on property of every class or description already included in their act of incorporation, according to their discretion, for which cash premiums only shall be received, and for any term which may be agreed upon. . . . Insurances thus effected shall not entitle the insured to membership in said company, nor subject them to the payment of assessments."

The company accepted and acted upon this supplement, and the returns show that they had done a large amount of business on the cash plan. From an elaborate investigation and marshalling of figures, as shown by the reports of the insurance commissioner and by the return of the company to the Auditor-General, it was claimed that the company had an "accumulated reserve," such reserve being represented by real estate, bonds and mortgages, cash, etc. It was claimed on the other hand (on the authority of Schimpf *v.* Lehigh Valley Mutual Ins. Co., 5 Norris, 373–376) that the company continued to be a purely mutual insurance company, notwithstanding it did part of its business on the cash premium plan; that it had no "capital stock or accumulated reserve;" that the apparent accumulated reserve was merely nominal, and represented a fictitious result, produced by a manipulation of the reports by treating the liabilities of the company as assets, and by treating assessments made or to be made on the premium notes as amounts actually received by the company, and that instead of having an accumulated reserve, the company was in fact, during the period of time in question, largely indebted over and above the amount of such alleged reserve.

HENDERSON, J., decided (1) that the company was not conducted on the purely mutual plan, and (2) that it had an accumulated fund or reserve; and therefore found in favor of the Commonwealth, for the amount of the tax, with interest, commissions, and penalty. Exceptions to the above finding having been overruled by the Court, judgment was entered in favor of the Commonwealth against the defendant for $8141.28. The defendant took this writ, assigning for error the overruling of the exceptions and the entry of judgment.

Jordan (with whom was *Hall*), for the plaintiff in error.

In availing itself of the power granted by the supplement to its charter, to insure, according to its discretion, for cash premiums as well as on premium notes, the company did not cease to be a purely mutual company and to do its business on the purely mutual plan. At one time this was questioned, but the modern authorities are full and uniform in support of our position.

Schimpf *v.* Lehigh Valley Mut. Ins. Co., 5 Nor. 373–376.
Union Ins. Co. *v.* Hoge, 21 How. 35–62.
Ohio Mut. Ins. Co. *v.* Marietta Woolen Factory, 3 Ohio St. Rep. N. S. 348.
Mygatt *v.* New York Protection Co., 21 N. Y. Rep. 52–64, 65.

Henry W. Palmer, Attorney-General (with him *Lyman B. Gilbert*, Deputy-Attorney-General), for the defendant in error.

It may be that a mutual insurance company may do a mutual business on both the premium note and the cash premium plans, provided the insured, in both classes, are *members of the company*, and this is the effect of the remarks by PAXSON, J., in Schimpf *v.* Lehigh Valley Mut. Ins. Co., relied on by the other side. But the supplement to the charter of this company expressly provides that those insured on the all cash plan, should *not* be entitled to membership in the company, nor be liable to assessment nor to share in the profits. Hence this company does not do business on the purely mutual plan, and is not within the exception in the Act.

June 13, 1881. THE COURT. There is, practically, but one question in this case and that is, does the Lycoming Insurance Company, in the language of the sixth section of the Act of the 20th day of March, 1877, do "business upon the purely mutual plan, without any capital stock or accumulated reserve?" In other words, is its business confined to the insurance of its own members and none others? for it is an essential feature of a mutual company that the person assured should, by force of his insurance, become a member of the company. (Susquehanna Insurance Co. *v.* Perrine, 7 W. & S. 351.) The initial proposition of mutual insurance is that the membership of the association shall insure the property of each other; on no other

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principle can a company of this kind be constituted. It is organizations of this kind that are exempted from the provisions of the Act above recited, but in order to be brought within the exemption they must confine themselves wholly to the mutual plan.

The very moment they step out of that, the very moment they undertake to insure those not members of the company, and begin to use their capital in general insurance, they pass out the statutory exception and become taxable.

Nor do we regard it of moment that the capital thus used is in the shape of premium notes rather than cash or other assets, and though we must construe the Act of 1877 as treating such notes neither as capital stock nor reserved funds, yet such construction must, obviously, be limited to the subject of the proviso, that is, to *purely* mutual insurance companies, and cannot be extended to the business of general insurance.

It is not open to debate, but that a mutual company may receive wholly cash premiums without compromising its character for mutuality, providing always it continues to maintain the essential characteristics of associations of this kind. Premium notes are given for, and used as a fund on which, from time to time, drafts may be made to pay the losses of individual members; these notes are its "accumulated fund," its "capital stock," and there is no possible reason why cash might not be substituted for such notes. All this has been very clearly shown by Mr. Justice PAXSON, in the case of Schimpf *v.* The Insurance Company (5 Nor. 373), hence, much of the argument of, and many of the authorities quoted by, the defendant's counsel go for nothing, as they deal with a question about which there is no controversy.

What we have to do, all we have to do, is to ascertain the character of the Lycoming Fire Insurance Company. Was it a purely mutual company? If not, it was not within the statutory exemption, and was properly subjected to taxation. But the defendant itself has definitely answered this question by the exhibition of a supplement to its charter, under which it has for a long time been acting, approved May 1, 1861, by which general powers of insurance are conferred upon it, and by which it is expressly provided that "insurance thus effected shall not entitle the insured to membership in said company, nor subject them to the payment of assessments." This destroys the purely mutual character of the company. It has now become a general insurer, as much so as any stock company, and it does not make the least difference that the profits thus acquired do not pass to the members of the company in the shape of cash dividends, for they nevertheless do enjoy the profits, if any such are realized, in the way of a decreased draft on their premium notes, thus lightening the cost of their own insurance. For the benefit of the members of the company was this branch of the business established; they alone were to enjoy the gains flowing from it, and they, on the other hand, must bear the drawbacks and losses.

It is needless for us to dwell on the question, raised in the Court below, as to whether this company had an accumulated reserve, for these words, as well as the preceding "without any capital stock" are but further qualifications of the associations it is intended to exempt.

They must be *purely* mutual insurance companies, and further, they must be without capital stock or accumulated reserve. As, however, the plaintiff has failed to bring itself within the primary qualification, its business not being of a purely mutual character, it is useless to make further inquiry as to its reserves or capital stock, or to burthen the case with further discussion.

The judgment is affirmed.

Opinion by GORDON, J.

July, '80, 9. May 10, 1881.

Cohen's Appeal.

Taxes—Seated lands—Acts of April 29, 1844, and May 13, 1879—Sale of lands for unpaid taxes assessed during a prior ownership—Injunction.

Improved land may be sold at treasurer's sale for the payment of taxes assessed and remaining unpaid for more than two years, notwithstanding the fact that the land has since been sold at sheriff's sale to a new owner.

Taxes were assessed in 1878 against L., the owner of two improved lots in the borough of Pittston. In 1880 the lots were sold at sheriff's sale, under a judgment, to C., the taxes remaining unpaid. The lots were subsequently advertised to be sold at treasurer's sale for the said taxes, by virtue of the Acts of April 29, 1844 (P. L. 501), and May 13, 1879 (P. L. 55). Upon a bill in equity, filed by C., to enjoin the sale, and demurrer thereto:

Held, that the Court below properly refused the injunction, and dismissed the bill.

Held, further, that an averment in the bill that "while the lands were in the possession of the former owner there was always sufficient personal property on the premises to pay all the taxes assessed, which might have been seized by the collector if he had used due diligence," was insufficient to justify an injunction.

Appeal from a decree of the Common Pleas of Luzerne County, sustaining a demurrer to a bill in equity, and dismissing the bill.

The bill, filed by Henry Cohen against John T. Griffiths, Treasurer of Luzerne County, set forth the following facts: In 1878 one Richard Lahey, being the owner of two houses and lots in the borough of Pittston, was assessed with

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$20.66 taxes on the one, and with $59.03 on the other, for county, school, poor, and building purposes, which have not been paid. In January, 1880, the said premises were sold at sheriff's sale, under an execution issued upon a judgment entered to September Term, 1877, against Lahey, and purchased by Cohen, the complainant, to whom the sheriff executed and delivered a deed duly recorded. Subsequently to the sheriff's sale, the said taxes were returned by the collector to the commissioners as unpaid, and by them certified to the treasurer (the defendant), who thereupon advertised the premises to be sold for non-payment of said taxes, in pursuance of the statutes authorizing the sale of seated lands for unpaid taxes. The bill averred that "while the said lands were in the possession of Lahey there was always sufficient personal property on the premises to pay all the taxes assessed, which might have been seized by the collector if he had used due diligence." The bill further averred that the proposed sale was not authorized by law, and that if permitted to take place, the title of the complainant would be clouded, and he would suffer irreparable injury; wherefore the complainant prayed that the defendant be restrained by injunction from proceeding to sell, etc.

The defendant demurred to the bill on the grounds, (1) that it appeared by the bill that the taxes were legally assessed and levied against the proper party, and that they had remained unpaid for two years; that the proposed sale was duly authorized by the Acts of April 29, 1844, § 41 (P. L. 501), and May 13, 1879 (P. L. 55). (2) That the averment of the fact that sufficient personal property could have been distrained on the premises to satisfy the taxes was insufficient in law to justify an injunction.

After argument, the Court sustained the demurrer and dismissed the bill, HARDING, P. J., filing an opinion, which, after stating the facts, proceeded as follows:—

Prior to the Acts in question, taxes due for *seated* lands were not a lien on real estate, but only a personal charge against the owner or occupant. In effect, as between the county and the collector, the latter was charged with the taxes. In case of non-payment to the collector, he was authorized to proceed against the taxable by distress of his goods, by imprisonment of his person, and after the expiration of the warrant, by suit in the name of the collector. In no case could the land be resorted to; the purchaser at judicial sale bought it free from the charge of the taxes, and the latter could take no part in the fund. The reasons given by Judge GIBSON for this conclusion, which was not afterwards doubted, were that a lien was not given expressly; that the whole course of legislation was based on the theory that the person and not the land was the debtor; that land, like personal property, was returned for the purpose only of determining "the *quantum* of assessment;" that the selling of lands for the trifling amount of taxes due on them would always be attended by great inconvenience and vexation; and finally, that there being no authority for selling the land for the taxes, there was no way of enforcing the lien claimed, and it would therefore be worthless. "If the Legislature had intended to create a lien, they would have provided some means of enforcing it, and the inference from the want of such a provision is irresistible." (Burd *v.* Ramsay, 9 S. & R. 109.)

In the case of *unseated* lands, the law was and is different. There the land itself, and not the owner, is the debtor. The compulsory collection of the taxes is out of the former, and never against the latter. The lien thereof follows the land into the hands of whomsoever it may go, and a sale in enforcement of it carries to the purchaser "all the estate and interest therein that the real owner or owners had at the time of sale, although the land may not have been taxed or sold in the name of the real owner thereof." (Act of April 3, 1804, sec. 5; Purd. Dig. 1447, pl. 27; Fager *v.* Campbell, 5 W. 287; Robinson *v.* Williams, 6 W. 285; Strauch *v.* Shoemaker, 1 W. & S. 175.) But while we have spoken of taxes assessed upon unseated lands as a lien, the statutes do not make use of that term, nor is it by virtue of there being a lien that the treasurer has authority to sell them. His authority comes from the express mandate of the statute. (Act of March 15, 1815, sec. 1; Purd. Dig. 1444, pl. 14.) Without this statutory authority the so-called liens of taxes on unseated lands would be as worthless as Judge GIBSON declared the asserted lien of taxes on seated lands in Burd *v.* Ramsay. We make these remarks upon the subject of the lien or charge of taxes upon unseated lands for the reason that they may give us some assistance in construing the effect and operation of the Acts of 1844, 1850, 1869, 1879, *infra*.

But to return for the present to the consideration of the remedies for the collection of taxes on *seated* lands. In Henry *v.* Horstick (9 W. 412), it was held "that the goods of the tenant in possession were liable to be distrained on for the taxes assessed thereon before he took possession, or became the owner of it." The grounds upon which this conclusion was reached, were not because the taxes were a charge upon the land, nor because they were a charge against the tenant in possession, but because the statute under which the distraint was made was remedial, and ought to be so construed as to make the remedy by it effectual in all cases. In

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other words, the right of distraint of the tenant's goods might exist as a statutory *remedy*, notwithstanding he was not personally liable, and the former owner or his heirs were, and notwithstanding the taxes were not a lien or a charge upon either his goods or his land. In McGregor *v.* Montgomery (4 Barr, 238) the jury were instructed that if the tax was assessed on the property of which the plaintiff was in possession *at the time of the assessment*, and so continued until the time of the sale, whether solely, or as a partner, the defendant (a collector) was justified in seizing the property in any part of the township. This instruction was approved in the Court above, Judge COULTER saying: "It cannot be pretended that by the use of the word distress, the Legislature intended to give the levy of a collector of taxes all the incidents of a distress for rent. It is more in the nature of an execution." The case of Henry *v.* Horstick was severely criticised, as giving an unwarrantable construction of the Act of April 15, 1834, sec. 46. The opinion of the Court, however, does not mention that Act, and the alleged illegal distraint which was the cause of action, was made previous to its passage. The case is therefore no longer authority, and for the reason given above was so declared in Smeich *v.* York County (18 Sm. 439). It was at least intimated in the last named case that the ruling in Henry *v.* Horstick was justified by the statutes in force when the cause of action arose. But however this may be, it appears from the report of the case of Smeich *v.* York County, that there was a sheriff's sale and a conveyance of the land subsequent to the assessment of the taxes; but the decision was not based on these facts, but upon the ground that the forty-sixth section of the Act of April 15, 1834 (P. L. 518) only made the goods of an occupier liable to distress for taxes *assessed* upon the real estate *during his possession* or occupancy, and remaining unpaid. So in Moore *v.* Marsh (10 Sm. 46) there was a sheriff's sale of the goods, and afterwards, while still on the premises, they were distrained by the collector. He was held liable in trespass, for the reason that the then owner of the goods (the purchaser at the sheriff's sale) was not the occupier of the premises at the time of the distraint. But this was not warrant for the argument that the taxes had a lien on the goods, which was discharged by the sale. On the contrary, it was held that neither the taxes nor the warrant of the collector had any such lien. Again, in many of the counties and cities of the State statutes are in force making taxes a lien on land, but we have no such statute as to this county. The general construction of these statutes has been that the lien of the taxes has priority in distribution, but that it is not divested unless the fund realized by judicial sale is large enough to pay them. (Philadelphia *v.* Cooke, 6 C. 56 (qualifying Gormley's Appeal, 3 C. 49); Smith *v.* Simpson, 10 Sm. 168; Eaton and Cole's Appeal, 4 WEEKLY NOTES, 342; and see Harrisburg *v.* Orth, 6 WEEKLY NOTES, 121; and recent opinion of Judge HAND, in Scranton *v.* E. E. Miller.)

From this review we conclude that taxes assessed against the owners of seated lands do not constitute a lien, technically speaking, in the absence of any statute making them such; that in the case in hand neither the collector nor the municipalities to which the taxes were due could have claimed them out of the fund arising from the sheriff's sale, even if it was large enough (which does not appear), and that therefore the position of the present plaintiff in regard to the liability of his land to be seized and sold for these taxes is the same as that of a purchaser at private sale would be.

The question remains then, Do the Act of 1844 and its supplements authorize a sale of the lands in the hands of the present owner for the taxes assessed against a former owner? The Act is evidently a remedial one, and intended to facilitate the collection of taxes by authorizing, in addition to the right of distress of personal property, a seizure and sale of real estate against which the tax was assessed, where no personal property could be found. To say since this Act was passed, that in the case of seated lands, the person and not the land is the debtor, and in the case of unseated lands, the land and not the owner is debtor, seems like a dispute over terms; for whether the land or the owner, or both, be the debtor for the taxes, the specific land against which the tax is assessed may ultimately be seized and sold for it. In that respect, it would seem that the tax was a charge on the land, although it may not be a divestible lien. It is provided as follows: "All real estate within this Commonwealth on which personal property cannot be found sufficient to pay the taxes assessed thereon, and where the owner or owners thereof refuse or neglect to pay the said taxes, the collectors of the townships in which said lands lie shall return the same to the commissioners of the several counties; *and the said lands shall be sold as unseated lands are now sold in satisfaction of the taxes due by the said owner or owners.*" (Act of April 29, 1844, sec. 4, P. L. 501; Purd. Dig. 1372, pl. 100.) What is the plain meaning of this language, remembering, as we have said, that the statute is remedial, and was intended to have general application? Whatever may be our opinion as to the inconveniences attending its enforcement, we think there is little doubt as to what the Legislature intended. The authority of the treasurer to sell under the provisions of this Act depends upon the facts: (1) That the

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land was seated. (Hathaway *v.* Elsbree, 4 Sm. 498.) (2) That there was not sufficient personal property to be found thereon "to pay the taxes assessed thereon." (3) That a return has been made to the commissioners by the collector. (4) That the owner or owners shall have refused or neglected to pay the taxes for the space of two years.

It will be seen that the collector has not merely the option of returning the lands, but "he shall return the same" is the mandate of the statute. A return that the lands had been aliened by the owner, or sold at sheriff's sale after the assessment, it is plain, would not be compliance with the law, and if such a return should be made it would not relieve him from the responsibility, unless, perhaps, it could be treated as mere surplusage. The collector has no more to do with these matters, than he is bound to take into consideration the liens that have subsequently been acquired. So the treasurer acts ministerially in making sale. He is neither commanded nor authorized to inquire into the title or the liens. The whole proceeding, from the return on, like that in sale of unseated land, is against the land, which was to be sold "as unseated lands are now sold." If the *land* to be sold was only the interest of the taxable at the time of the sale, is it not clear that it would have been so expressed? On the contrary, by the Act of 13 March, 1815 (6 Sm. 299; Purd. Dig. 1444, pl. 14), when the treasurer sold unseated lands, he was directed "to make and execute a deed or deeds in fee simple;" and by the Act under consideration seated lands are to be sold in the same way, and the sales are undoubtedly to be perfected by the same sort of conveyance. Again, by the Act of March 22, 1850, sec. 7 (P. L. 306; Purd. Dig. 1372, pl. 101), the treasurer was directed to "give the same notice of sale as is now required by law for the sale of unseated lands." See Act of 1815 (*supra*), and Act of March 9, 1847 (P. L. 278; Purd. Dig. 1445, pl. 17). If there were any doubt as to the effect of these statutory provisions, it was set at rest by the Act of March 12, 1869, sec. 1 (P. L. 340; Purd. Dig. 1372, pl. 102), which repeals the proviso requiring one year's actual notice of the sale to the owner, and declares that "all lands hereafter sold for non-payment of taxes under the provisions of the said Act of April 29, 1844, shall be *held and redeemed* as if sold as unseated lands," etc.

Thus, by this legislation taken together, seated lands were to be *sold, held, and redeemed* the same as unseated lands. But how were unseated lands sold for taxes held? The Act of April 3, 1804, sec. 1 (4 Sm. 203; Purd. Dig. 1447, pl. 27), provided that such sale vested in the purchaser "all the estate and interest therein that the real owner thereof had at the time of such sale, although the land may not have been taxed or sold in the name of the real owner thereof;" and the Act of April 21, 1856 (P. L. 477, sec. 1; Purd. Dig. 1447, pl. 28), provided that "in *all* public sales of lands hereafter made by the treasurer," etc., "in pursuance of the laws of this Commonwealth, the rule of *caveat emptor* shall apply," etc. The Act of May 13, 1879 (P. L. 55), except in its retroactive operation, does not differ materially from the Act of 1869 (*supra*), and, indeed, is a re-enactment almost *verbatim* of that Act. We have been at a loss in discovering its purpose, unless it was intended by general legislation to bring back under the operation of the Act of 1869 certain counties as to which the latter Act had been repealed. This, however, is a mere surmise.

It may be urged that it would be a great hardship on the present plaintiff to permit his land to be sold for the tax debt of his predecessor in title. It may cause inconveniences, but we fail to see how this construction of the law will necessarily cause hardship. He knew, or had the means of knowing, that taxes were assessed on the land; he had the means of knowing that they were unpaid; and, if this be the proper construction of the law, he knew that the land on which the tax was assessed could be seized and sold therefor. This is not necessarily enforcing a charge against him on account of a debt that he does not owe, but against the land, which the law ultimately, and upon certain conditions of which he had knowledge, makes liable. It was said in Parker's Appeal (8 W. & S. 452), "the assessment of the tax cannot well be regarded as a secret act, which any one interested in knowing whether it exists or not may not inform himself of, if he will only take the trouble of making inquiry at the proper source."

The sixth paragraph of the plaintiff's bill contains the averment that there was sufficient personal property on the premises to have paid the taxes, etc. If this be the fact, no title can pass by the sale. But, as we have said before, the treasurer acts only ministerially, and does not assume to give a good title. He is not bound, nor is he authorized, to go behind the return of the collector. So far as his authority to sell depends upon the fact that not sufficient goods were to be found on the premises, the return is the evidence. Being a public officer, and acting ministerially, it would be a hardship upon him to compel him in a court of equity to prove in each case that the collector's return was true in fact, when the person aggrieved has an equally sure, speedy, and adequate remedy by a bill in equity *quia timet* against the purchaser, or in an action of ejectment. If a treasurer in making sales of land, whether seated or unseated, for taxes,

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could be restrained for matters appearing outside the record, or in parol, upon the ground that a cloud would be placed on a title, there would be very few sales made. And if he can be restrained for such cause in a case like the present, we do not see why he might not for the same cause in a case of sale of unseated lands. For example, in the latter case, if the land be seated, no title can pass, and yet it was never contended that the sale could be stopped for that cause. The cases seem to us to be analogous, and as we have said that the present plaintiff has as sure, speedy, and adequate a remedy against the purchaser,—

The demurrer is sustained, and the bill is dismissed at the cost of the plaintiff.

The plaintiff thereupon took this writ and filed the following assignments of error.

The Court erred: (1) In holding "that in case of seated lands, the person and not land is debtor, and in case of unseated lands the land and not the owner is debtor, seems like a dispute over terms." The distinction has been frequently made by the highest authority, and is material. (2) In holding "that the tax is a charge upon the land, although it may not be a divestible lien." (3) In construing the words "*as unseated lands are now sold*" in the Act 29th April, 1844, to apply to the legal effect instead of merely to the manner of the sale. (4) In sustaining the demurrer and dismissing the bill.

S. J. Strauss (with whom were *E. S. Osborne*, and *E. P.* and *J. V. Darling*) for the appellant.

We submit as propositions to be established by this case:—

(1) The title to seated lands sold for taxes by a county treasurer, under the Acts of 29 April, 1844, § 41 (P. L. 501), and May 13, 1879 (P. L. 55), cannot pass by the sale unless the owner thereof at the time of the assessment remains the owner at the time of such tax sale.

(2) One who purchases the land at sheriff's sale as the property of the delinquent tax-payer can in no form, directly or indirectly, be required to pay taxes which the former owner left unpaid.

(3) That as a sale of the land for these taxes will beyond question becloud the fair title of the sheriff's vendee, equity will interfere by injunction.

Under the Act of April 29, 1844, § 41, "All real estate within this Commonwealth on which personal property cannot be found sufficient to pay the taxes assessed thereon, and where the owner or owners thereof neglect or refuse to pay the said taxes, the collectors of townships in which said lands lie shall return the same to the commissioners of the several counties; and the said lands shall be sold as unseated lands are now sold, in satisfaction of the *taxes due by the said owner or owners*" etc. (P. L. 501).

The material change made by the Act of May 13, 1879, allows redemption during the same period as if the land were unseated, and the right to redeem within one year after actual notice is repealed.

If under this provision of the Act the land set forth in the bill can be sold, it is either because the tax is a lien on the land running with it and following it irrespective of owners into whosesoever hands the title may come, thus making the land itself debtor for the taxes; or it is because the tax is a charge upon the person taxed, and the statute gives a summary remedy against his land for its collection in the nature of and analogous to distress.

Now it has been settled by numerous decisions that under the general tax law of April 15th, 1834 (P. L. 509), taxes on seated lands are not liens upon the land itself, but are a charge upon the person of the owner at the time of assessment.

The old Act of April 11, 1799, and the Act of April 15, 1834, are very similar to the Act of 1844, and have been construed according to the above principles.

Burd *v.* Ramsay, 9 S. & R. 109 (1822).
Henry *v.* Horstick, 9 Watts, 414 (1846).
Janney *v.* Harlan, 3 Clark, 230 (1845).
Caldwell *v.* Moore, 1 Jones, 58 (1849).
Miller *v.* Gorman, 2 Wr. 311 (1861).
Smeich *v.* York County, 18 Sm. 439 (1871).

Will this Court now hold, for the first time, that the Act of 1844 made a radical change in the law and made taxes a lien on the land as well as a debt by the owner.

If the tax is not a lien the injunction should be granted.

Mott *v.* Penna. R. R. Co., 6 Casey, 33.

Thomas H. Atherton (with whom was *Allan H. Dickson*) for the appellee.

This is a test case and many counties in eastern Pennsylvania are awaiting the decision. No action had been taken in Luzerne County to recover overdue taxes by proceeding against the lands under the Act of 1844 until the Act of 1879 repealed the objectionable features of the former Act (requiring actual notice to owners, and, etc.), and called the attention of the commissioners to the Act of 1844, since which they have certified a large amount of back taxes to the treasurer, the collection of which will depend upon the decision in this case.

The appellants contend that the sale will pass no title. But equity will not interfere to restrain a void sale.

Wiser's Appeal, 8 WEEKLY NOTES, 354.
Taylor's Appeal, Ibid. 192.
Winch's Appeal, 11 Smith, 424.

We claim that this proceeding is *in rem*; that the land itself became charged with the tax after

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the collector had failed for two years to collect it from the person owning it at the time of assessment or from his goods and chattels on the land, and that a sale will convey the fee simple. The object of the Act is the collection of the taxes, and it is absurd to suppose that the Legislature thought the taxes could be collected under the construction of the Act contended for by the appellant.

May 23, 1881. THE COURT. We affirm this decree upon the able and conclusive opinion of the Court below.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

Jan. '81, 147. Feb. 25, 1881.

Rankin's Appeal.

Executors and administrators—Counsel fees—When executors not entitled to, for maintaining contested will—Practice.

Where the contest as to the validity of a testamentary instrument is substantially between two sets of legatees or devisees, the executor has no right to espouse the interests of either party to the exclusion of the other, and will not be entitled to credit for legal expenses incurred by him in successfully maintaining the validity of the instrument.

Semble, that in such case the executor's proper course would be to notify the parties whose interests as devisees or legatees are threatened, and require them either to defend the instrument or to furnish the means with which to make a defence.

Appeal of Ellen F. and Emma M. Rankin from a decree of the Orphans' Court of Philadelphia County, sustaining the exceptions to the adjudication of the Judge auditing the account of the executors of Eleanor Rankin, deceased, and surcharging said executors as hereinafter set forth.

At the audit, before ASHMAN, J., the following facts appeared: Eleanor Rankin died August 12, 1874, leaving a will bearing date August 27, 1873, whereby she devised to her sons, Abraham G. W. and Alexander W. Rankin, a certain piece of real estate, and devised and bequeathed the residue of her estate to John F. Belsterling and Joseph A. Quinn, upon certain trusts for her daughters, Ellen F. and Emma M. Rankin, for the terms of their respective lives with remainders over to their children, etc. She appointed also said Belsterling and Quinn to be her executors. The will was presented for probate, but was contested by the daughters on the ground that another paper bearing date June 3, 1873, was the true will of testatrix, and had been by her republished subsequent to the date of the first named instrument. By this latter will a much larger portion of testatrix's estate was devised and bequeathed to her daughters, and one of them, Ellen F. Rankin, was nominated as executrix.

An examiner was appointed and Belsterling and Quinn retained counsel to sustain the first-named will. Testimony was taken and after a somewhat protracted litigation an issue was refused, and the contested will admitted to probate. Belsterling and Quinn thereupon filed their account, claiming credit, *inter alia*, for $100 counsel fee for services in connection with the audit, and $500 counsel fee for services in maintaining the contested will.

The Auditing Judge reduced the first-named credit to $50, and disallowed the claim for $500 altogether, surcharging the executors with the whole amount so disallowed.

The executors thereupon filed exceptions to the adjudication which the Court, HANNA, P. J., in an opinion reported 9 WEEKLY NOTES, 407, *q. v.*, sustained, allowing both credits claimed in the account, and entering a decree accordingly. Ellen F. Rankin and Emma M. Rankin thereupon took this appeal, assigning for error the decree of the Court as above.

Joseph R. Welsh and *John D. Yarrow*, for appellants.

The claim for $100 was excessive. As to the other claim it should have been disallowed. Executors have no right to put upon an estate the expense of a contest which should be borne by the parties actually interested on either side.

Royer's Appeal, 1 Harris, 569.
Mumper's Appeal, 3 W. & S. 443.
Scott's Estate, 9 W. & S. 98.
Geddis's Appeal, 9 W. 284.
Landis's Estate, 1 Phil. Rep. 528.
Dietrich's Appeal, 2 Watts, 332.
Koppenhaffer *v.* Isaacs, 7 Watts, 170.

Belsterling and Quinn had not yet assumed to act as trustees and must, therefore, be taken to have acted solely as executors.

Henry M. Dechert, for the executors, appellees.

The claim of $100 for a counsel fee was reasonable and proper.

Sterrett's Appeal, 2 P. & W. 426.
Martin's Appeal, 3 WEEKLY NOTES, 320.

Where a person holds the double position of executor and trustee under a will, he is entitled to a credit for legal expenses incurred in maintaining the validity of the instrument.

Geddis's Appeal, 9 Watts, 284.
Scott's Estate, 9 W. & S. 98.
Burr *v.* MacEwen, 1 Bald. 154.
Amand *v.* Bradburne, 2 Ch. Ca. 138.
Mohun *v.* Mohun, 1 Swanst. 201.
Jacobs *v.* Bull, 1 Watts, 370.
Ingersoll's Estate, 1 WEEKLY NOTES, 417.
Koppenhaffer *v.* Isaacs, 7 Watts, 170.

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May 2, 1881. THE COURT. While the credit claimed for counsel fees is undoubtedly a reasonable compensation for the professional services rendered by the learned counsel for the executors, it is contended that, under the circumstances, the amount so paid is not a proper charge to the estate, and this is the sole question presented for our consideration.

The item of $100, for general advice in relation to the administration of the estate and services rendered in the settlement and adjudication of the account was properly allowed; but the claim of $500, paid for professional services in resisting appellant's application for an issue, *devisavit vel non*, rests on a very different principle.

It was contended by appellants, that the paper admitted to probate as the will of their mother, was not her last will and testament; that a paper of earlier date, under which they would take a much larger, and their two brothers a correspondingly smaller interest in their mother's estate, was in fact the true will, and their avowed purpose was to set aside the former and establish the latter. In a pecuniary point of view, it was manifestly to their interest that this should be done, while it was equally to the advantage of the two brothers that the will already probated should be sustained. So far then, as pecuniary considerations were involved in the contention before the Orphans' Court, the real parties to it were the brothers on the one side, and the sisters, appellants, on the other. Under such circumstances, what should the executors have done? Was it in the line of their duty to embark in the contest, and expend money which would otherwise be payable to appellants, whose interests they were opposing; or should they have called on the brothers to come forward and defend the will in which they, as devisees, were personally interested, or indemnify the executors in doing so for them? In the light of both reason and authority, there can be but one answer to these questions. When they were advised, as they were in the very outset of a protracted controversy, that appellants had resolved to contest the validity of the will, and endeavor to establish another paper as the true will, and, that the latter, if established, would be greatly to the advantage of appellants, they should have notified the two brothers, whose interest as devisees under the former will was thus threatened, and required them either to resist the application for an issue themselves, or provide the means with which to make the necessary defense. This principle is clearly recognized in several cases, among which are: Mumper's Appeal (3 W. & S. 441); Dietrich's Appeal (2 Watts, 332); Koppenhaffer *v.* Isaacs (7 Watts, 170); Royer's Appeal (1 Harris, 569). Some of the reasons on which the rule is grounded, are thus stated by Mr. Justice KENNEDY in Mumper's Appeal, *supra*: "It would seem to be just as well as equitable that those who have an immediate and direct interest in the question, should be left to contest and bear all the costs and charges attending it. It ought to be left to them to employ counsel or not, as they please, and consequently to bear the expenses of doing so. If left to those named in the writing as legatees or devisees to employ counsel, when thought advisable, they can by agreement among themselves, apportion the expenses, etc. But if it be left to the person or persons named as executors, who have no other interest in it, to employ and pay counsel out of the estate for their services rendered in establishing the will, it is not only leaving it to persons who have no private interest in the matter to restrain them from being prodigal at the expense of those immediately interested in establishing the writing as a will, but it will, wherever there are residuary legatees or devisees, throw the whole expense upon them, if their interest should be sufficient to meet it; and if not more than sufficient, would leave them nothing."

The learned President of the Orphans' Court, while conceding the correctness of the general rule recognized in the cases above cited, came to the conclusion that it was inapplicable to the present case, for reasons suggested in the following extract from his opinion: "Here the contestants were *cestuis que trustent*, and the proponents of the will were both executors and trustees. They were made respondents by the act of the *cestuis que trustent* in their effort to destroy the trust declared by the testatrix, and it became their duty to defend and uphold the will. This they did, not merely as executors, but as testamentary trustees, and were successful. In such case we think the estate should justly pay the expenses incurred."

When the interests of all parties under a testamentary instrument are menaced, it may be the duty of the executor or trustee therein named to uphold and defend it; but where the contest as to its validity is substantially between two sets of legatees or devisees, he has no right to espouse the interests of either to the exclusion of the other. In Scott's Estate (9 W. & S. 98), it was held that an executor is entitled to a credit in his administration account for fees paid counsel for professional services in establishing the validity of the will and bequests therein contained, when the legatees entitled to the estate are parties in interest; but a very different case is presented when the real contest is between two sets of devisees, and the vital question is, which of two papers is in fact the will of the testatrix. In each of these papers the same contending parties are named as devisees and legatees, but the

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quantum of interest that each would take under the respective instruments is very different; that of the appellants being much less under the paper admitted to probate than under the other. It was therefore impossible for the appellees to uphold and maintain the former without arraying themselves in opposition to the interests of the appellants, and at the same time espousing the cause of their real opponents. We fail to see any good reason for making this case an exception to the general rule that the expenses of such a contest should be borne by the parties to it, or at least by those for whose benefit it was carried on. On the contrary, we think it is fairly within both the letter and spirit of the rule established by the authorities above cited.

The $500 paid out of the fund of the estate for counsel fees in resisting the application for an issue, etc., was credited to accountant in the statement of his "Principal Account," under the date of July 13th, 1877. He should be surcharged in the same account with that sum, and in his "Income Account" he should be charged with $103.75, interest on said sum from the date of the misapplication thereof to the date of the decree in the Court below, viz., December 31st, 1880.

The decree of the Orphans' Court is reversed, and it is now adjudged and decreed that the balance of *principal* in the hands of accountant on December 31st, 1880, the date of said decree in the Court below, is five hundred and forty-seven $\frac{68}{100}$ dollars ($547.68), and that the balance of *income* in his hands on the same date is three hundred and eighty-six $\frac{10}{100}$ dollars ($386.10); and it is further ordered that the appellee pay the costs of this appeal.

Opinion by STERRETT, J.

Common Pleas—Law.

C. P. No. 1. May 7, 1881.

Howell v. Burns, Contractor, and Espen et al., Owners.

Mechanics' liens—Repairs made by tenant—Provision in lease that tenant shall make all necessary repairs—Landlord's consent under Act of Aug. 1, 1868.

Rule to strike off mechanics' liens.

Burns was lessee of premises No. 1020 Chestnut Street from Espen *et al.*, and employed plaintiff to furnish materials and make alterations and repairs to the demised premises, for which he failed to pay, and for which a mechanic's claim was filed. The lease contained the following clause:—

"The lessee shall make all necessary repairs to the premises demised, including the roof and windows, and shall make no alteration or improvements without the lessor's consent."

Plaintiff claimed that this was such a "written consent" by the owner as is required by the Act of August 1, 1868 (Purd. Dig. 1028, pl. 21), to render the property liable for repairs and alterations done for the tenant.

W. W. Montgomery, for the rule.

The test of the right to lien the landlord's property for work done for the tenant, as laid down in 1880 in Hall *v.* Parker (8 WEEKLY NOTES, 325), is that the building has been erected or alterations made by the tenant for the landlord with the consent of the latter, and ultimately to be paid for by the latter. And all the cases in our Supreme Court have been decided in accordance with this principle.

Woodward *v.* Leiby, 12 C. 437.
Leiby *v.* Wilson, 4 Wr. 63.
Hopper *v.* Childs, 7 Wr. 310.
Fisher *v.* Rush, 21 P. F. Smith, 40.
Barclay *v.* Wainwright, 5 N. 191.

A mere written authority by the landlord to a tenant to make repairs, whether general or special, does not subject the landlord's property to a lien.

Dietrich *v.* Crabtree, 8 WEEKLY NOTES, 418.
Reid *v.* Kenney, 4 Ibid. 450.
McClintock *v.* Criswell, 17 Smith, 183.

Chas. H. Krumbhaar and *Chas. C. Lister*, contra.

The right to recover under the claim filed rests on the Act of August 1, 1868, which extends the right to file a mechanics' claim for repairs, etc., made by the tenant with the written consent of the landlord. Consent in a written lease is sufficient.

Amos *v.* Clare, 9 Phila. 35.

The consent here given is absolute, and a portion of the repairs for which the claim is filed is expressly designated therein.

May 14, 1881. THE COURT. Rule absolute.

C. P. No. 2. June 7, 1881.

Hirsch v. Kohn et al., trading, etc., as Merchants' Lodge, No. 176, Knights of Pythias.

Amendment—Adding new defendants—Unincorporated society.

Rule to amend the writ so that the name of defendants shall read "Merchants' Lodge, No. 176, Knights of Pythias of Pennsylvania, a beneficial secret society composed of the following members, viz.: [here follow the names of the members]."

It appeared from the record that the writ issued

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against H. Kohn and nine others trading and doing business under the name of Merchants' Lodge, No. 176, Knights of Pythias of Pennsylvania. The plaintiff declared in assumpsit, and the defendant pleaded in abatement, that the promises, if ever made, were made by the defendants jointly with thirty-five other persons named in the plea. Whereupon the present rule was taken.

The defendants are an unincorporated association.

Devine, for the rule.

Colton, contra.

The amendment would make this a suit against an unincorporated association, *suo nomine*, which cannot be, nor, on the other hand, can the members be made individually liable.

Act of 28 April, 1876 (P. L. 53), Purd. Dig., 1981.

A bill in equity is the proper remedy.

Paul *v.* Keystone Lodge, 3 WEEKLY NOTES, 408.

Luders *v.* Volp, 8 Id. 417.

THE COURT. Rule absolute for leave to amend by adding the other defendants, and to issue alias summons against them.

C. P. No. 2. March 7, 1881.

Building Association v. Steel.

Practice—Special return by sheriff—Act of 20 April, 1846—It is the duty of the sheriff upon the receipt of costs, and the production of searches, to make a return as provided for in the Act.

Rule on sheriff to show cause why he should not make a special return.

The sheriff's affidavit which, by agreement of counsel, was read as a deposition, showed the following facts: By virtue of a levari facias issued on a judgment obtained in the above case for $2354.25 (the case being a suit upon a mortgage of $5000, held by the plaintiffs), the sheriff sold the premises for the sum of $5500, but the purchaser having failed to comply with the terms of the sale, the plaintiff's attorney, who was the second bidder, offered to pay to the sheriff a sum of money sufficient to cover all legal costs and charges, and to take the property at the price for which it was sold, namely $5500. He produced searches which showed that the plaintiffs were the holders of a mortgage of $5000, which the record showed to be the next lien upon the premises after the mortgage upon which the suit was brought which resulted in the sheriff's sale. He accordingly requested the sheriff to take his receipt on account of the second mortgage, and to make a return as provided for in the Act of 1846, §§ 1 and 2 (P. L. 411, P. D. 655).

The sheriff had received notice that the last mentioned mortgage was in suit in Court of Common Pleas No. 3, and that an affidavit of defence had been filed claiming that nothing more than $175, was due upon the mortgage. He accordingly refused to receive the receipt on account of the second mortgage tendered by the plaintiff's counsel, or to make a special return as provided for in the Act of 1846. Thereupon the counsel for the plaintiff took this rule.

R. C. Winship (*Gilpin* with him), for the sheriff, showed cause.

If this rule is made absolute the result will be that two issues involving the same point will be on trial at the same time in different courts—one being an issue granted to decide as to the disposition of the fund now in the sheriff's hands resulting from the sale of these premises, and the other the issue in the case now in progress in Court of Common Pleas No. 3.

Joseph R. Rhoads, for the rule.

The Act of 1846 provides in express terms that if the purchaser appears from the searches to be a lien creditor and pays to the sheriff a sum sufficient to defray all legal costs, it shall be the duty of the sheriff to receive the receipt of such lien creditor, and to make a special return.

All the facts necessary are admitted in the sheriff's affidavit, which shows that all the requirements of the Act have been fulfilled.

THE COURT. Unless some authority to the contrary is shown we must follow the words of the Act literally.

Rule absolute.

C. P. No. 3. June 25, 1881.

Rusk v. Clifford et al.

Affidavit of defence law—Instrument within the Act—Bond of insolvent under the Act of June 16, 1836—Averment.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant on an insolvent bond under the Act of June 16, 1836. Plaintiff filed a copy of the bond executed by defendants in the sum of $500, the condition of which was, that—

"if the said Reuben C. Clifford shall appear at the next term of the Court of Common Pleas of the said county, and then and there present his petition for the benefit of the insolvent laws of this Commonwealth, and comply with all the requisitions of the said law, and abide all the orders of the said Court in that behalf, or in default thereof, or if he fail in obtaining his discharge as an insolvent debtor, then he shall surrender himself to the jail of the said county, then this obligation to be void."

Plaintiff also filed an averment that "said bond has become forfeited by reason of the non-compliance with its terms;" and that "the amount of the said bond, by reason of said forfeiture, is now due."

The affidavit of defence suggested to the Court that the copy of the instrument of writing sued upon is not such as would entitle plaintiff to judgment for want of an affidavit of defence.

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Wendell P. Bowman, for the rule.

The filing of the bond is provided for by Act of Assembly of March 12, 1842, which is supplemental to the Act of March 28, 1835 (Purd. Dig. 497, pl. 18, and 495, pl. 13).

Horn R. Kneass, contra.

The copy of the instrument of writing sued upon is not such as would entitle the plaintiff to judgment for want of an affidavit of defence.

McFate *v.* Shallcross, 1 Phila. 40.
Smith *v.* Harley, 1 WEEKLY NOTES, 111.
McNarr *v.* Winpenny, Ibid. 29.
Hutchinson *v.* Weir, Ibid. 267.
Koelle *et al. v.* Engbert *et al.*, Ibid. 202.
Feist *v.* Prince, 1 Legal Chron. 135.
Stokes *v.* Sayre, 1 Miles, 25.
Com. *v.* Steelman, 2 Miles, 405.

THE COURT. Rule absolute.

C. P. No. 4. June 13, 1880.

Whitney v. Bruner.

Assumpsit for goods sold and delivered and money had and received—When maintainable—Will always lie where goods of one man come into the possession of another who has parted with no value and are sold by him.

Rule for a new trial.

Assumpsit, by Whitney against Bruner. On the trial, the following facts appeared: A. J. Cohen being indebted in a considerable sum to Bruner & Co., coal dealers, offered to pay them in coal, which offer was accepted. He then contracted with Whitney to sell coal to Bruner & Co., for a certain cash price. Whitney shipped the coal to Bruner & Co., and Cohen managed to be in Bruner's office when the bill of lading was brought in, and receipted for the coal in Bruner's name, but without authority. Bruner & Co. credited Cohen on their books with the value of the coal. Cohen was at this time utterly insolvent, and known so to be by Bruner & Co. There was evidence that the coal was not unloaded until the 2d of December, and that on the 1st of December Whitney sent a bill for the coal to Bruner & Co., but the latter denied having received it. Whitney thereupon brought this suit against Bruner & Co., filing a narr. in assumpsit with the common counts.

The Court, THAYER, P. J., instructed the jury (1) That the plaintiff could not recover under the count for goods sold and delivered, where the goods had been obtained through the fraud of a third person; (2) That if the plaintiff had shown that the defendants had sold the coal and received the price, he might recover under the count for money had and received; but as there was no evidence of this the plaintiff could not recover. The verdict was for the defendants, and the plaintiff obtained this rule.

Silas W. Pettit, for the rule.

The fact that the defendants retained the coal after notice of the fraud and the rendition of a bill, amounted, if not to a ratification of Cohen's purchase for their account, at any rate to a conversion of the property which rendered them liable in this action.

Dundas *v.* Muhlenberg, 11 Casey, 351.
McCullough *v.* McCullough, 2 Harris, 295.
Gray *v.* Griffith, 10 Watts, 431.

Upon the merits of the case the plaintiff has a right to recover.

Deysher *v.* Triebel, 14 P. F. Smith, 383.
Kingsford *v.* Merry, 1 Hurls. & Norm. 503.
Decan *v.* Shipper, 11 Casey, 239.
Andrew *v.* Dietreich, 14 Wend. 31.
Lelar *v.* Brown, 3 Harris, 215.

The giving a credit on an old account is not a consideration which will protect the party to whom the goods are delivered, even though he take them *bona fide*.

Root *v.* French, 13 Wend. 570.

If trover or replevin would lie for the coal which is the subject of this action, *à fortiori* will an action for money had and received lie, where the goods have been taken for the purposes of trade, and the lapse of time and other circumstances are such as authorize the jury to find that they have been converted into cash.

Alfred Moore, contra.

There can be no recovery under a count for goods sold and delivered in such a case.

Deysher *v.* Triebel, 14 Smith, 383.

The action for money had and received has never been extended to money received without unfair practice or deceit.

Hinkle *v.* Eichelberger, 2 Barr, 483.
Deysher *v.* Triebel, *supra*.

[THAYER, P. J. It is a mistake to say that assumpsit for money had and received will lie only in cases where there has been fraud and deceit on the part of the recipient of the goods. Where the goods have been unlawfully obtained from the owner and the purchaser has parted with no value this action will lie for the proceeds. It is an equitable action and the general rule is that it can be maintained wherever, *ex æquo et bono*, the defendants ought not to retain the money. The instruction that plaintiff could not recover was given on the ground that it did not appear that the defendants had sold the coal, and, therefore, the action for money had and received would not lie. But the omission to prove the conversion was clearly an oversight. Besides, there are authorities to the effect that after such a lapse of time a sale will be presumed.]

C. A. V.

June 17, 1880. THE COURT. Rule absolute.

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C. P. No. 4. June 13, 1881.

Wiler v. Fiegel and Wife.

Husband and wife—Necessaries—When husband liable—Mere fact of cohabitation presumptive evidence of authority of wife as agent of husband to purchase necessaries for herself—This presumption rebuttable by proof that husband supplied her himself, or made her an adequate allowance—Whether the articles are necessaries or not a question for the jury.

Rule to take off a nonsuit.

Assumpsit for goods sold and delivered to Margaret Fiegel, one of the defendants, alleged to be necessaries for the support and maintenance of the said Margaret Fiegel. The narr. was drawn to bring the case within the provisions of the eighth section of the Act of April 11, 1848 (Purd. Dig. 1006, pl. 15). Defendants pleaded separately "non-assumpsit, payment, set-off with leave," etc. No plea of coverture was filed. On the trial the plaintiff offered evidence to show that the defendant, Margaret Fiegel, had ordered the goods, which consisted of laces, silk, hosiery, etc., without mentioning her husband, alleging that she had a regular income out of which she could and would pay for the goods. It was admitted that she had an income of $1000 per annum. Renny Fiegel, the husband, kept the Woodbine Hotel, No. 3200 Germantown Avenue.

The Judge who presided at the trial entered a nonsuit on the ground that no evidence had been offered to show that the goods were necessaries, or that the husband had knowledge of and consented to the transaction.

H. T. Fenton, for the rule.

Enough evidence was given to entitle the plaintiff to go to the jury. The question whether or not the goods were necessaries was for the jury.

Parke *v.* Kleeber, 1 Wright, 251.
Rigoney *v.* Neiman, 23 P. F. Smith, 330.

The fact of necessaries or not is to be determined by her condition in life and the amount of her separate estate. The plaintiff need not show in the first instance that the husband has failed to supply his wife with necessaries, though the defendant may show that she has been amply supplied by her husband.

Davidson *v.* McCandlish, 19 P. F. Smith, 169.
Berger *v.* Clark, 29 P. F. Smith, 340.
Pettit *v.* Fretz, 9 Casey, 120.
Mahon *v.* Gormley, 12 Harris, 80.
Murray *v.* Keyes, 11 Casey, 384.

T. J. Diehl, contra.

The statutory remedy of 1848 is against the husband in the first instance. No doubt the husband is liable for his wife's necessaries.

[THAYER, P. J. But as regards all such purchases, is there not a presumption of agency arising from cohabitation? True, he may rebut that presumption.]

The construction of the Act has always been that it must be shown affirmatively that the goods were necessaries, (1) to charge the husband; (2) to charge the wife's separate estate.

Berger *v.* Clark, 29 P. F. Smith, 340.

A buggy was held to be necessary for an aged corpulent woman, who managed a farm consisting of two tracts of land.

Freymoyer's Estate, 2 Lanc. Bar, 29 Oct. 1870.

All the cases decide that the pleadings must make out a case within the terms of the statute, and the evidence must support the pleadings, *i. e.*, they must establish a debt contracted by the wife in the purchase of articles necessary for the support and maintenance of the family of the said husband and wife.

Parke *v.* Kleeber, 1 Wright, 251.

No judgment can be taken for want of an affidavit of defence on copy filed against a married woman, even though accompanied by an averment that the goods were necessaries.

Parke *v.* Kleeber, *supra*.

C. A. V.

June 25, 1881. THE COURT. It is undoubtedly the law that a husband who supplies his wife with necessaries suitable to her degree is not liable for debts contracted by her without his authority and against his consent. (Seaton *v.* Benedict, 2 Smith's Leading Cases, 439.) A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. If he supplies her properly she is not his agent for the purchase of an article unless he sees her wear it without disapprobation—per BEST, C. J. During cohabitation, however, there is a presumption, arising from the very circumstance of the cohabitation, of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate. (Clancy on Married Women, 23.) It is a rule of evidence that the mere fact of cohabitation is presumptive evidence of authority as his agent to purchase necessaries for herself. (McCutchen *v.* McGahay, 11 Johnson, 281.) But this presumption may be rebutted by proof that he supplied her himself or made her an adequate allowance. (Renaux *v.* Teakle, 8 Excheq. 680; Cany *v.* Patton, 2 Ash. 140.)

The plaintiff's case therefore depended upon two facts. 1st. Whether the articles furnished to the wife were necessaries suitable to the husband's degree; and 2d, Whether the wife had authority to purchase them. The first question was a question of fact entirely for the jury. Upon the second question the *prima facie* presumption arising from cohabitation was that she had such authority. This *prima facie* presumption might, it is true, have been rebutted, but the nonsuit, which proceeded upon the ground that proof of the authority lay in the first instance upon the plaintiff, was unquestionably wrong.

Rule absolute.

Opinion by THAYER, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, JULY 28, 1881.* [No. 15.

Supreme Court.

Jan. '79, 46. January 20, 1881.

Stokes v. Miller.

Will — Issue devisavit vel non — Testamentary capacity — Undue influence — Evidence of undue influence necessary to defeat a will — Burden of proof — Confidential adviser — Inconsiderable bequest to — Evidence — Rule as to incompetency of non-subscribing witnesses as to capacity — Testimony as to former evidence of witness to contradict present testimony — Examiner — Use of evidence taken before, for this purpose — Judicial comments on evidence tending to mislead the jury — Impropriety of.

A testatrix who was old and somewhat feeble, and as to whose insanity there was considerable evidence, executed a will whereby she left to her confidential adviser who had drawn the will, certain property amounting to about one-eightieth part in value of her whole estate, and devised and bequeathed the residue to him in trust for certain of her relatives for whom she had expressed affection:

Held, that the above state of facts was not sufficient to reverse the usual rule, which, in an issue to test the validity of a will, lays the burden of proof upon the party alleging fraud or undue influence, and that there was no such evidence of fraud or undue influence as could properly be submitted to a jury.

Undue influence of that kind which will affect the provisions of a testament, must be such as subjugates the mind of the testator to the will of the person operating upon it, and in order to establish this, proof must be made of some fraud practised, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator, and these influences must be proved to have operated at the very time of making the will.

A person, who is not a subscribing witness to a will, and who has testified to no facts indicating testamentary incapacity on the part of a testator, is not competent to give an opinion as to want of capacity on the testator's part to execute a will.

Where, in order to contradict a witness as to a particular fact, the examiner before whom certain testimony in the case had formerly been taken, was called to testify as to the witness's evidence before him in reference to this fact, and it was apparent that it was not necessary, in order to show that the testimony so taken harmonized with that given at the trial, to read the whole thereof:

Held, that it was error to allow the whole of such testimony to be put in evidence.

Judicial comments disparaging to witnesses or parties and not grounded upon facts in evidence, or any other judicial remarks similarly without foundation, which may tend to mislead and prejudice the jury, are improper and erroneous, and constitute ground for reversal.

Error to the Common Pleas No. 4, of Philadelphia County.

Feigned issue, wherein Edwin L. Stokes, trustee and executor under the will of Harriet Ward, deceased, was plaintiff, and George L. Miller and Susan M. Miller, his wife, and Catharine Kyle were defendants, to try the validity of the will of said Harriet Ward, and of a codicil thereto.

On the trial, before ELCOCK, J., the facts of the case, as recited in the opinion of the Supreme Court, were found to be as follows:—

"In the Court below this cause was a feigned issue framed in obedience to a precept from the Orphans' Court, requiring the determination of two questions of fact affecting the last will and testament with codicil annexed, of Harriet Ward. The facts alleged against the validity of the will and codicil in question, were the mental unsoundness of the testatrix, and fraud and undue influence exerted upon her by Edwin L. Stokes. The issue was made up in the form generally observed by making the executor plaintiff, and the contestants defendants, the issue being the validity of the will. The plaintiff proved the execution of the will and codicil and rested. The defendants then put in a large amount of testimony in support of their allegations of mental unsoundness and fraud and undue influence. The cause was left to the jury by the Court upon these questions of fact, and was determined in favor of the defendants by the verdict. . . .

"The testatrix, Harriet Ward, who died on February 14, 1872, in Philadelphia, was a widow, about sixty years of age. She was twice married, first to one David Kyle, and after his death to Hugh M. Ward. Her second husband died during her life. By the first husband, she had three children, Robert, who died during the war, Susan M. and John W. Kyle. The two latter were the contestants of the will, but the son, John W., having died pending the proceedings, his wife, Catharine, was substituted in his place. The contestants are therefore the daughter and daughter-in-law of the testatrix. By her second husband Mrs. Ward had a child, Virginia, who died in 1869. She also had three grandsons, children of her son, John W. Kyle, to wit: Robert, John, and David, aged about eight, ten, and twelve years respectively, at the time of Mrs. Ward's death. There were also two other children of her son John, both daughters, Katie and Harriet E., aged about three and twelve years. The foregoing appear to be all of the nearest relatives of the testatrix who survived her. Her property consisted of a tract of land

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in Texas, several parcels of real estate situate in the city of Philadelphia, several ground rents upon property also in this city, several burial plots, a mining right on a tract of land in the State of Connecticut, a mortgage, some United States bonds, some railroad bonds, and some bank stock. The whole of this property is very precisely described in items, in the will, and is said to have been worth about $25,000 or $30,000.

"The will contains but two bequests, one of a tract of land containing six hundred and forty acres in Jasper County, Texas, to Edwin L. Stokes, in fee-simple; and the other, of all her remaining estate, real and personal, to the same Edwin L. Stokes as executor and trustee, to hold and invest, with power to change investments, to receive the rents and profits of the real estate and the interest and income of the personal estate, and accumulate all the income after deducting taxes, legal charges and expenses, until the three grandsons above named arrived at the age of twenty-one years. After their arrival at twenty-one the rents and income of the accumulated capital and income were to be paid over to the said three grandsons in equal shares, semi-annually, until they reached the age of twenty-eight years, when the whole of the principal and accumulations of the estate was to be divided in equal shares between the said three grandsons.

"The codicil simply directed the trustee to hold three gold watches, some silver spoons, and jewelry for the same legatees, until their age of twenty-eight years, when they were to be delivered to them.

"The testatrix had become estranged from her daughter, Mrs. Miller, for a number of years, on account of a family difficulty, and it seems, from the undisputed testimony, that her son, John W. Kyle, was somewhat given to intemperate habits. One witness testified that she gave as a reason for leaving her son out of her will, that he was too dissipated; that the children would never be benefited by it.

"The will was executed on January 22, 1872, and the codicil on February 8, 1872. The circumstances attending its execution, as detailed by the witnesses, were substantially as follows: The testatrix had a slight attack of sickness in December, 1871, while on a visit to a neighbor, and then spoke of making a will, and of the grandsons as the objects of her bounty, and gave reasons why she would leave nothing to her son or daughter. In January, 1872, she wrote to Mr. Stokes a letter, stating that she was very sick and was very anxious to see him. He went at once, and he testifies that she told him she wanted him to draft a will for her. She then gave him instructions as to her wishes, which were to leave the Texas land to himself, a life interest in the house to Mary Ann Deal, and the residue of her estate to her three grandsons. He prepared such a will, which she executed, after keeping it a few days in her possession. It was left with her; but later in the month she informed Mr. Stokes that she wanted to change the will, leaving Mary Ann Deal out. She wished another will drawn, and she desired that her property should all be enumerated in the instrument. She told him what property she had, and went up stairs and brought down her deeds, bonds, and papers. She called them all off, and he took a list of them, and from that he prepared the second will, which is the will of January 22, 1872, now in dispute. He left it with her three or four days, so that she might read it and see if it was correct. On January 22 he and the subscribing witnesses, Edward S. Lawrance, a member of the bar and uncle of the plaintiff, and Frank Stokes, a brother, went to Mrs. Ward's to have the will signed and witnessed. All three were examined on the trial, and gave the same account of what took place. Mr. E. L. Stokes read the will aloud to Mrs. Ward. Mr. Lawrance asked her whether that was to be her last will and testament, and whether she wished him and Frank Stokes to witness it. She said 'Yes,' and added that it would be necessary to have pen and ink, which she got and placed on the table. She then signed the will, and Lawrance and Frank Stokes signed it as subscribing witnesses. She handed the will to E. L. Stokes, and asked him to keep it, which he did. All these witnesses testified that she was in perfect possession of her faculties; that her mind was clear and bright, and that she was a very intelligent woman. Mr. Lawrance, who had known her from the spring of 1870, and had business transactions with her, said, that 'there was not the least difficulty in making her understand the contents of the will; never had any difficulty in making her understand anything; she was an intelligent and well-educated woman; at that time she was, in my opinion, competent and able to make her last will and testament.' At the execution of the codicil she had become more feeble, but with that exception, nothing transpired that requires special mention.

"The testimony delivered on both sides at the trial showed that Mrs. Ward was a woman of good birth and education; that she was of resolute will, of excellent business habits, of strong likes and dislikes, and somewhat given to prejudices; that she had lived a very careful and prudent life in reference to business matters, practising rigid economy at all times, and had thus accumulated her estate. She made her own in-

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vestments, collected her own rents, interest, and dividends, and paid her own taxes, debts, and expenses.

"She received the income of a trust fund of about $15,000 or $16,000, which had been left by her father, John Wetherill, in trust for her use about the year 1851. From 1861 she managed the trust estate also, the control of it having been handed over to her by the trustee. In 1870, the trustee, Dr. Lamb, having died, Edwin L. Stokes was, by her request, appointed in his place, and administered the trust estate until her death.

"In the latter part of her life she seems to have lived penuriously, if not meanly. Much of the testimony of the contestants was directed to her peculiarities in this respect. She lived alone, did her own work, scrubbed the pavement on her knees, cleaned the gutters, wore insufficient clothing in cold weather. Her house was miserably furnished, so as to have the appearance of poverty. Some neighboring children teased her at times, and she had them arrested for trivial causes; occasionally quarrelled with her neighbors; was sometimes seen out-doors in her bare feet. She raked the fire out on the zinc twice; had pebbles and pieces of brick done up in paper bags, and pieces of paper twisted up and lying about; would sometimes wander about the room with a blanket over her, talking to herself. Other peculiarities and eccentricities were testified to, and a number of witnesses said that in their opinion she was of unsound mind."

There was no further evidence to sustain the contention of the defendants that undue influence had been exerted upon testatrix than that set forth above. It appeared, further, that testatrix had frequently expressed a fondness for the grandsons to whom she bequeathed and devised the bulk of her estate; and, also, from a tax receipt given in evidence, that the Texas lands devised to Stokes were valued at only $320.

The defendants called Samuel Fife, Sarah C. Yarnall, and William Little, who testified on their behalf as to some facts relative to testatrix, which did not amount to proof of her testamentary incapacity. They were then asked whether, from what they saw and knew of her, they thought she was competent to transact the ordinary business of life. Objected to. Objection overruled and evidence admitted. Exception. (Ninth assignment of error.)

William H. Ruddiman, Esq., the examiner appointed by the Orphans' Court to take testimony whether the issue in this case should be awarded or not, was called by plaintiff to testify to the evidence of Mrs. Elizabeth Winters taken before him, in order to contradict her evidence on the trial. On cross-examination, defendant asked him to read all that Mrs. Winters had testified to before him, as well as the part of her examination wherein it was claimed that she had contradicted herself. Objected to. Objection overruled and evidence admitted. Exception. (Tenth assignment of error.)

The plaintiff in his second point asked the Court to charge as follows: Cruelty to children is no evidence, *per se*, of the want of sufficient capacity to make a will. *Answer*. I affirm this point, but whether starving a child to death is within the term is for you. (Seventh assignment of error.)

The plaintiff in his third point asked the Court to charge as follows: The evidence in this case is not sufficient in law to rebut the presumption of the sanity of Harriet Ward, at the time she executed the will in question, and the verdict of the jury should be for the plaintiff on that issue. *Answer*. I decline so to charge you. (Eighth assignment of error.)

The plaintiff in his fourth point requested the Court to charge as follows: There is no evidence sufficient, even if believed, to justify the jury in finding that the will in question was the result of duress, constraint, fraud, or undue influence, and the verdict of the jury should be for the plaintiff on that issue. *Answer*. I decline so to charge you. (Eleventh assignment of error.)

The Court in its general charge further said: "The evidence from which this undue influence may be drawn is confined to that of the three witnesses, plaintiff, E. S. Lawrance, and F. Stokes. The *onus* is on *them* of freeing themselves of this charge. If they have done it to your satisfaction, then on that issue you must find for the plaintiff. If not, then you should find for the defendants.

"There is no direct evidence of fraud, deceit, or falsehood practised in this case, but you may find circumstantial evidence of the conduct of those who had the preparation and execution of this will, whether the testatrix acted with a full consciousness as to what she was doing. The circumstantial evidence is sufficient if it makes out the facts to the satisfaction of the jury." (Twelfth and thirteenth assignments of error.)

Also as follows: "But another question arises, why should she (the testatrix) create a trust estate by her will, when she had just experienced such a sad lesson in the trustee who was appointed for her own benefit in her father's estate, and if seeking a trustee, why select the one she did? Had she such knowledge of him as would justify this trust?" (Fourth assignment of error.)

Verdict and judgment for defendants.

Plaintiff thereupon took this writ, assigning for error, *inter alia*, the action of the Court in admitting in evidence the testimony of defend-

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ants above stated to have been admitted under objection, the answers to plaintiff's points above cited, and the portions of the general charge above set forth.

Byron Woodward (with whom were *F. E.* and *F. C. Brewster*) for plaintiff in error.

Admittedly there was no direct evidence of fraud or undue influence in this case, but the Court left it to the jury to find circumstantial evidence of undue influence in those who had charge of the preparation and execution of the will.

Influence necessary to annul a testamentary act must amount to such force and coercion as destroys free agency, and substitutes the will of the party exercising it for the will of the testator.

Tawney *v.* Long, 26 Sm. 106.

To submit a question of fraud to the jury for the purpose of overturning a written instrument upon slight parol evidence, is clearly error. The evidence of fraud in such case must be clear and precise and indubitable.

Brinks *v.* Heise, 3 Norris, 251
Penna. R. R. Co. *v.* Shay, 1 Id. 198.

The testatrix was not a person of feeble mind, on the contrary she had a strong mind and an uncontrollable will, and that distinguishes this case from that of—

Boyd *v.* Boyd, 16 Sm. 293.

The rule in the latter case, that where the bulk of the property is given to the party who draws the will and who stands in a confidential relation to the testator, a presumption of fraud arises, is inapplicable here, for the devise to Stokes amounted to scarcely one-eightieth part of testatrix's fortune. It is a well settled rule of law that where a bequest is trifling in amount, the burden of proving fraud or undue influence is on the person alleging it.

The averment of the Court that "the testatrix had just experienced a sad lesson in her trustee," etc., was untrue and misleading.

Stokes's Appeal, 30 Sm. 340.

A tendency in the charge to mislead is ground for reversal.

Insurance Co. *v.* Rosenberger, 3 WEEKLY NOTES, 16.

If the Court assume a fact not in evidence, the judgment must be reversed.

Musselman *v.* R. R. Co., 2 WEEKLY NOTES, 105.

There is no evidence that her daughter was starved to death by the testatrix, and hence the Court assumed that of which there was no proof.

Ashbridge *v.* Kenyon, 15 Leg. Int. 158.

Where witnesses have testified to no facts fairly indicating incapacity, it is error to permit them to give an opinion.

Dickinson *v.* Dickinson, 11 Sm. 401.

The admission of all of Mrs. Winters's testimony was improper, because the plaintiff had not the benefit of cross-examination.

John Dolman and *Wm. A. Husbands* for defendant in error.

The relation of the plaintiff to the testatrix was a confidential one. He drew the will and benefited greatly by it. The testatrix lived a solitary life, and the evidence clearly shows her to have been insane. Therefore it is submitted that the *onus* is clearly upon the plaintiff to show that no fraud was practised upon the testatrix.

Boyd *v.* Boyd, 16 Sm. 293.

The answer of the Court to the point "that cruelty to children is not evidence *per se* of unsoundness of mind," amounted to no more than this, that the jury were to judge whether a sane mother would have acted as the testatrix did.

The observation of the Court relative to the trustee of the estate of testatrix's share of her father's estate was warranted by the evidence.

On the trial of an issue of *devisavit vel non*, a witness who has testified to all the facts within his knowledge, and to acts, words, and manner of a testator, may afterwards give his opinion as to the testator's mental capacity, and the jury is to judge from his testimony whether his opinion is well founded or not.

Pidcock *v.* Potter, 18 Sm. 342.
Titlow *v.* Titlow, 4 Id. 223.

It is manifestly unfair to a witness to read disconnected sentences or parts of testimony of the witness taken on a former occasion, for the purpose of contradicting the witness. A jury cannot possibly judge whether there is any contradiction or discrepancy between the former and the present testimony, unless they hear the whole testimony as a connected whole.

February 7, 1881. THE COURT. The case is brought here upon various assignments of error claimed to have been committed in the admission of evidence, and in the charge and answers of the Court. . . . [Here follows the statement of the facts of the case already given.]

* * * * *

In the view that we take of the case, it is not necessary to recount the testimony relating to the mental capacity of the testatrix with any greater particularity. As the case will have to be tried again, we prefer to leave the question of the sufficiency of the testimony on the question of capacity undecided. Should it come here again, it may present different aspects from those which now attend it. On the question of undue influence, however, the case is in a different situation. The plaintiff's fourth point requested the Court to charge the jury that "there is no evidence sufficient, even if believed, to justify the jury in finding that the will in question was

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the result of duress, constraint, fraud, or undue influence, and the verdict of the jury should be for the plaintiff on that issue."

This the Court declined, and on the contrary charged as follows:—"There is no direct evidence of fraud, deceit, or falsehood practised in this case, but you may find circumstantial evidence of the conduct of those who had the preparation and execution of this will, whether the testatrix acted with a full consciousness as to what she was doing. The circumstantial evidence is sufficient if it makes out the case to the satisfaction of the jury." The Court also charged on this subject as follows:—"The evidence from which this undue influence is drawn, is confined to that of the three witnesses, plaintiff, E. S. Lawrance and F. Stokes. The *onus* is on *them* of freeing themselves from this charge. If they have done it to your satisfaction, then on that issue you should find for the plaintiff. If not, then you should find for the defendants." In all this, there was, in our opinion, grave error. We have examined with great care the testimony of the witnesses named, as well as the other testimony in the case affecting this question, and we are bound to say, that there is in our judgment no evidence whatever showing or even indicating any fraud, duress, or undue influence used in procuring the execution of the will. We have already recited the testimony of the three witnesses from which alone the learned Judge says the evidence of undue influence is to be derived. Instead of proving any undue influence, it proves most conclusively that the will was the result of Mrs. Ward's own direct, intelligent, and voluntary instruction. There is not a particle of evidence that she was ever asked, much less coerced, either to direct or assent to the particular provisions of the will. The great bulk of her estate is given to her own grandsons, for whom she had expressed fondness during her life. Only a very small devise to E. L. Stokes, in point of value, is made in the will, and that according to his testimony was proposed by herself. Yet this trifling gift to one who had been acting as her trustee by her own request, and who had been upon pleasant and friendly terms with her, is held to subvert the usual rule of law, which places the *onus* of proof in such cases, upon the party alleging the fraud or undue influence. The case of Boyd *v.* Boyd (16 P. F. S. 283) is relied upon, as justifying the charge of the Court on this subject. But a very slight examination of that case will show that it is not applicable to the circumstances of the present case. A brief quotation will suffice. On page 293, Mr. Justice SHARSWOOD, in delivering the opinion of the Court said: "Hence when the party upon whom rests the charge (of undue influence), derives none or a very inconsiderable benefit from the will, there must undoubtedly be evidence of direct influence, exerted at the time of making the will, such as in effect to destroy the free agency of the testator. (Eckert *v.* Flowry, 7 Wr. 46.) But where, being an entire stranger, having no claims from lawful relationship, he derives a very considerable benefit from the act, such direct proof ought not to be, and is not required. Such was the case of Dean *v.* Negley (5 Id. 312). General evidence of power exercised over the testator, especially if he be of comparatively weak mind from age or bodily infirmity, though not to such an extent as to destroy testamentary capacity, will be enough to raise a presumption which ought to be met and overcome, before such a will can be established. Particularly ought this to be the rule, when the party to be benefited stands in a confidential relation to the testator. . . . Undoubtedly if the counsel of the old man whose mental faculties are impaired, though not destroyed by advanced age, should draw for him a will, giving to himself the bulk of his estate, or a very considerable part of it, it would not be enough to show the formal execution of the paper in the presence of two subscribing witnesses called in for the purpose. He must go further and rebut the presumption by some evidence, that the disposition made was the exercise of the free will of the testator." The only evidence of the value of the Texas land devised to E. L. Stokes, was a tax receipt in which the valuation was stated at $320. We are not referred to any case by the learned counsel for the contestants, nor are we aware of any, in which the recipiency by the person drawing the will, of so trifling a sum as this, has been held sufficient to reverse the usual rule applicable to such cases in relation to the burden of proof. While it is true that Mr. Stokes was also made trustee for the grandsons for a number of years, it must also be considered that in legal contemplation the duties and responsibilities of that position are a full equivalent for any merely personal advantage arising from it.

The rule in Pennsylvania, as to the kind of evidence necessary to defeat a will on the ground of undue influence, has been many times expressed in emphatic language in the decisions of this Court. It is forcibly stated by Mr. Justice GORDON, in the following language, in the case of Tawney *v.* Long (26 P. F. Smith, on p. 115): "Undue influence of that kind which will affect the provisions of a testament, must be such as subjugates the mind of the testator to the will of the person operating upon it, and in order to establish this, proof must be made of some fraud practised, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator, and these influences

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must be proved to have operated as a present constraint at the very time of making the will." The same doctrine was declared in Eckert *v.* Flowry (7 Wr. 46); McMahon *v.* Ryan (8 Har. 329); and Thompson *v.* Kyner (15 P. F. S. 368). We are obliged to say that we have been unable to find a particle of testimony in the present case, which brings it up to these requirements, and the learned Court below was, therefore, in error in submitting the question of fraud and undue influence to the jury. The eleventh, twelfth, and thirteenth assignments are sustained.

In the fourth assignment of error, certain language of the learned Judge, in his charge to the jury in relation to the creation of a trust and the selection of a trustee, is complained of. These remarks were disparaging to the trustee, and might fairly constitute a subject of argument by the adverse counsel, but we think they were not called for by anything in the testimony, and would have a tendency to mislead and prejudice the jury as to the true matters for their determination. For this reason the fourth assignment is sustained.

We think the seventh assignment is also sustained. The plaintiff's second point was in these words, "cruelty to children is no evidence, *per se*, of the want of sufficient capacity to make a will." The answer of the Court was as follows: "I affirm this point, but whether starving a child to death is within this term is for you." The affirmation of the point was a legal necessity. The added remark was entirely unauthorized by anything in the testimony, and we feel constrained to say we think it without the pale of judicial propriety. It could only subserve the purpose of creating a prejudice against the plaintiff's case, and coming from the Judge, who is always supposed to be impartial between litigants, it may have exerted a powerful influence upon the minds of the jury in producing the verdict which they rendered. It assumed, or appeared to assume, a fact not in evidence, and it tended to mislead the jury, and for both these reasons it was erroneous.

We are of opinion that the ninth assignment of error is clearly sustained as to the testimony of Samuel Fife, Sarah C. Yarnall, and William Little. Not one of these witnesses testified to any facts indicating incapacity of the testatrix, and hence they were not competent, not having been subscribing witnesses, to give an opinion on the subject. In Dickinson *v.* Dickinson (11 P. F. S. 401), we held that one not a subscribing witness to a will, having testified to no facts indicating incapacity of a testator, is not competent to give his opinion as to want of capacity. The rule is a salutary and reasonable one, and ought to be enforced whenever the circumstances require it. There is nothing in Bitner *v.* Bitner (15 P. F. S. 347), or Pidcock *v.* Potter (18 P. F. S. 342) that conflicts with the rule as stated, or with the authority of Dickinson *v.* Dickinson.

The tenth assignment of error is also sustained. The witness, Mrs. Winters, on cross-examination, was asked whether she had not given certain testimony when she testified before the examiner. She denied it, and the examiner was then called to contradict her simply as to those particular matters. Then the contestants were allowed to give in evidence her entire testimony in chief before the examiner. There was no warrant for this, and no necessity for it in order to show that her testimony before the examiner, when taken as a whole, harmonized with her testimony on the trial as to these matters, for it did not do so.

There are several other assignments of error, none of which are material except the third, which required the Court to take the case from the jury on the question of incapacity, on the ground of insufficiency of the testimony to sustain a verdict. As has been stated before, we express no opinion on this subject, as the same question may come before us after another trial on the same testimony in connection with other evidence relating to the same matter.

Judgment reversed, and venire facias de novo awarded.

Opinion by GREEN, J.

Oct. & Nov. '79, 368. Nov. 16, 1880.

Detwiler's Appeal.

Assignment for benefit of creditors—Assignee not bound to let the real estate assigned to him—Act of June 16, 1836, sects. 24 and 34 (P. L. 737)—Rights and duties conferred on assignee thereby—Rights and duties of creditors of assignor.

A voluntary assignee for the benefit of creditors is under no obligation to let the real estate included in the assignment, and, therefore, where he allowed the assignor to retain possession of, and to use said real estate:

Held (reversing the decree of the Court below), that he was not chargeable in his account with the rental value thereof.

Appeal of John S. Detwiler from a decree of the Common Pleas of Fayette County.

The following were the facts: On April 22, 1876, Samuel Detwiler executed a voluntary assignment of his real and personal estate to John S. Detwiler, in trust, to sell, etc., etc., for the benefit of the assignor's creditors. At the time of the assignment there were several judgments against the assignor, which were liens upon the lands assigned, and other judgment liens thereon to a large amount were obtained soon afterwards. The real estate included in the assignment con-

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sisted of four farms, on one of which the assignor lived and had erected a grist and a saw mill. The assignor retained possession of the real estate, running and operating the grist mill and saw mill just as he always did before the assignment, and farming the land with men under his employ. The assignee took no possession of the real estate, and received no rent therefrom. On May 3, 1878, two years after the assignment, none of the land having yet been sold, the assignee filed his account of the personal estate which he had received. Exceptions being filed thereto, Daniel Downer, Esq., was appointed auditor, who made report, surcharging the assignee with the sum of $2935, the estimated rents which the real estate and saw mill and grist mill would have produced had they been let. Exceptions having been filed on behalf of the assignee to this report, the Court dismissed the exceptions and confirmed the report, saying, *inter alia*, "We do not see how the assignee can be relieved from liability for rents of the real estate conveyed to him in the deed of assignment, and included in the appraisement. If he permitted the assignor to remain in the actual occupancy of the real estate, using and enjoying the profits thereof, we must conclude that the assignor did so as the agent of the assignee, otherwise the assignee failed in the proper discharge of his duty in not taking possession of the real estate. He seems to have considered that the property was in his possession, as he paid the taxes on it, and also paid the insurance on the buildings; and for such payment has been allowed a credit in his account."

The assignee thereupon took this appeal, assigning the action of the Court in dismissing the exceptions and confirming the decree for error.

Boyle and *Mestrezat*, for appellant.

The assignee does not receive the property for the purpose of holding and renting it. He acquires merely a naked power to sell.

Fulton's Estate, 1 Sm. 211.
Wright *v.* Wigton, 5 WEEKLY NOTES, 30.

In this respect he is like an executor with a naked power to sell.

Blight *v.* Wright, 1 Phila. 549.
Myers's Estate, 9 Id. 310.
Chew *v.* Nicklin, 9 Wr. 87.
Gump's Estate, 34 Leg. Int. 150.

D. Kaine, for the creditors of Samuel Detwiler, appellees.

Under the Act of June 16, 1836, sec. 34 (P. L. 737), it was the duty of the assignee to take the real estate into his possession. Under the Act of February 17, 1876 (P. L. 4), he should have applied to the Court and obtained an order to sell. Not having done either of these, he has failed in his duty, and must account for the value of the real estate.

January 3, 1881. THE COURT. This contention relates to the liability of the appellant for rent of the real estate assigned to him for the benefit of creditors. In April, 1876, Samuel Detwiler executed a voluntary assignment of his real and personal estate to the appellant, in trust for the latter to sell and dispose of the same, and if any part thereof remained, after paying the debts of the assignor, to deliver over and reconvey the same to him. At the time the assignment was made, there were several judgments against the assignor, which were liens on the lands assigned, and other judgment liens thereon to a large amount were obtained soon afterwards. The assignor retained possession of the real estate. The appellant took no possession thereof, and received no rent therefrom. On settling his account of the personal estate which he had received, exceptions were filed thereto, the main ones being for his not having charged himself with the value of the rents of the real estate. The Court held him liable therefor, and decreed accordingly. This is assigned for error. The correctness of this decree must be ascertained by a consideration of the effect of the assignment, and of the duty thereby imposed on the assignee.

It is well settled that a voluntary assignee is the mere representative of the assignor, enjoying his rights only, and is bound where he would be bound. Neither he nor the creditors for whom he holds the property in trust, are purchasers for value. They are not parties to the deed. They have not relinquished anything in compensation for the benefits of the trust. They have not agreed to look to the property assigned for the satisfaction of their claims. They have no title to the property itself. They acquire a right only to enforce the duty undertaken by the assignee. (Twelves *v.* Williams, 3 Whart. 485; Jefferis's Appeal, 9 Casey, 39; Fulton's Estate, 1 P. F. S. 204; Wright *v.* Slingluff, 3 Norris, 163; Morris's Appeal, 7 Id. 368.)

The assignment on its face does not impose on the assignee any duty to let the real estate. It was liable at any time to be sold by virtue of executions on the judgment liens. Any attempted letting must have been for a term of uncertain duration. A lien creditor could proceed at his will to sell the real estate. Other creditors, on application to Court, could enforce a sale. In view of the fact that no creditor caused a sale to be made, the presumption is that no sale was desired while the value of real estate was so much depreciated.

It is contended that inasmuch as the 34th section of the Act of 16th June, 1836 (Purd. Dig. 782) vests the estate in the assignee, and makes it his duty to take possession of the property, if he fails so to do, he is liable to the creditors for an amount equal to the value of the rents. At

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first sight, this section might produce such impression on the mind. In general terms, it deals with all the property assigned, and gives a right of possession. It then stops. It does not profess to declare or define the duties of the assignee after he has taken possession of the land. A previous section of the same Act had already defined his duty to be "to convert the real and personal estate of such insolvent into cash" (Id. 780, pl. 32). Thus the manifest intent of the Act is to give a power of sale, not a power to let. The object of the assignment is to convert the property by sale, and not for the assignee to work the land or let it to others. His position is similar to that of an executor with a naked power of sale, yet we are not aware he has ever been held liable for rents not received. A creditor cannot rest on his rights, refrain from all action to induce a sale, and thus charge the assignee with rents which he never received. The learned Judge, therefore, erred in surcharging the appellant with rents not received, and the decree must be modified accordingly.

And now it is ordered and decreed, that the sum of $2935 be stricken from the sum adjudged to be in the hands of the appellant; and the residue, being $7487.03, be and hereby is adjudged and decreed to be the true sum due from him. So modified, the decree is affirmed. It is further ordered that the costs of this appeal be paid out of the fund.

Opinion by MERCUR, J.

Oct. & Nov. '80, 289. Nov. 10, 1880.

Gray's Appeal.

Errors and appeals—What not reviewable—Orphans' Court—Appointment of guardians, a matter in discretion of the Court below—Right of ward to make choice of new guardian upon his arrival at the age of fourteen years.

The legal discretion of the Orphans' Court in the appointment of guardians of minors is not subject to review in a court of error.

The Orphans' Court having decided that a minor, for whom a guardian had been appointed by the Orphans' Court while under the age of fourteen years, has not a naked legal right to make choice of a new guardian upon his arrival at the age of fourteen years:

Held, that such decision being made in the exercise of a legal discretion, is not subject to review by the Supreme Court.

McCann's Appeal, 13 Wright, 304, followed.

Appeal by Phineas T. Gray from a decree of the Orphans' Court of Allegheny County, refusing his petition to make choice of a new guardian.

The facts were as follows: On Nov. 29, 1873, Phineas T. Gray, by his next friend, presented a petition to the Orphans' Court of Allegheny County, setting forth that he was a minor child of P. H. Gray, deceased, under the age of fourteen years, and had no guardian; that he was entitled to real estate of no annual value, and to personal estate amounting to $2000; and praying the Court to appoint some fit person guardian of his person and estate. The Court appointed Joseph H. Gray guardian of said minor, who gave bond and entered upon the discharge of his duties.

On September 18, 1880, said Phineas T. Gray presented another petition to the Orphans' Court, setting forth the foregoing facts, and that he was now over the age of fourteen years, to wit, of the age of fifteen years, and praying the Court to allow him to make choice of some fit person as guardian of his person and estate, instead of the said Joseph H. Gray, heretofore appointed by the said Court. The petition assigned no reason for the change of guardianship prayed for.

A citation to show cause having been issued, the guardian filed an answer, asking the Court to refuse the application on the ground that the minor had been unduly influenced by some of his relatives against his guardian. A general replication having been filed, the parties appeared for a hearing before the Court, and the counsel for respondent called the respondent to prove the facts alleged in his answer, when he was stopped by the Court; the Court ruling that the burden of proof was upon the petitioner to show cause for a change of guardian. The petitioner having refused to show cause, by writing filed, based his right to make choice "without showing any cause, but upon his naked legal right to make choice arising upon his arrival at the age of fourteen years." Whereupon the Court, HAWKINS, P. J., made a final decree refusing the application, and filed the following opinion: "When the Legislature gave the 'Orphans' Court of each county . . . the care of the persons of minors, resident within such county, and of their estates, and . . . power to admit such minors when and as often as there shall be occasion to make choice of guardian,' it gave, in plain terms, discretionary power to that Court in the appointment of guardians. (McCann's Appeal, 13 Wr. 304.) The law presupposed the immaturity of minors and the consequent necessity of 'care' over their persons and estates. Is there 'occasion' in the present case, to admit the petitioner to make choice of a new guardian instead of the old? He already has an unexceptionable guardian. A change of guardian will involve the filing and auditing the account of the old guardian, and the expense and cost incidental thereto, which must be borne by the minor's estate. It

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may, and probably will, become necessary to call in the present investment, and a change of policy will follow in the administration of the trust; this will cause delay and consequent loss to the minor's estate. These are some of the obvious objections to change. On the other hand, no special advantages are adduced for making it. The application is based entirely on an asserted 'naked right of choice.' If such right exists, why come into the Orphans' Court at all? If petitioner is competent to make choice without the supervision of this Court, then he does not need its 'care,' he is competent to transact his own business, and there is no occasion for a guardian; but if, as the Legislature has asserted, he needs its 'care,' he needs its supervision in the selection of a guardian. There can be no 'occasion' to make choice of a guardian, where no advantages can be attained. It follows that the circumstances of this case do not justify a change of guardians, and the application to be admitted to 'make choice' must be refused."

The petitioner, thereupon, took this appeal, assigning as error, the refusal of his petition.

J. E. Kuhn, for appellant.

In the case of minors, over the age of fourteen, the discretionary power of the Orphans' Court is exercised in the approval or non-approval of the choice of the minors—not in the absolute denial of the right of choice which we claim the Orphans' Court gave in this case.

Arthur's Appeal, 1 Grant, 55.
Lee's Appeal, 27 Pa. St. 229.
Lewry's Estate, 5 WEEKLY NOTES, 475.

C. W. Robb (*S. A. McClung* with him), contra.

It is within the discretion of the Court to determine whether there is any *occasion* for the minor to make choice.

McCann's Appeal, 13 Wright, 304.

Nov. 22, 1880. THE COURT. As we understand the decision in McCann's Appeal (13 Wright, 304), it is very correctly stated in the syllabus: "The legal discretion of the Orphans' Court in the appointment of guardians of the persons and estates of minors is not subject to review by a court of error." It follows that we ought not to intervene, even if we thought that the discretion of the Court below was not properly exercised in this case.

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM.

Jan. '80, 113. March 4, 1881.

Jones's Appeal.

Executors and administrators—Right to administer—Non-residents—Acts of 15 March, 1832, § 22, and of 29 March, 1832, § 27—Appointment by Register—Revocation of letters erroneously granted—Rights of legatees—Right to nominate.

In granting letters of administration, the Register is not at liberty to disregard the clearly expressed wishes of the parties preferred by the law and entitled to the estate, even if they be non-residents of the Commonwealth. If he has appointed a total stranger, he should, upon application of such parties, vacate the letters already granted, and appoint some suitable nominee of such parties in whom they can confide.

Appeal of A. H. Jones from a decree of the Orphans' Court of Bucks County, reversing the order of the Register of Wills, and revoking the letters *d. b. n. c. t. a.* upon the estate of Wm. Early, granted by the Register of Wills to the appellant.

The following are the material facts of the case: Wm. Early died in Bristol, Bucks Co., in 1870, leaving a last will and testament, whereby he devised and bequeathed the bulk of his property, after certain legacies, to his daughters S. J. Painter and M. A. Von Forstner, and appointed one J. R. Green his executor and trustee "to take charge of" the shares of his daughters in his estate. Green dying, one J. L. Stackhouse was appointed administrator *d. b. n. c. t. a.*, but died July 10, 1879, without having fully administered. The debts, however, were all paid and administration completed with the exception of the residue and a contingent legacy of $500. On August 1, 1879, A. H. Jones, the appellant, a stranger to the estate, neither creditor, legatee, nor next of kin, was appointed administrator *d. b. n. c. t. a.* of the estate and entered upon his duties. On September 16, 1879, the testator's two daughters, residents respectively of New York and Texas, filed their petition with the Register, praying for a citation to A. H. Jones to show cause why his letters should not be revoked. A citation accordingly issued and, after argument, the Register refused to revoke the letters. The petitioners thereupon appealed to the Orphans' Court, and that Court after argument, entered a decree revoking the letters granted to Jones, and directing the Register to issue letters to Anthony Swain or such other fit person as the petitioners should nominate. The following opinion was filed by WATSON, P. J.:—

"The 22d sec. of this Act of 15th March, 1832 (P. L. 140, Purd. 410, pl. 27), provides that in all cases of an administrator with a will

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annexed, when there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue. The 27th sect. of this same Act (Purd. 409, pl. 21), provides that letters testamentary granted to any person not being an inhabitant of the State, and letters of administration to any person whatsoever, without a bond with sureties being taken, shall be void.

"The 27th sec. of the Act 29th of March, 1832 (P. L. 195, Purd. 454, 239), provides that when any executor or administrator shall have removed from the State, the letters may be vacated by the Orphans' Court, on application of any person interested in the estate.

"Adopting this last quoted section as the criterion of qualification, it has been held in some cases that non-residence is a disqualification for the office of administrator.

"The cases on the subject are not all easily reconcilable with each other; some of them appear not to have been very fully considered. In Sarkie's Appeal (2 Barr, 157), the 27th sec. of the Act 15th of March, 1832, is quoted as prohibiting the granting of letters testamentary to a non-resident; a careful reading shows that the prohibition extends only to such grant without security. The last case on the subject is Sharpe's Appeal (6 Nor. 163). There letters had been granted on the application of the kindred and creditors. It was held that they ought not to be revoked on the request of the widow, who, at the time they were granted, was a non-resident, and who afterwards came into the State. In Odiorne's Appeal (4 Smith, 175), it was said a widow, who had abandoned her husband, was not in a position to object that administration has been granted to one out of this State. It is to be observed that it is only a person interested in the estate who can ask that the letters of an executor or administrator who has removed shall be revoked; it would seem to follow that such an one can object to the original granting of letters to a non-resident. I feel very confident that no case can be found where it has been held that the Register is at liberty to disregard the clearly expressed wishes of the parties preferred by the law and entitled to the estate, whether they be residents of this Commonwealth or beyond its borders, and grant letters to a total stranger whose only interest is the expectation of earning commissions by his services in the execution of the trust; such stranger is not in a position to object to the granting of letters to a non-resident. The objection can be made only by the party in interest; if the parties who are entitled to the estate are not in a position to administer it themselves, then the trust should be committed to their nominee, who has their confidence, and whose services are to be paid for from their funds."

A. H. Jones took this appeal, assigning for error the decree of the Court as above.

Alex. McIlwee (with him *B. H. Brewster*, *L. B. Thompson*, and *H. Yerkes*), for appellant.

There was no allegation made of unfitness on the part of the appellant; the parties wanted him ousted without any good reason. The Court based its decision on the appellees' right to nominate a person from a particular class; but the appellees were themselves incompetent.

Act of 15 March, 1832, §§ 18–23 (P. L. 140).
Cornpropst's Appeal, 9 Casey, 537.
Hassinger's Appeal, 10 Barr, 454.
Ellmaker's Estate, 4 Wharton, 38.
Sarkie's Appeal, 2 Barr, 157.
Sharp's Appeal, 6 Norris, 163.

Being incompetent themselves, they could not control the decision of the Register by nominating a substitute for his appointee, without showing reasonable cause. The Act of 1832 makes no provision for nominees or substitutes for the parties in interest, and, though it has been said that the Register ought to respect their recommendation of a substitute, the statute prescribes no rule of choice in this regard. It is to be presumed that the Register, in appointing the appellant here, exercised his discretion wisely.

Wood's Appeal, 5 Sm. 334.
McClellan's Appeal, 4 Harris, 116.
Shomo's Appeal, 7 Sm. 358–9.

B. F. Gilkeson, for the appellees.

The estate here has been practically settled, and almost the only thing now remaining, is the management of the trust for the two daughters. It cannot be permitted that a mere stranger, not wanted by any of the parties interested, can come in and seize the estate, and hold it against those who really have to do with it.

The letters were properly revoked, if for no other reason, because they were granted without notice to the residuary legatees.

Maupay's Est., 2 Brewster, 491.
McCaffrey's Est., 2 Wr. 333.

Moreover, either of the petitioners had the right to administer herself or to nominate a substitute; the case here is that of an administrator with the will annexed, and is specially provided for by the—

Act of 15 Mar. 1832, §, 22 P. L. 140, Purd. Dig. 410.

Non-residence does not disqualify an executor, and an administrator, under the 67th section of the Act of 1832, stands in the same position as an executor. The right to administer is predicated upon interest in the estate, and all the cases recognize that the Register is bound to respect the nomination of the next of kin.

Ellmaker's Est., 4 Watts, 34.
Beiber's Appeal, 1 Jones, 462.
McClellan's Appeal, 4 Harris, 110.
Shomo's Appeal, 7 Sm. 356.

There is no sound basis for the argument that

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non-residence disqualifies for administration *c. t. a.* The cases cited do not support it. Sharp's Appeal, *supra*, was a case of general administration, and not with the will annexed; and there is nothing in the language there to decide this case. In Hood on Executors, p. 61, note 6, the expressions of SERGEANT, J., in Sharp's Appeal, in reference to residence, are criticized as a mistake, shown to be such by the Act itself. This view is supported in—

Odiorne's Appeal, 4 Sm. 179.

March 14, 1881. THE COURT. We affirm this decree upon the opinion of the learned President of the Court below.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

May, '81, 75. May 4, 1881.

Brubaker's Appeal.

Administration—Letters should not be granted to two jointly unless they agree—Double administration not allowable—Register of Wills—Register's right of selection among representatives standing in same class—Not reviewable—When he may not revoke letters—Orphans' Court practice.

The Register of Wills should not grant letters of administration to two or more persons upon one estate unless they are mutually agreed to accept the trust.

The granting of two separate co-ordinate administrations upon one estate is a thing wholly unknown to our jurisprudence.

Where the class primarily entitled to administration upon a decedent's estate consists of several persons, it is the duty of the Register to grant letters to such one or more of them as he shall judge will best administer the estate. He may thus grant letters to them all jointly, if they so desire; or, in his discretion, he may select one of them and commit the administration to him alone to the exclusion of the others, and when properly exercised this discretion is not the subject of review.

Where a class are all equally related to the intestate or concerned in his estate, primogeniture will give no right of preference so as to weigh against the wish of the majority in interest, yet if things are precisely equal, if the scale is exactly poised, seniority will incline the balance.

When the Register has once exercised his discretion by selecting from a class one or any number of persons to whom he grants letters of administration, it is no longer in his power to revoke the letters thus granted, except for sufficient cause.

Appeal from a decree of the Common Pleas of Lancaster County, reversing the decision of the Register of Wills, and directing that letters of administration on the estate of Jacob Sheaffer, deceased, be granted to Mrs. Lavina Wolf.

The facts of the case were as follows: Jacob Sheaffer died intestate on August 14, 1880, leaving to survive him as his only heirs-at-law two daughters, Elizabeth Brubaker, wife of Levi B. Brubaker, and Lavina Wolf, wife of Henry Wolf, both of whom resided at Millway. Mrs. Wolf attended her father during his last illness, and was present when he died; Mrs. Brubaker was the elder daughter, but during this period was confined to her house by illness. Mrs. Wolf called on Mrs. Brubaker on the evening of the day of the funeral, and in conversation said (referring to the administration): "We will just leave everything as it is until you are well again." Mrs. Brubaker replied, "Yes." When Mrs. Wolf replied, "Well, we will hang up something [meaning a caveat] so that nobody else can get in." No caveat, however, was filed. Mrs. Wolf called again several times between the 17th and 25th of August; but nothing further was said on the subject of the administration until the latter date, when Mrs. Brubaker said she would administer alone, that they could never settle if they acted together. A few days subsequently Mrs. Wolf discovered that letters of administration had been granted to Mrs. Brubaker alone, on the 24th of August, the Register having gone to Millway for that purpose, in response to a request, and being given to understand that no opposition would be made. Mrs. Wolf thereupon applied to the Register for a hearing and asked to be joined in the administration with her sister. The Register refused the hearing and denied her application, whereupon she took an appeal from the Register's decision to the Orphans' Court. Depositions were taken, showing the foregoing facts, and also that the respective husbands of Mrs. Brubaker and Mrs. Wolf were debtors to the estate and were on bad terms with each other. After argument, the Court, in an opinion by PATTERSON, J., sustained the appeal on the ground that the sisters were entitled to be put upon an equality, but, deeming it improvident to force a joint administration on unwilling parties, directed that separate letters of administration be issued to Mrs. Wolf upon her entering security, providing her husband assented by joining in the administration bond.

From this decree Mrs. Brubaker took this appeal, assigning the decree for error.

H. C. Brubaker and *A. J. Eberly*, for the appellant.

S. P. Eby, for the appellee.

May 23, 1881. THE COURT. Jacob Sheaffer survived his wife and died intestate August 14, 1880, leaving as his only heirs-at-law two married daughters, Elizabeth Brubaker and Lavina Wolf. Ten days after his decease, letters of administration on his estate were duly granted by

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the Register to Mrs. Brubaker, the elder daughter, and on September 2d the petition of the younger daughter and her husband was presented, praying that she be joined with her sister in the administration already granted. This application was refused by the Register, and thereupon the petitioners appealed from his decision to the Orphans' Court, and a rule, with notice to Mrs. Brubaker, was granted to show cause why Mrs. Wolf should not be joined in the administration. Under this rule depositions were taken by both parties, and the Court, after hearing, on January 29, 1881, made a decree sustaining the appeal and ordering letters of administration to be issued to Mrs. Wolf "on her father's estate upon her entering good and sufficient security with the Register for the faithful performance of her duties as administratrix, providing her husband's assent is obtained, which assent will be evidenced by his joining in the administration bond."

It is contended that the Court erred in thus ordering letters of administration to be issued to Mrs. Wolf; and in forcing a joint administration against the consent of Mrs. Brubaker, to whom letters had been previously granted.

The learned Judge in his opinion says: "The present administratrix and the appellant are both equally competent to perform the duties of administrator; both stand in equal degree of relationship to the decedent; both have equal share or interest in his estate; and looking on this appeal, we look at the whole case on its merits and the rights of the respective parties, and we are of the opinion that letters of administration should be granted to this appellant, that both may be on an equality. But the Court does not feel at liberty to enjoin a joint administration between these sisters; indeed the prevailing rule is not to enforce a joint administration on unwilling parties."

It is very evident from this that the Court recognized the impropriety of attempting to create a joint administration against the protest of one of the parties thereto. The nature of the office forbids it. Joint administration necessarily involves joint liability, and no one can be compelled to assume such responsibility. Due regard to individual rights as well as the interest of the estate require that administration should not be committed to two or more persons unless they mutually agree to accept the trust. Nor does the decree in this case require joint administration. If it did it would be manifestly wrong; but, its effect is to create two separate co-ordinate administrations on the same estate, and for that reason it is equally objectionable. Such a thing is unknown to our jurisprudence even in theory, and in practice it would be entirely impracticable. Under the English statute, the Ordinary may commit the administration to the widow and next of kin jointly, or he may grant to one exclusive administration of a particular portion of the goods of the intestate and to the other a separate administration of the residue; but no warrant for any such practice as that contemplated by the decree of the Orphans' Court can be found in our statute.

When the class primarily entitled to administration consists of several persons, it is the duty of the Register to grant letters to such one or more of them as he shall judge will best administer the estate. He may thus grant letters to them all jointly, if they so desire; or in his discretion, he may select one of them and commit the administration to him alone, to the exclusion of the others; and when properly exercised, his discretion is not the subject of review either in the Orphans' Court or here. He is not bound to select the oldest in preference to the youngest of the class entitled to administration. Primogeniture gives no right of preference, so as to weigh against the wish of the majority of interests; yet if things are precisely equal,—if the scale is exactly poised,—being the elder brother would incline the balance (Hood on Executors, 64; 1 Williams on Ex'rs, 427); and the same principle applies to the elder of two sisters. In Thomas's Appeal (7 P. F. Smith, 356) it is said that among children the right does not depend on seniority: it is entirely in the discretion of the Register; but when he has exercised his discretion by selecting one of the sons, it is no longer in his power to revoke the letters thus granted and issue them to another, except for sufficient cause. "When administration has been committed to any of the next of kin, others, even in the same degree of kindred, have during the life of the administrator no title to a similar grant." (Hood on Executors, 64.) In the case before us the two daughters of the intestate were equally competent to administer, and the Register might have granted letters to both jointly if they had so desired; but he was not bound to do so. In the exercise of his discretion he selected Mrs. Brubaker, who requested that letters should be issued to herself alone. Having done so, it was not in his power to revoke the letters thus granted, nor to join the younger sister in the administration against the will of the other. Nor is there anything in the circumstances, as disclosed by the testimony, to justify the Court in reversing the decision of the Register and creating a dual administration, which if it could be permitted to stand, would undoubtedly be prejudicial to the interests of the estate.

The decree of the Orphans' Court is reversed and set aside, and the decision of the Register is affirmed; and it is ordered that the costs, including the costs of this appeal, be paid by the appellee.

Opinion by STERRETT, J.

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Oct. & Nov. '80, 130. Oct. 25, 1880.

Barr and Daugherty v. Boyles.

Evidence—Sheriffs and constables—May justify under execution regularly directed to them without showing judgment on which founded—Fraud—Delivery of possession of personalty on sale thereof—How far necessary as against creditors of vendor—Court and jury.

Where a constable is sued in trespass for levying upon and selling personalty he may justify by putting in evidence an execution directed to him, regular in form, and containing nothing on its face to indicate want of jurisdiction in the justice by whom it is issued, without showing the judgment, or the regularity of the proceedings on which said execution is founded.

Semble, that it is *aliter* in a suit against the plaintiffs in the execution.

Whether a debtor assigning his property has done so with fraudulent intent as against his creditors is for the jury.

Circumstances under which it is for the jury to say whether a vendor of personalty has so far made delivery of the possession thereof as to render the sale good as against his subsequent execution creditors.

Error to the Common Pleas of Armstrong County.

Trespass *de bonis asportatis*, by Joseph H. Boyles against W. S. Barr and Robert Daugherty for levying upon and selling as constables certain machinery and fixtures of an oil well as the property of one Floyd which plaintiff claimed belonged to him.

On the trial, before BOGGS, P. J., the following facts appeared: William P. Floyd, being the lessee of a certain farm upon which was an oil well and certain machinery and fixtures, and having the right under the terms of his lease to remove said machinery and fixtures from the land, by a bill of sale dated November 29, 1875, sold his leasehold interest in said property, and also said machinery and fixtures to Joseph H. Boyles, the plaintiff, for $425. A bill of sale was made out and Floyd immediately went with Boyles to the land, showed him the machinery and fixtures in a little wooden house, and gave him the key to the door of said house. Boyles then locked the door and left the land. At the time of this sale, it appeared that Floyd's debts did not exceed $150, and that he was worth, according to his own estimate, between $2000 and $3000. The value of the fixtures and machinery sold was estimated between $200 and $250. During the December ensuing the sale judgments were recovered against Floyd aggregating about $150. Floyd remained in possession of a house on the property sold by him near the oil well, where he lived, and which he had reserved to himself in the bill of sale, agreeing to pay a small rent to Boyles therefor.

About three weeks after this sale Boyles came again upon the land, nailed up the house containing the machinery and fixtures, and went away. On the 6th or 7th of January, 1876, he again returned and instructed Floyd and some other men to remove the machinery and fixtures for him as he wanted them elsewhere. Floyd and the others accordingly set to work, but on January 8, 1876, were interrupted by Barr and Daugherty, the defendants, who as constables levied on the fixtures and machinery as the property of Floyd. Floyd told defendants he had put the property out of his hands and that he had things fixed so that his creditors couldn't get a cent out of the property. A day or two afterwards Boyles served on them a formal notice of his claim of ownership to the goods. Defendants, nevertheless, proceeded with their levy, and on January 14 following sold the property to purchasers by whom it was taken away, whereupon Boyles brought this suit.

On the trial defendants produced as a witness James Sulley, Esq., a justice of the peace, who testified to the truth of a record on his docket of two judgments recovered by Adams and McBride respectively against Floyd, and to the fact of executions having been issued by him against the chattels of said Floyd in pursuance thereof, which writs of execution were directed to defendant Barr as constable, and which were returned as having had money made thereon by virtue of a levy and sale of the machinery and fixtures in question. These executions were then offered and admitted in evidence.

The defendants then offered in evidence an execution dated the 8th day of January, 1876, by H. R. Fullerton, a justice of the peace, and under his seal, directed to Robert Daugherty, constable, at the suit of Phillips & Co. *v.* Floyd, commanding him to make the sum of $45.55; to be followed by evidence that H. R. Fullerton was a justice of the peace, that the signature to the execution was his, that he had delivered it to Daugherty, and that Daugherty under such execution levied upon and sold some of the property in this suit, for the purpose of justifying his selling of the property as the property of Floyd.

Objected to by plaintiff because there was no offer to prove a judgment on which said execution was founded. Objection sustained. Evidence excluded. (First, second, and third assignments of error.)

The plaintiff requested the Court to charge: "That fraud must be proved or inferred from competent evidence and cannot be presumed, and if the jury believe from the weight of evidence in this cause that the sale on the 29th day of Nov. 1875, of the oil-well rig and fixtures by Floyd to the plaintiff was *bona fide* and for a valuable consideration paid, without notice to or

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knowledge of the plaintiff that Floyd was indebted, in that event the verdict of the jury should be for the plaintiff." Answered in the affirmative if there was such delivery and change of possession, as is required, as explained in general charge. (Fifth assignment of error.)

The defendants requested the Court to charge as follows: "If the jury believe from all the evidence in the cause that at the time of the alleged sale by Floyd to Boyles on 29th November, 1875, the object and intention of the parties was to prevent the property being made liable for the claims of Floyd's creditors, then such alleged sale is void, and the verdict of the jury must be in favor of defendants." Answered in the affirmative so far as Barr is concerned and his executions extend, and in the negative so far as property not taken aside from his execution, as explained in general charge. (Ninth assignment of error.)

Plaintiff requested the Court to charge as follows: "That it is not necessary in order to perfect a purchaser's title to an oil-well rig, including the derrick, engine, and boiler, etc., attached to the land, that the purchaser should remain at or in the property purchased, but he is only required to take such possession as the property is susceptible of, and the taking of the key of the engine house and locking the door thereof and retaining the key is such possession as will protect the purchaser as against the vendor and his creditors. Answered in the affirmative as qualified and explained in general charge.

And also, "That there is no authority shown in the case to justify Robert Daugherty in selling any of the property claimed in this case." Answered in the affirmative, as explained in general charge.

The defendants requested the Court to charge: "There is no evidence in this cause that actual possession of all the property mentioned in the bill of sale of 29th November, 1875, was delivered or even attempted to be delivered by Floyd to Boyles prior to 8th January, 1876. We instruct you that such alleged sale was fraudulent in law and conveyed no property to Boyles as against Floyd's creditors." *Answer.* The evidence is for the jury, and the request is refused, that is also for the jury, as explained in general charge."

And also, "If the jury believe that the property alleged to have been sold by defendants on 14 January, 1876, was by Floyd on 29 November, 1875, sold or attempted to be sold to Boyles by bill of sale, and that the purpose and intention of said Boyles at the time of such alleged purchase was not to use said property in operating upon the land where it then was but to remove the same to Butler County, and that said Boyles took no possession of the same (other than locking the door of the engine house), but permitted Floyd to remain in possession of at least part of the property mentioned in said bill of sale and to exercise acts of ownership over the same and to afterwards sell part of it, then we instruct you that said alleged sale by Floyd to Boyles was fraudulent in law and conveyed no property to Boyles as against Floyd's creditors. *Refused*—that is for the jury, as explained in general charge.

The Court charged, *inter alia*, as follows:—

"The concurrent possession with the vendor is colorable, where the vendor appears to keep the same relation to the property that he did before the sale; the Court will pronounce it fraudulent and colorable *per se*. While it is settled that where there has been such sufficient actual or constructive delivery to the vendee, the fact that the vendor is employed as a servant about the premises in a capacity where he holds out no right of ownership, does not constitute such concurrent possession as the law demands, and the Court, in such case is relieved from pronouncing it so. In such case it is a question for the jury whether the change of possession has been actual and *bona fide;* and so, gentlemen, I leave this case to you to say from the evidence how that was.

"You will carefully consider all the evidence in the case and determine respecting the nature of the transaction as to whether or not the purchase of the property in dispute by the plaintiff from Floyd was *bona fide* or whether it was colorable and fraudulent, with intent to hinder, delay, and defraud creditors; and as you find that question one way or the other, so should be your verdict. If you find it *bona fide* and honest, then your verdict should be for the plaintiff for such measure of damages as I have already indicated; but if you find it fraudulent and colorable as I have already explained, your verdict should be for the defendants on the executions in the hands of W. S. Barr; but as to any of it sold by the defendants which has not been levied and sold on the executions in the hands of Barr, your verdict should be for the plaintiff, giving compensatory damages therefor, as the defendants have shown no warrant or execution to justify themselves for selling any property not levied and sold in said three executions. This would be so even if the sale to Boyles was in fraud of creditors; it would still be binding between Floyd and Boyles, and no outside person could attach it except creditors."

(Tenth assignment of error.)

Verdict and judgment for plaintiff, whereupon defendants took this writ, assigning for error the rejection of their offer of evidence, the answers of the Court to the points presented by plaintiff and defendants, and the portion of the charge above cited.

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John Gilpin and *G. S. Crosby*, for plaintiffs in error.

It was enough for plaintiffs as constables to show an execution issued by competent authority without showing the judgment whereon it was founded.

Paul *v.* Vankirk, 6 Binn. 124.

The evidence in this case was so clearly indicative of fraudulent intent on the part of Floyd for transferring the property to Boyles; and the delivery of possession to the purchaser, or marking it with any indicia of his ownership, so plainly lacking that the Court should have charged as matter of law that the sale was void as against Floyd's creditors.

Chase *v.* Ralston, 6 Casey, 539.
Haynes *v.* Hunsicker, 2 Casey, 58.
McKibbin *v.* Martin, 14 Smith, 352.
Billingsley *v.* White *et al.*, 9 Smith, 465.
Dunlap *v.* Bournonville, 2 Casey, 72.
Trunick *v.* Smith, 13 Smith, 21.
Steelwagon *v.* Jeffries, 8 Wright, 407.
Garman *v.* Cooper, 22 Smith, 32.
Clow *v.* Woods, 5 S. & R. 275.
Streeper *v.* Eckart, 2 Wharton, 308.
Milne *v.* Henry, 4 Wright, 357.
Brawn *v.* Keller, 7 Wright, 104.

J. P. Colter (*E. S. Golden*, with him), for the defendant in error.

The defendants clearly could not put in evidence an execution without showing the judgment on which it was founded.

The question of the validity of Boyle's title was properly submitted to the jury.

November 15, 1880. THE COURT. This was an action of trespass for seizing and carrying away the machinery and fixtures of an oil well. They were on land leased for a term of years, with a right in the tenant to remove them therefrom. At a previous time they had been unquestionably owned by one Floyd. The plaintiffs in error were constables. They sought to justify the taking under and by virtue of executions against Floyd, to them severally directed. The defendant in error claimed to have purchased the property of Floyd, and to have taken possession thereof prior to any levy thereon. The validity, as against Floyd's creditors, of this alleged sale was denied and presented the main contention in the case.

The executions directed to Barr, and the records of the judgments on which they issued were given in evidence. Under the several offers covered by the first, second, and third assignments, the plaintiffs in error offered in evidence the execution directed to Daugherty, to be followed by proof that H. R. Fullerton by whom it purported to be issued, was a justice of the peace in and for the County of Armstrong, having his office at Parker City therein, and as such justice, and at his office, he issued the execution under his seal, and delivered the same to Daugherty as constable; that as such constable, he levied on, duly advertised and sold as the property of said Floyd some of the articles in question. The execution was in due form. It recited that a judgment had been obtained before said justice, by Thomas Phillips & Co. against W. P. Floyd, for the sum of $45 together with $7.20 costs, which judgment remained unsatisfied; and commanded him, said Daugherty, to levy the said debt, and interest thereon, together with costs, on the goods and chattels of the said debtor, and to expose the same to sale, etc. The evidence was objected to, and rejected by the Court by reason of the judgment recited in the execution not being shown.

In a suit against the plaintiffs in the executions for seizing and selling the property, they must show the judgments on which the executions issued, to justify the taking. The rule is held differently when the suit is against a sheriff or constable, who are ministerial officers. When an execution, regular in form, and nothing on its face indicating want of jurisdiction in the justice, is directed to the constable and placed in his hands, it is sufficient to protect him in duly executing it according to its commands. He is not required to examine the record to ascertain whether the justice had jurisdiction, and whether the proceedings are all regular. The apparent regularity and presumed jurisdiction, as evidenced by the execution, not only protect him in its due execution, but make it his duty to proceed to execute the writ. Among the numerous decisions recognizing this principle, may be cited Kerlin *v.* Heacock, 3 Binn. 215; Paul *v.* Vankirk *et al.*, 6 Id. 123; Allison *v.* Rheam, 3 S. & R. 139; Kingsbury *v.* Ledyard, 2 W. & S. 37; Moore *v.* Allegheny City, 6 Harris, 55; Billings *v.* May, 11 Id. 189; Cunningham *v.* Mitchell, 17 P. F. S. 78; Fall Creek Coal and Iron Co. *v.* Smith, 21 Id. 230; also Savacool *v.* Boughton, 5 Wend. 170; Beach *v.* Furman, 9 Johns. 330; Holden *v.* Eaton, 8 Pick. 437. It follows that the offer of evidence covered by the third assignment, in connection with those covered by the first and second, was improperly rejected.

Under the evidence admitted, no error is discovered in the fifth, ninth, and tenth assignments. The remaining assignments relate to the sale and delivery of possession to the defendant in error. As a whole the charge contains a fair exposition of the law. Qualified and explained as the answers to the points are, by the general charge, we see no sufficient cause therein for reversal. The substantial error consists in the rejection of evidence, and for this—

Judgment reversed, and a venire facias de novo awarded.

Opinion by MERCUR, J.

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Common Pleas—Equity.

C. P. No. 2. June 8, 1881.

Ward v. Mooney.

Equity—Jurisdiction—Adequate remedy at law—Certificate of counsel that there is none—Pledgor and pledgee—Duty of pledgee to retain collaterals, and not to use them in satisfaction of the debt unless authorized.

Sur demurrer to bill.

The bill set forth that the complainant leased from the respondent the New Columbia Hotel at Cape May for the season of 1880, and as security for payment of rent, deposited with him thirteen one thousand dollar bonds of the Susquehanna Canal Company. That the complainant has paid his rent in full, "but the defendant has refused and neglected, and does refuse and neglect, to return the same. That said defendant claims to retain possession of the said bonds, in violation of the terms of said agreement of lease, as security for other claims for which there is no legal foundation."

The prayer was, *inter alia*, that the defendant be required to account for all profits and income he has received from said bonds; that defendant be required to deliver up said bonds; and that an injunction be granted, restraining the defendant from selling, assigning, transferring, or delivering said bonds to any person other than the complainant.

The defendant demurred because the remedy in the case would be at law and not in equity, and there is no certificate of counsel to the bill that the case is of such a nature that no adequate remedy can be obtained at law, or that the remedy at law will be attended with great additional trouble, inconvenience, or delay.

Further, because it is not stated, nor does it appear, that the defendant proposes, or is going to sell, assign, transfer, or deliver said bonds to any person other than the plaintiff.

R. P. White, for the demurrer.

There is no ground of equitable relief set up by the bill.

Bispham's Equity, § 460.
Gloninger *v.* Hazard, 6 Wr. 389.

The bill was defective in not having the certificate of counsel.

Everhart *v.* Everhart, 3 Luz. L. R. 59.
Act of Oct. 13, 1840, Purd. Dig. 590, § 4.

Samuel Dickson, contra.

The holder of a collateral cannot apply it to the payment of a debt due him unless expressly authorized to do so.

Conyingham's Appeal, 7 Sm. 474.

THE COURT. Demurrer overruled.

C. P. No. 4. June 9, 1881.

Wallace v. Boyd.

Attorney and client—Fraudulent pledge of corporation stock—What amounts to notice to the pledgee—Negligence.

Sur exceptions to report of master.

Bill in equity, filed by Wallace *et al.*, executors of R. W. Pechin, deceased, against the Pennsylvania Railroad Co. and Elizabeth Boyd, to compel the transfer on the company's books of certain shares of stock, the certificates for which, at the time of filing the bill, were in the name of Elizabeth Boyd, one of the defendants, but were in the possession of plaintiffs as executors, together with blank powers of attorney for the transfer of the same.

Cross bill by Elizabeth Boyd, averring that the certificates and powers of attorney had been fraudulently obtained from her; to compel the surrender of them; and praying an injunction to prevent the company from transferring the same.

The cause was referred to an examiner, and afterwards to Edward R. Worrell, Esq., as master, who reported the facts substantially as follows:—

The certificates of 100 shares Pennsylvania Railroad stock, the right to which was in suit, were originally the property of the defendant, Miss Boyd, but were placed by her with her counsel, A. B., Esq., at his request, and for safe keeping only. Some time prior to October 27, 1866, A. B. obtained Miss Boyd's signature to a blank power of attorney, in the usual form, authorizing the "sale, transfer, or assignment" of 80 shares of stock, and some time prior to July 27, 1872, obtained her signature to a like power of attorney for 20 shares. They were signed by A. B. as witness, and were executed by Miss Boyd at his request, she confiding implicitly in him, without inquiring as to their real contents and purposes, and with no inquiry thereafter as to the way in which they had been used. A. B., having thus obtained the signatures, attached the power to the certificate of stock which had been deposited with him, and negotiated on October 27, 1866, a loan of $4000 at six months, at 7 per cent. discount from R. W. Pechin, depositing with him the certificates and power as collateral security, which loan was renewed every six months, at the same rate of discount, until October 27, 1877, A. B. falsely representing that the loan was for his client, claiming no title in himself for the stock, and giving Pechin a due bill in the following form:—

$4000. Memorandum. Oc. 27, 1866.
Due to Robert W. Pechin four thousand dollars in six months from date. Collateral 80 shares Penna. R. R.
A. B., Attorney.

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He received the money and applied it to his own use, paying the discount at each renewal with his individual check. In like manner he obtained another loan of $1000 July 27, 1872, at 8 per cent., and deposited twenty shares of Miss Boyd's stock, with the power attached as collateral. The shares continued to stand on the railroad company's books in the name of Miss Boyd, and she collected the dividends until a short time before the bill was filed.

The evidence taken by the examiner showed that A. B. was Pechin's counsel in several cases between 1863 and the time of Pechin's death in 1878.

The master found that Pechin acted in good faith, and was innocent of all fraud, and that Miss Boyd's misplaced confidence in her attorney occasioned the loss. He accordingly reported the following form of decree, viz., "That the plaintiffs have a good title to the certificates of stock as a security for an indebtedness of $5097.38, and that upon payment by said Elizabeth Boyd of the said sum with interest within thirty days, that the said executors do assign and transfer the said certificates of stock to the defendant Elizabeth Boyd; otherwise the defendant company do permit a transfer of the said shares by the said executors upon the powers now in their possession." To this report exceptions were filed by Miss Boyd.

James H. Little and *Clifford P. McCalla*, for the exceptions.

The certificates were not negotiable, and their bailment was not negligent. The execution of the powers was a distinct act, induced by fraud, and void *ab initio*. The negligence was on the part of plaintiff decedent; the loans were made to A. B. as attorney, and the powers were witnessed by him. Pechin was thus put upon inquiry.

Parke *v.* Neely, 9 Nor. 59.

The powers, even if valid, did not authorize a pledge.

Ellis's Appeal, 8 WEEKLY NOTES, 538.
Denny *v.* Lyon, 2 Wr. 101.
Bank of Canada *v.* Livingston, Albany L. J. 71 (1878).

The certificate and the power were given at different times and for different purposes.

Building Ass. *v.* Sendmeyer, 14 Wr. 67.

Power to sell and assign and transfer in pursuance of the sale, does not import a higher power. This, together with the fact that both powers were witnessed by the attorney was notice.

[THAYER, P. J. If he had borrowed the money for his own use, the fact that he witnessed the powers would have been notice, but not otherwise.]

Nevertheless the form was unusual enough to put the pledgee on his guard.

Parke *v.* Neely, *supra*.
Dorsey *v.* Abrams, 4 Norris, 299.
Ellis's Appeal, *supra*.

The testimony establishes a continuous professional relation subsisting between the plaintiff's decedent and A. B.

Geo. M. Dallas and *Robert M. Logan*, contra, cited—

Penna. R. R. Co.'s Appeal, 5 Nor. 80.
Wood *v.* Smith, 8 WEEKLY NOTES, 441.
Denny *v.* Lyon, 2 Wr. 101.
Building Ass. *v.* Sendmeyer, 14 Wr. 67.
Bayard *v.* Bank, 2 Smith, 232.

C. A. V.

June 17, 1881. THE COURT. Exceptions dismissed, and it is ordered that the decree reported by the master stand as the decree of this Court.

Common Pleas—Law.

C. P. of Delaware Co. May 2, 1881.

Love v. The Economy Building Association.

Act of June 11, 1879—Rule on sheriff's vendee to show cause why he should not bring ejectment within ninety days—When rule should be made returnable—Act to be strictly construed.

Rule to show cause why order of Court of February 7, 1881, extending the return day of rule to bring ejectment, etc., should not be rescinded.

On January 3, 1881, Jane Love presented her petition under the Act of June 11, 1879 (P. L. 127), praying for a rule on the Economy Building Association to show cause why they should not bring their action of ejectment within ninety days or judgment, as provided in said Act, for certain premises in Ridley Township, Delaware County, which she alleged were her property, but which had been levied upon and sold as the property of one John Craig, under a judgment obtained against him by the said association, and purchased by them at sheriff's sale.

On the same day the said rule was granted returnable on the fourth Monday of January, 1881, the next return day. On February 7, 1881, on application of the plaintiff alleging that she had been unable to make service on the defendant, the Court extended the return day to the first Monday of March, 1881, the next return day.

On March 7, 1881, this rule was granted on behalf of the defendant to show cause why the

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order of Court of February 7, 1881, extending the return day to the first Monday of March, 1881, should not be rescinded.

E. Quinn, for the rule.

V. Gilpin Robinson, contra.

May 2, 1881. THE COURT. This rule is founded on the Act of Assembly of June 11, 1879, P. L. 127. I am not aware of any settled practice under the Act. Judging from the unskilful manner in which it is drawn up, we take it for granted that the draftsman was a theoretical rather than a practical lawyer. The Act not only provides new law, but prescribes new practice. . . . .

Instead of having the preliminary question, whether the sheriff's vendee should be required to bring his action to test his title within a limited time, settled, the Act requires him to show cause, and if he fails to show good cause why he shall not commence his suit, the rule is to be made absolute, which ends the matter; no further time is given, his title is adjudged worthless, and he is forever debarred from maintaining it by suit, on a question not touched in the issue, but only preliminary to it, to wit, whether he should be limited or not in the time for commencing his suit. It is the first legislative attempt to make an interlocutory judgment or preliminary decree final upon all other questions in the suit. It is impossible to conceive the reason for calling upon a man to show cause, and at the same time fixing the day of hearing him at a period when, should his efforts be fruitless, the limitation will have closed upon his right to prove his title. He is not called upon by the rule to prove his title, but only to show some reasonable ground why he shall not begin his action for that purpose within ninety days; yet, upon the hearing of this rule, the Act declares that where he shall fail to show cause why such action cannot be brought within ninety days after service of the rule it shall be the duty of the Court to enter judgment against the parties served, and make the rule absolute, which judgment *shall be final* and conclusive between the parties, etc., and thereafter no action shall be brought upon such sheriff's deed.

These comments are not intended as a criticism upon the object of the Act. It is conceded that there ought to be a proper and reasonable limitation to the right of action by a sheriff's vendee, unless he can show good cause why he should not have his common law right, which might be twenty-one years, to bring his ejectment; but they are intended to show the highly penal nature of the Act, as a reason for giving to it the strict construction it deserves. Being against the course of the common law alone would require us to give it a strict construction, but being penal in its nature is an additional reason for such a construction. As valuable titles may hereafter rest upon this Act it behooves us to consider it carefully.

The Act gives to the person in possession the right to petition the Court for a rule on the purchaser at a sheriff's or other judicial sale, to appear and show cause why he shall not within ninety days from the service of the rule commence his action to test the title. If the Act gave ninety days *after* the rule is made absolute it would be reasonable enough. The Act gives to the petitioner the option to make his rule returnable at any term or return day he may choose, and requires it to be served as summonses are served, and returned. The rule is to be entered in the appearance docket, and to be indexed as lis pendens.

The second section provides for the hearing of the rule, and for the final judgment on making it absolute. In case of failure to serve the rule before the return day, the Act makes no provision for an extension of the time, or change of the return day. Perhaps, in giving the petitioner the right to fix his own return day, the legislator did not suppose it would be necessary to provide for an extension of time or for an alias rule. The Court has no power to extend or change the return day of a summons, and, *à fortiori*, it should not have the power in a case like this. I know of no such power in any case where the process is for the commencement of adversary proceedings to settle finally a disputed right. I do not, of course, deny such power in interlocutory rules and motions.

In the case in hand the parties in possession of the land filed their petition for the rule on the third day of January, and made the same returnable on the fourth Monday of the same month. The sheriff, having failed to make service of the rule, the petitioner asked leave of the Court to extend the return day to the first Monday of March, 1881. The notice was then served, and on the first Monday of April, 1881, came on for the hearing. The purchaser (the defendant in the rule) appeared and objected to the power of the Court to extend the return day, claiming that the notice had perished in the petitioner's hands by the failure of the sheriff to serve it before the return day, and that the rule should, therefore, be dismissed.

It is impossible, from a simple reading of the Act, to say whether the return day should be less or more than ninety days after the service. It would seem from the second section that it should be more. All rules should be ready for hearing at the return day. If this is less than a ninety-day rule, how is the Court to make it absolute as to the right to commence the suit, the

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Act declaring that no such suit shall be commenced after the rule is made absolute. If the rule could be returnable less than ninety days after the service, and a hearing be had at the return day, the right to bring the action would be adjudicated before the time provided by the Act. The probable meaning of the law is, that on filing the proper petition the Court shall grant the rule returnable at a period sufficiently distant to allow full time for service, and ninety days more for the defendant in the rule either to bring his action of ejectment, or on the return day show some good cause why he has not done so. If the action be commenced, the rule must, as a matter of course, be discharged; if no action be commenced, and some good reason shown for the delay, the rule may also be discharged; but if no good cause be shown, then the rule shall be made absolute, and the right to bring such action be forever barred. If this is the meaning of the Act, the proceedings are irregular, as the rule was, even as extended, made returnable too soon.

The only Act on our statute books bearing even a faint resemblance to this is the Act of Feb. 27, 1798 (3 Sm. 303), requiring the production of books and papers on the trial under penalty of nonsuit or judgment, as the case might be. That Act is not more penal than the one now under discussion, yet it has been most strictly construed. The chief vice of the present Act is in the second section, which requires the rule to be made absolute, but gives no time thereafter for bringing the action of ejectment. As it is, the party must elect to have his whole title depend upon the cause he is able to show why he should not be compelled to such a speedy trial, for, if he fail to show a good cause, his right is gone beyond redemption. But few would risk such a hazard, for while he has ninety days to show cause, he has not one minute to bring his action after the cause he may be able to show is deemed insufficient. The Act does not even give him an appeal; he may, perhaps, have his writ of error, but if the record is perfect this would avail him nothing.

Giving, therefore, the strict construction to the Act it deserves, the rule in this case was either returnable too soon, or it died in the sheriff's hands for want of service on or before the return day. The Court had no power to amend the rule by changing the return day after the sheriff had returned it unserved.

The rule is, therefore, dismissed. The petitioner has leave to issue an alias rule returnable at a time certain, not less than ninety days after the same may be legally served on the adverse party. The rule must be accompanied with a notice that on failure to bring the action within the ninety days, or to show good cause at the return day why he could not, his right to bring such an action will be forever barred.

Opinion by CLAYTON, P. J.

C. P. No. 1. May 7, 1881.

Myers v. Bott.

Practice—Appeal from magistrate—Effect of, upon transcript from magistrate's judgment—An appeal from the judgment of a magistrate prevents the filing of a transcript.

Rule to strike off transcript.

This was a suit before a magistrate in which the plaintiff obtained judgment, and on the same day entered a transcript of the proceedings in the Court of C. P. No. 1. The defendant afterwards took an appeal, which was perfected in the proper time and entered in C. P. No. 2.

Schaefer, for the rule.

A transcript creates no lien if an appeal be taken within the twenty days.

Hastings *v.* Lolough, 7 Watts, 540.

Wagner, contra.

THE COURT. The appeal is taken in order to ascertain in whose favor judgment should be entered. It would therefore be incongruous to allow the magistrate's judgment to remain in full force as a lien upon the real estate, when in fact it should perhaps have been entered for the defendant.

Rule absolute.

Per ALLISON, P. J.

C. P. No. 2. Dec. 18, 1880.

Barry v. Penna. Salt Co.

Amendments—On an alternative order giving leave to amend, otherwise judgment for defendant, the amendment will be permitted at any time before judgment is actually entered, though not within the same term.

Rule to show cause why amended declaration should not be stricken off.

This was an action on the case for the malicious abuse of civil process, brought to September Term, 1877, and declaration filed September 28, 1878. A demurrer to the declaration was sustained April 10, 1880, with leave to plaintiff to amend, otherwise judgment for defendant. (Reported 8 WEEKLY NOTES, 307.) Upon December 6, 1880, an amended declaration was filed and this rule was taken.

A. Sydney Biddle (with whom was *F. T. Chambers*), for rule.

The time during which plaintiff had leave to amend extended only to the end of the term in

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which the order sustaining the demurrer was made. No judgment entered adversely can be opened or vacated after the term.

King *v.* Brooks, 22 Sm. 363.

The decision of April 10, 1880, was in effect an entry of judgment for the defendant, unless the plaintiff amended his declaration within a proper time; and the proper time within which, after judgment upon demurrer, the unsuccessful party should apply for leave to amend has been held to be within the term.

Wood *v.* Anderson, 1 Casey, 407.
Stout *v.* Stout, 8 Wr. 457.
Geeckie *v.* Monck, 1 C. & Kir. 554.
Hammond *v.* Colli, 3 Mass. G. & G. 212.

Joseph C. Fraley, contra.

THE COURT. In Wood *v.* Anderson (1 Casey, 407) there was judgment entered—here there never was any judgment, the order being an alternative one that "plaintiff has leave to amend *or* judgment for defendant."

The Pennsylvania practice has always been to disregard terms in such cases, and permit amendments at any time until judgment is actually entered. In such cases as this the safe practice would be for defendant to take a rule on plaintiff to amend within a time fixed or judgment be entered for defendant.

Rule discharged.

Opinion by MITCHELL, J.

C. P. No. 2. June 8, 1881.

Keen v. Bockius.

Plea of former judgment for same cause of action—Proper practice as to plea to second action where first has been nonsuited and the costs are not paid.

Sur demurrer to replication.

Keen having brought suit against Bockius, the defendant pleaded that suit was brought by the plaintiff against the defendant in Common Pleas No. 3, "for the non-performance of the very same identical promises," and that "it was then and there considered by the said Court that the plaintiff should take nothing." The plaintiff replied that the judgment in the said suit was a judgment of compulsory nonsuit. To this defendant demurred.

Jos. M. Pile, for demurrer.

It is not alleged that the judgment in the suit in C. P. No. 3 has been reversed, hence it must be taken to be final and conclusive.

Lucas Hirst, contra.

THE COURT. Upon the authority of Fleming *v.* Ins. Co. (4 B. 475) and Gurley *v.* R. R. Co. (9 Phila. 153), the proper practice under circumstances like the present is to take a rule to stay proceedings in the second suit until the costs in the first suit are paid.

Plea, replication, and demurrer withdrawn.

C. P. No. 2. June 6, 1881.

Murphy v. Holmes.

Statute of Limitations—Credits indorsed on instrument within six years, but denied by defendant, insufficient to toll the statute.—Affidavit of defence.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note.

The following is a copy of the instrument in writing filed and upon which suit was brought:—

$400. PHILADELPHIA, Jan'y 14, 1865.

Sixty days after date, for value received, I promise to pay to the order of Miles Murphy $400 without defalcation; 100 shares of Egbert Oil Co.'s stock being held as collateral security for the payment of the same.

JAMES C. HOLMES.

Credits allowed as follow, to wit:—

1865.	Sept. 14. By net proceeds of the 100 shares of Egbert Oil Co.'s stock .	$60.00
1879.	Sept. 2. By cash on account of arrears of interest	10.00
"	Dec. 19. By cash on account of arrears of interest	50.00
	Total, ...	$127.00

The writ issued March 30, 1881.

The affidavit of defence alleged, *inter alia*, that the suit "is barred by the Statute of Limitations;" and that the defendant "never made the alleged payments on account of the said note."

Wollaston, for the rule.

THE COURT. Rule discharged.

[See Kinsloe *v.* Baugh, 1 WEEKLY NOTES, 147; Hull *v.* Mooney, 5 Ibid. 511; Newton *v.* Smith, 6 Ibid. 56.]

C. P. No. 2. June 8, 1881.

Allegaert v. Smart.

Lessor and lessee—Covenant not to let adjoining premises for the same business—Remedy for breach.

Motion for a rule for a new trial.

Replevin. Smart leased to Allegaert several adjoining stores and dwellings on Eighth Street for five years, and in the lease stipulated that he would not lease any of the remaining buildings in the block for the millinery business during the term of the lease. During the term, Smart

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leased one of the remaining buildings in the block to David Herzman for the millinery business. Allegaert having refused to pay the rent falling due thereafter, the lessor distrained, and Allegaert thereupon brought this action of replevin.

On the trial the Court charged, *inter alia*, "Allegaert was not released from his covenant to pay rent. He could not remain in possession and not pay rent." The verdict was for the defendant.

Theo. F. Jenkins, for the motion.

If the lessor retain possession of any part of the demised premises, this will suspend the rent.

McClurg *v.* Price, 9 Sm. 420.

An eviction from *any* portion of the premises will suspend the rent.

Wolf *v.* Weiner, 7 Phil. 274.
Garrison *v.* Moore, 1 Id. 282.
Bauer *v.* Broden, 3 Id. 214.
Doran *v.* Chase, 2 WEEKLY NOTES, 609.

THE COURT. It would seem that the agreement not to let for a millinery shop is not a condition, but a covenant; and all that the plaintiff can claim is damages for the breach; such breach does not suspend the rent.

Rule refused.

Orphans' Court.

May 19, 1881.

Aaron Mayer's Estate.

Testamentary and foreign guardians—Jurisdiction of Orphans' Court to direct filing of account by testamentary guardian appointed by will in another State, where the guardian, ward, and estate are within the jurisdiction.

Sur petition and answer.

Joseph Mayer, the father of the petitioner, died January 3, 1865, domiciled in California, where his will was originally proved. He appointed the respondents, who were domiciled in Philadelphia, guardians of his children, directing that the latter should be brought here and placed at school "until such time as it might be necessary to remove them elsewhere to a higher institution of learning." Upon the settlement of the account of the executor in California, the estate of the wards was awarded to their said guardians, who brought it to Philadelphia, where the amount was duly invested according to the laws of Pennsylvania, and where it is now held.

The children were brought to Philadelphia in accordance with the provisions of the will, and some years afterwards were, with the assent of the guardians, taken by their mother, who is one of their guardians of the person, to Germany, for the purpose of completing their education. One of the respondents has also removed to Germany, without relinquishing his rights as an American citizen, and with the intention at some future day of returning to Philadelphia permanently,—he now being here on a visit. The other respondent is still domiciled in Philadelphia; and neither of them has ever resided in California.

The petitioner, the oldest son of the testator, became of age in September, 1878. He has returned to Philadelphia, and declares it to be his domicil. He asks that his guardians should be ordered to file their account, so that the balance found to be in their hands may be awarded to him.

Mayer Sulzberger, for petitioner.

By the Act of June 16, 1836, § 19, the Orphans' Court has jurisdiction over "the appointment, control, removal, and discharge of the guardians of minors and the settlement of their accounts;" also in "all cases within their respective counties, wherein executors, administrators, guardians, or trustees may be possessed of, or are in any way accountable for any real or personal estate of a decedent."

The property, the guardian, and the ward being in this State the Courts of this State necessarily have jurisdiction.

Moore *v.* Hood, 9 Rich. (S. C.) Eq. 311.
Wharton's Conflict of Laws, § 260, note (2d ed.).
Hubbard's Guardianship, 22 Alb. L. J. 315.

Every sovereignty must take care of its citizens or subjects except where State comity prevents. No comity requires a State to send its citizens to distant States for the adjudication of matters in dispute between persons domiciled within the jurisdiction of the Court concerning property in the jurisdiction. The California Court would have no power to enforce a decree, nor would its decree bind the non-resident guardian in any proceeding in this State. The reference to California would be a vain thing. Testamentary guardians do not derive their powers from any "authority" without the State. A will appointing a testamentary guardian is as to that in the nature of a deed and need not be proved.

2 Kent's Com. 225.

The Statute 12 Car. II. c. 24, enacts that any father may, by *deed or will*, dispose of the custody of his minor child.

The Orphans' Court has *exclusive* jurisdiction of the settlement of accounts between guardian and ward.

Denison *v.* Cornwell, 17 S. & R. 374.
Comm. *v.* Lockwood, 18 Pittsbg. L. J. 10.

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R. P. White and *D. M. Fox*, contra.

The question is, To what forum shall this account be presented? We are prepared to file an account and make settlement of this minor's estate as soon as this question is settled. It is our opinion that California alone has jurisdiction over this matter, as it was the domicil of testator.

Story's Conflict of Laws, Sec. 514.
Wharton's Conflict of Laws, Sec. 631.
Williams on Executors, 1762.
Motheland *v.* Wireman, 3 P. & W. 185.
3 Redfield on Wills, 441.

June 4, 1881. THE COURT (after stating the facts). The sole question in this case is one of jurisdiction. There are other prayers in the petition besides that for an account, but the relief prayed is either incidental to and dependent upon the account, or else it is based upon allegations denied by the answer, and therefore, as the case is heard upon petition and answer, not now to be considered.

Having thus before us the estate, the ward in person, and the guardians, are we, because the will which created the guardianship was originally proved in California, without the power to order the account asked for? It is to be remarked, that though more than two years have elapsed since the ward attained his majority, it is not pretended that the respondents have filed an account in California; and hence, if the objection to our jurisdiction should be sustained, as neither the estate nor the guardians are within that State, and as they have given no security there, its courts would be powerless to compel an account, or to enforce any decree with regard to the distribution of the estate.

It must be admitted that the text-books which treat of foreign guardians, class them with foreign executors and administrators. Thus Judge STORY (Story's Conf. Laws, § 504, a) declares that such a guardian has no power over property not in the State or country in which he has "obtained his letters of guardianship;" and that, before he can exercise such power, he "must obtain *new letters of guardianship* from the local tribunals." He adds further, that "few decisions upon the point are to be found in the English or American authorities, probably because the principle has always been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators." To the same effect also is Redfield on Wills, vol. 3, p. 441, etc.

Our Act of Assembly with regard to foreign guardians (Act of 29 March, 1832, § 7; Purd. 412, § 36) provides that "no appointment of guardian made or granted by any authority out of this State shall authorize the person so appointed to interfere with the estate, or control the person of a minor in this State."

But does this Act, or do the authorities referred to by Story and Redfield, apply to testamentary guardians? Such guardians require no "letters of guardianship" or credentials of any kind whatever from court, register, or surrogate, or "from any authority out of the State." The simple probate of the will is all that they need; and even this is said not to be essential. (2 Kent, *225.) In this respect they are unlike either an administrator or executor or the ordinary guardian. In the great case of Johnstone *v.* Beattie (10 Clark & Fin. 142), where it was held by the House of Lords that an infant domiciled in Scotland, but temporarily in England, might be made a ward of Chancery, it appears to have been conceded by all the Judges that a testamentary appointment by a testator in Scotland, if made according to the Statute of Charles II., would be valid in England.

But however this may be in general, it seems clear, that an appointment of a guardian by the will of a father of full age, and a citizen of the United States, executed according to the laws of this State, and proved, either originally or by authenticated copy from another State, cannot be regarded, because of the non-residence of the testator, as an appointment "made or granted by any authority out of the State," and especially where, as here, the persons so appointed are citizens of Pennsylvania, and the will expressly provides for the removal of the wards (and impliedly of their estate) to this jurisdiction. (See White *v.* Howard, 52 Barbour, 294.) Under the Act of 15th of March, 1832, § 12, the probate of a will by exemplification from another State has precisely the same effect for the purpose of obtaining letters testamentary, etc., as if the original proof had been here; and the persons named as executors may in both cases alike, take out letters, subject, of course, to the provisions of the 16th section of the same Act, requiring security from a non-resident executor.

The right of a resident guardian can be none the less; and as no letters from or recognition by the Register is required by him, his authority becomes complete the moment the will is thus proved; and, like all other testamentary guardians, he becomes, at the same moment, bound by the laws of this State relative to guardians, and liable to account for all the estate of the ward which may come into his hands within this jurisdiction.

Nor is it at all material that the estate may have so come from another State, and by virtue of a decree of the court of testator's domicil; on the contrary, the liability to account here may thus, by reason of the removal of questions

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of comity, become entirely free from doubt. In awarding distribution of the balance shown by the account of the executor, and directing payment to non-resident guardians of the shares of minor children who, by the direction of the will, were to be taken to the domicil of such guardians, it is clear the Court intended to renounce its jurisdiction, so far as the non-resident guardians and the estate thus placed in their control were concerned, just as the courts of this State do when payment is awarded to the administrator or executor of the domicil, upon the settlement of the account of one acting under ancillary letters, or in the still more analogous case under the Act of 21st of April, 1856 (Purd. 412, §§ 37, 38), to a guardian resident in another State, whose laws extend similar privileges to citizens of this State.

It is to be presumed, in the absence of proof or allegation to the contrary, that the laws of California, in this respect, are similar to our own (Westlake on Priv. Inter. Law, § 413; Orton *v.* Reed, 29 Legal Intel., 1872, p. 261), and that the award to the respondents was made accordingly. And it cannot be doubted that when a balance has thus been remitted to a foreign guardian, the jurisdiction of the court of the domicil ceases, and the guardian becomes accountable only to his own tribunals.

The question is not affected by the place of domicil of the ward. It is clear that this is no longer in California. If it is not in Pennsylvania, it must be that of the mother (she being still a widow), viz., in Germany (School Directors *v.* James, 2 W. & S. 568). It was held, however, in White *v.* Howard (52 Barbour, 294), that where, as here, a ward had been removed to another State by the direction of the father's will, such State became his domicil. Conceding it, however, to be in California, our statutes provide for the appointment of guardians of non-resident minors having property in this State; and it would be a complete answer to an application for such appointment, that there was already, resident in this State, a guardian appointed by the will, duly registered here, of the ward's father. It can scarcely be that a guardian who could thus prevent the exercise of an undoubted jurisdiction of the Orphans' Court is not himself subject to its control.

In the case of McNamara *v.* Dwyer (7 Paige, 239), the question of the *liability* to account of a foreign executor who had come to reside in New York, bringing with him the assets of the estate, was carefully considered by Chancellor WALWORTH, and it was held, that while it was well settled that such an executor had no right to maintain an action in New York, he might be compelled to account; and that a contrary doctrine would, in many cases, lead to a total failure of justice.

A similar doctrine seems to be recognized in Swearingen *v.* Pendleton (4 S. & R. 389), and in Evans *v.* Tatem (9 S. & R. 252); though in Mothland *v.* Wireman (3 Penna. Rep. 185), the law was held to be different in the case of an administrator, between whom and an executor, whose title is under a will, and not by mere local grant of administration, the distinction is pointed out by Judge GIBSON.

In the course of his opinion in McNamara *v.* Dwyer (*supra*), Chancellor WALWORTH says: "If a guardian appointed in a sister State should come into this State with the property of his ward, or after he had squandered the same, or appropriated it to his own use in the State where he received his appointment, there could be no reasonable doubt as to the jurisdiction of this Court to compel him to account for and pay over to his ward what was justly due, according to the laws of the State in which he assumed the trust."

Under the Act of June 16, 1836, § 19 (Purd. p. 1104, § 8), the jurisdiction of the Orphans' Court extends, *inter alia*, to "I. The appointment, control, removal, and discharge of the guardians of minors, and the settlement of their accounts.

"II. The removal and discharge of executors and administrators *deriving their authority from the register of the* respective county, and the settlement of their accounts.

"VIII. *All cases* within their respective counties, wherein executors, administrators, guardians, or trustees may be possessed of, or in *any way accountable for*, any real or personal estate of a decedent."

Two things are here noticeable: *First*, That the clause qualifying the authority with regard to the control of executors and administrators ("deriving their authority from the Register of Wills of the respective county") is omitted in the case of guardians; and *second*, That additional powers, not embraced in the 1st and 2d sections, are conferred by the 8th section, the language of which is general: "*All cases*" in which executors, administrators (without the restrictive words), guardians, or trustees may be "*in any way* accountable" for real or personal estate of a decedent.

Nothing could be more general than the language thus used. And, as said in Mussleman's Appeal (15 Smith, 485), the effect of this Act was to greatly extend the jurisdiction and powers of the Court. How far what is said in Mothland *v.* Wireman (*supra*) with regard to the want of power of the Orphans' Court to compel an account by an administrator of assets col-

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lected in another State (the case having been decided in 1831) is affected by it, need not now be considered; but certainly since this Act, in the case put by Chancellor WALWORTH in McNamara *v.* Dwyer (*supra*), of a guardian absconding from another State with the estate of his ward, our jurisdiction would be quite as extensive as that of the New York Court of Chancery. The letter of the Act is clear. What is there in its spirit to restrain it? The question is as to the *liability* of the guardian, and is aside from his *powers*.

We think, however, that the petition should set forth what was stated as a fact at the argument, the admission of the will to probate in this county. (Armstrong *v.* Lear, 12 Wheaton, 169.) This having been done, we will order the respondents to file their account.

Opinion by PENROSE, J.

Dissenting opinion by HANNA, P. J.

As the guardians derived their authority under a last will and testament which was admitted to probate at the domicil of testator, the State of California, I am of the opinion that we have no jurisdiction to compel an account to be filed by them with the register of this county. It seems to me that this clearly appears from the doctrine as laid down in Mothland *v.* Wireman (3 Penrose & Watts, 185); Freeman's Appeal (68 Penna. State Reports, 151); Parker's Estate (7 Philada. Rep. 514, Id. 8 Phila. 217); Hopkin's Estate (11 Ibid. 45). Such jurisdiction was attempted to be conferred by the Act of June 10, 1871 (Purdon, 1105, pl. 15); but the Act was declared to be unconstitutional by ALLISON, P. J., in Parker's Estate (*supra*), and subsequently repealed by the Act of February 5, 1873 (Purdon, 1812, pl. 1).

Should it appear, however, that the will has been admitted to probate here, and letters testamentary issued, in pursuance of the Act of March 15, 1832 (Purd. 405, pl. 7), then the executors could not only *qua* executors, but as testamentary guardians, be cited to file an account. But otherwise they are amenable only to the proper tribunal at the domicil of testator.

May 19, 1881.

Benjamin Mayer's Estate.

Testamentary and foreign guardian—Jurisdiction of Orphans' Court—Allowance for support of minor.

Sur petition and answer.

This petition was presented for an order to pay a monthly allowance for the support of a minor, whose father was domiciled in California, and where his will was admitted to probate. The respondents objected to this order and set up in their answer that this Court has no jurisdiction, but that the application should be made in California, where the settlement of the estate of the minor's father was made.

Mayer Sulzberger, for the petition.

R. P. White and *D. M. Fox*, for the respondents.

June 4, 1881. THE COURT. For reasons which are more fully set forth in the opinion this day filed in the matter of the petition of Aaron Mayer, we think we have jurisdiction in this case. When the will, which appointed the respondents guardians, was proved in Philadelphia by the admission to probate of the exemplification from California, they, being residents of, and domiciled in this State, became fully clothed with authority to act as guardians here; and when, upon the settlement of the executor's account, the Court in California awarded the minor's share of the estate to his said guardians, knowing, as the will indicated, that it was to be brought to Philadelphia for the purposes of the trust, that Court renounced its jurisdiction, and the respondents became accountable here, just as guardians in California would become accountable there for moneys paid to them by a guardian or executor here, under the provisions of the Act of April 21, 1856 (Purdon, page 412, §§ 37, 38).

The allegations of fraud and mismanagement contained in the petition are denied by the answer, which, in the shape in which the matter came before us, must be accepted as conclusive.

No reason is shown, however, why the allowance asked for should not be granted. It is not alleged that the petitioner, who is nearly of age, did not have the consent of his mother, who is one of the guardians of his person, when he returned to this country from Germany; and as it is necessary that he should have the means of support, and the amount asked for is not an unreasonable one, we will, upon the amendment of the petition by setting forth the admission of the will to probate in this county, make an order for the payment of the allowance.

Opinion by PENROSE, J.

HANNA, P. J., dissents.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, AUG. 4, 1881.* [No. 16.

Supreme Court.

Jan. '81, 188. April 1, 1881.

Appeal of the Phillipsburg Savings Bank.

Mortgages—Unrecorded mortgage—Notice of—When insufficient to affect the lien of a subsequent recorded mortgage—Burden of proof—Actual and constructive notice—Agency—When not established.

In order to avoid a defence of usury to a mortgage which was to be given to a bank as security for a loan made by it, the mortgage was executed to an employé of the bank as mortgagee and by him assigned to the bank as a purchaser, no consideration passing either to or from the employé:

Held, that the employé was not thereby constituted an agent of the bank so as to affect it with any knowledge that he might acquire during the transaction of a prior unrecorded mortgage.

To affect a mortgagee with notice of a prior unrecorded mortgage, such notice, if express, must be directly communicated in some form, or by some person having an interest in the property, to the mortgagee, or his agent, who acquires the knowledge in the course of the transaction; if implied, the circumstances must be of such a character that a failure to make inquiry would be gross and culpable negligence on the part of the mortgagee.

The burden of proof rests with the holder of the unrecorded mortgage to prove notice.

The evidence here was not sufficient to establish such notice as would bring the case within the above principle.

Appeal of the Phillipsburg Savings Bank from a decree of the Common Pleas of Lehigh County, sustaining the exceptions to the report of a commissioner appointed to distribute the proceeds of a sheriff's sale of real estate under a levari facias issued on a judgment obtained on a mortgage executed by the American Slate Company to Alexander Wilson.

The following facts appeared from the report of the commissioner (A. B. Longaker, Esq.): On July 12, 1873, the American Slate Company, a corporation duly incorporated under the laws of this State, and owner of a tract of land and slate quarries in Lehigh County, executed and delivered to Alexander Wilson a mortgage of said real estate for $6500. This mortgage was not recorded until October 27, 1873, by reason of an agreement made by Wilson with one Shoemaker, the treasurer of the company and its agent for negotiating the mortgage, who represented to Wilson that the company were at that time endeavoring to obtain a large loan, out of the proceeds of which his mortgage would be paid off. On August 20, 1873, the company succeeded in obtaining from the Phillipsburg Savings Bank a loan of $40,000, and on the same day it executed a mortgage for a like amount to one Jacob Kemmerer, an employé of the bank. This mortgage Kemmerer immediately assigned to the bank, and it was, together with the assignment, recorded the same day. The circumstances attending this transaction were as follows: The bank, by resolution of its board of directors, agreed to make the loan above mentioned, but as nine per cent. interest was to be paid, was desirous of avoiding the defence of usury. A committee of the board, of which one John Shouse was a member, was, therefore, appointed to consult with counsel as to the best mode of taking the mortgage, and it was finally agreed that it should be executed by the Slate Company to Jacob Kemmerer and by him assigned to the bank. Shoemaker, the treasurer of the company, requested Kemmerer to go to Allentown and obtain the usual certificates of search from the Prothonotary and Recorder of Deeds, and he having done so brought them to Shoemaker, who then remarked to him, "That Alexander Wilson had not put his mortgage on record." Later on Shouse requested Kemmerer to get him a certificate from the Orphans' Court, in order that he might ascertain the position of a dower charge disclosed by the recording search. This was done. Kemmerer testified as follows as to his giving this certificate to Shouse: "I brought that paper to him. It was a certificate from the Orphans' Court. That was the only time I had a conversation with Shouse. He spoke of parties having claims against the American Slate Company. He mentioned Alexander Wilson. Whether he said that Alexander Wilson had a lien which he might put upon record I do not know, but he did say he hadn't entered up his claim." On cross-examination he testified, "I can't remember the exact words John Shouse used that day. I could not give the exact language. There was nothing said about Mr. Wilson's claim except as to his not entering it up, or something of that kind. I think at the same conversation he asked me whether Mr. Wilson had entered up his claim. I do not remember the language he used about the claim. I am positive he used the expression 'entered up his claim,' or words to that effect. I do not recollect that he asked me whether Mr. Wilson had brought suit or got judgment on his claim. I do not suppose that he asked me whether any one else had entered up their claim. Oh, yes, he mentioned Nightingale as having a claim, but he didn't say

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anything about his having entered it up. He didn't mention any one else as having claim, that I remember."

It was also in evidence that no mention of the existence of the Wilson mortgage was ever made to the committee or to the board. The certificates of search showed two judgments against the company, which being satisfied, the mortgage was duly executed and the money paid as above set forth. Wilson then made a demand on the Slate Company for the amount of his mortgage, but by evasive answers was put off from time to time, until finally he put his mortgage on record and issued execution under which the fund in controversy arises. Wilson claimed the proceeds on the ground that although the record of his mortgage was later than that of the bank's, yet from the fact of Kemmerer, an employé, and also Shouse, a director, having knowledge of the claim of Wilson, the bank was affected with notice of his mortgage, and consequently its mortgage was deferred. The commissioner, however, was of opinion that there was no sufficient evidence to bring the existence of Wilson's mortgage to the knowledge of the bank or of its officers, and so reported, awarding the fund to the bank and charging the costs of the proceedings upon the fund.

Exceptions were filed by Wilson to this finding and award of the commissioner, and also by the bank to the charging the costs upon the fund, and not upon Wilson. The Court (ALBRIGHT, P. J.) sustained the exceptions filed by Wilson, and entered a decree awarding the fund to him, but dismissed the exception of the bank. The bank thereupon took this appeal, assigning for error the action of the Court as above set forth.

W. S. Kirkpatrick and *Edward Harvey*, for appellant.

The bank had no notice or knowledge either actual or constructive of the existence of Wilson's mortgage; this is found as a fact by the commissioner, and his findings as to questions of fact are sustained by the Court below who, however, have drawn a different conclusion from them.

The findings of a commissioner as to matters of fact must stand unless they are clearly against the weight of the evidence or such as would justify the granting of a new trial.

Hottenstein's Appeal, 2 Gr. 301.
Spering's Appeal, 21 Sm. 25.

There has been no such actual notice to the bank as can possibly affect it. This notice must be brought home directly to the party or his agent.

Jaques *v.* Weeks, 7 Watts, 270.
Scott *v.* Gallagher, 14 S. & R. 333.
Boggs *v.* Varner, 6 W. & S. 469.
Bank *v.* Whitehead, 10 Watts, 397.
Bank *v.* Norton, 1 Hill, 572.

To be affected with notice it must come from a party in interest, and not by means of vague rumors or reports of strangers.

Rogers *v.* Hoskins, 15 Georgia, 166.
Church *v.* Guernsey, 3 Wr. 85.
Dougherty *v.* Darrach, 30 Harris, 399.
Ripple *v.* Ripple, 1 Rawle, 390.
Wilson *v.* McCullough, 11 Harris, 440.
Kerns *v.* Swope, 2 W. 75.

These principles apply equally to constructive notice which must come from some authentic source, which to disregard would be an act of gross and culpable negligence. There is no evidence here of such notice to the principal.

Maul *v.* Rider, 9 Sm. 172.
Le Neve *v.* Le Neve, Smith's L. C. in Eq , Vol. II., Pt. I. 109.
Woodworth *v.* Paige, 5 Ohio, N. S. 75.
Ware *v.* Lord Egmont, 4 DeG., Mac. & G. 460.
Peebles *v.* Reading, 8 S. & R. 496.
Jones *v.* Smith 1 Hare, 55.

Kemmerer was in no sense the agent of the bank in this transaction, he was merely a go-between. This is found, as a fact, by both the Court and the commissioner, and is fully established by the evidence. Nor is the evidence of the knowledge of Shouse, considering him as the agent of the bank, of such a character as to affect the bank. This knowledge of the agent must be acquired in the course of the transaction in which he is immediately employed.

Hood *v.* Fahenstock, 8 Watts, 489.
Bracken *v.* Miller, 4 W. & S. 111.
Smith's Appeal, 11 Wr. 128.
Houseman *v.* Girard Mutual Ass'n, 31 Sm. 262.

Edward J. Fox and *W. E. Doster*, for the appellee.

An unrecorded mortgage is good against a subsequent mortgage with notice of the unrecorded mortgage. This is settled.

Stroud *v.* Lockart, 4 Dal. 144.
Mellon's Appeal, 8 Cas. 129.
Nice's Appeal, 4 Sm. 201.
M'Laughlin *v.* Ihmsen, 4 N. 364.

Shouse's expression that "Wilson had not entered up his claim," showed that he had a knowledge of a claim of Wilson's, which was sufficient to put him on inquiry. His failing to do this was gross negligence on his part, and being the agent and a director of the bank, the latter must suffer for his neglect. Whatever is sufficient to put a party on inquiry amounts to notice, and will bind a party who neglects to inquire.

Jaques *v.* Weeks, 7 Watts, 261.
Lodge *v.* Simonton, 2 P. & W. 439.
Epley *v.* Witherow, 7 Watts, 163.
Mulliken *v.* Graham, 22 Sm. 490.
Parke *v.* Neeley, 9 N. 59.

Where or how Shouse derived his knowledge is not important.

Trefts *v.* King, 6 H. 159.
Philips *v.* Bank, Ibid. 404.
Butcher *v.* Yocum, 11 Sm. 170.
Biddle *v.* Moore, 3 Barr, 161.

Of Kemmerer's knowledge of the existence of

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the mortgage there is no doubt. The Court and commissioner, however, say that he was not the agent of the bank. The evidence shows that he was selected by the bank to take the mortgage for the bank who made the loan and to assign it to the bank. This is sufficient to make him the agent of the bank, who are thereby affected with notice.

Winton *v.* Little, 9 WEEKLY NOTES, 37.
Story's Eq. Vol. I. § 408.
Bouvier L. D., 99.
Parsons on Contracts, Vol. I., Chap. 3, § 1.
Bispham's Eq., § 269.
Sergeant *v.* Ingersoll, 7 Barr, 345.
Astor *v.* Wells, 4 Wheaton, 466.
Murphy *v.* Nathans, 10 Wr. 514.

May 2, 1880. THE COURT. Both parties to this contention are mortgage creditors of the American Slate Company, whose real estate, covered by their mortgages, was sold by the sheriff, and the proceeds brought into court for distribution. All the liens on the property were discharged by the sale, and the creditors were turned over to the proceeds. After appropriating part of the fund to costs and a prior incumbrance, the residue $7396.26, was claimed by each of the mortgagees. The auditor awarded it to the appellant, but the Court drew a different conclusion from the facts and decreed it to the appellee. The single question presented for our consideration is, which of the two creditors has the prior lien on the fund? Appellant's mortgage, though given after, was recorded about three months before that of the appellee, and is therefore entitled, *prima facie*, to the fund in question. Thus, the bank, as owner of the first recorded security, occupies, under the provisions of our Recording Act, an important vantage ground from which it cannot be dislodged without clear and satisfactory proof of notice, express or implied, of Mr. Wilson's prior mortgage. Express or direct notice of the prior incumbrance is a distinct and positive knowledge of its existence, acquired by the subsequent incumbrancer or his agent, not on some former occasion, or through the medium of vague reports, emanating from persons not interested in the property, but obtained in the course of the transaction in which the security is taken, from persons whose situation and interests are calculated to inspire confidence in their statements. Implied, or, as is sometimes called, constructive notice, is nothing more than evidence of actual notice, when the presumption thereof is satisfactorily warranted by the facts, or made necessary by considerations of public policy. Thus a person has constructive notice of the contents of any instrument under which he claims or to which he is referred by such instrument. He is likewise visited with constructive notice of the actual interest of any tenant in possession with whom he deals, and also of previously registered transfers and liens. To render either kind of notice effective for the purpose of postponing a prior to a subsequent recorded mortgage, the proof should be not only clear and satisfactory, but it should be brought home to the party to be affected or to his agent, before the transaction in which he is interested is completed. Everything done after such notice is considered as done *mala fide*, and so far from availing to protect the second mortgagee, will have the effect of postponing his security to that of the unrecorded mortgage.

A mortgagee is practically a purchaser within the general scope and design of the Recording Act, as well as the Statute of Frauds, and the cardinal principles of law, as to the effect of notice or want of notice to either are the same. Implied or constructive notice which arises from legal inference drawn from facts and circumstances, is only effectual to charge a purchaser or mortgagee when the circumstances are of such a character that a failure to obtain the knowledge would be gross and culpable negligence. When it is sought to affect him with express notice, it must be shown that actual information was directly communicated in some form, or by some person having an interest in the property. "Notice from an unauthorized party, or from one having no interest, is mere rumor." (Churcher *v.* Guernsey, 3 Wright, 84). The vague reports of strangers, or information given by disinterested persons, respecting a defect in title to land, will not have the effect of notice to a purchaser. (Kerns *v.* Swope, 2 Watts 75; Ripple *v.* Ripple, 1 Rawle, 386; Boggs *v.* Varner, 6 W. & S. 469; Jacques *v.* Weeks, 7 Watts, 261; Maule *v.* Rider, 9 P. F. Smith, 167.) The same principles apply to mortgagees.

Keeping in view the general principles above stated, and also the fact that the burden of proving notice to the bank of Mr. Wilson's unrecorded mortgage, is on him, let us briefly inquire whether there was sufficient evidence of either actual or constructive notice to the bank to justify the postponement of its mortgage to that of the appellee.

In the first place, it is contended that inasmuch as Mr. Kemmerer, the bank's assignor, knew of Wilson's mortgage, the bank was thereby affected with notice, and, furthermore, that Kemmerer was in fact the agent of the bank in negotiating the loan, and thus his knowledge was notice to the bank.

It cannot be doubted that Kemmerer was fully advised of the existence of the Wilson mortgage, but the mere fact that the subsequent mortgage was made to him, and by him assigned to the bank, is insufficient to affect the latter with no-

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tice of the secret equity of Mr. Wilson, who was not a party to the second mortgage or to the assignment thereof. In such case, the assignee of a mortgage is not affected by the knowledge of the assignor. The equity of the third party arises collaterally, and nothing short of actual or constructive notice will affect the *bona fide* assignee. (Mott *v.* Clark, 9 Barr, 399; McMasters *v.* Wilhelm, 4 Norris, 218; Davis *v.* Barr, 9 S. & R. 137). Was Kemmerer the agent of the bank in negotiating the loan? The auditor and Court both held that he was not, and we think the evidence fully justifies their conclusion. There is nothing to show that he was ever selected to represent the bank in the transaction. His own testimony proves that he was a merely nominal mortgagee or "go-between" for the purpose of avoiding a defence of usury. The bank refused to accept a mortgage directly from the company, and suggested that the security be made to a third party, by whom it could be assigned, and thus give the transaction the appearance of a purchase by the bank. It is very clear that Kemmerer was not clothed with any such agency for the bank in negotiating the loan, as would affect it with his knowledge of the previous incumbrance. He was not charged with the duty of making inquiry as to the character of the security, the condition of the title, or the incumbrances on the same, and in no proper sense can he be regarded as the agent of the bank. Other parties were specially deputed to represent the bank in arranging the terms of the loan and passing upon the sufficiency of the security. It is contended that in the course of that business, Mr. Shouse, one of the committee, acquired such information as made it his duty to inquire and ascertain the facts in regard to appellee's claim. The only witness who testified on that subject says, "Later in the week John Shouse wanted to know whether I could not get a paper from the Orphans' Court. I brought the paper to him. It was a certificate from the Orphans' Court. He mentioned Alexander Wilson. Whether he said that Wilson had a lien he might put upon the record, I do not know, but he did say he hadn't entered up his claim." On cross-examination he says, "I can't remember the exact words John Shouse used that day. I could not give the exact language. There was nothing said about Mr. Wilson's claim except as to his not entering it up, or something of that kind. I think, at the same conversation, he asked me whether Mr. Wilson had entered up his claim. I do not remember the language he used about the claim. I am positive he used the expression 'entered up his claim' or words to that effect. I do not recollect that he asked me whether Mr. Wilson had brought suit or got judgment on his claim. I do not suppose that he asked me whether any one else had entered up their claim. Oh, yes, he mentioned Nightingale as having a claim, but he didn't say anything about his having entered it up. He didn't mention any one else as having a claim that I remember."

The testimony above quoted is substantially all the evidence there is as to Shouse's knowledge of a claim held by Mr. Wilson. There was nothing to show from whom he obtained the information or when it was received, whether before or while negotiations for the loan were pending. The character of the testimony is rather vague and unsatisfactory. The language said to have been used by Mr. Shouse does not import knowledge of anything more definite than that Mr. Wilson had some kind of claim that might be entered up, but what it was, whether a judgment note or some other form of security, is at best open to conjecture. He may have thought it was a judgment note. Indeed, his language is more consistent with that supposition than that he meant a mortgage. It is not pretended that any party in interest ever informed Shouse that Wilson held a mortgage or claim that was capable of being entered up.

Viewing the testimony in its most favorable light, it is wholly insufficient to prove that the bank, or any of its officers or agents, had notice of the Wilson mortgage, or that such facts came to their knowledge during the pendency of the negotiation, as made it their duty to inquire. For these and other reasons more fully stated by the learned auditor, we think he was right in his conclusion, that the bank was unaffected by knowledge or notice of the prior unrecorded mortgage, and is therefore entitled to the fund in dispute.

Aside from the claim of the appellee, the appointment of an auditor to distribute the fund appears to have been necessary, and, under the circumstances, we are not satisfied that there was any error in charging the costs upon the fund.

It is adjudged and decreed that so much of the decree of the Court of Common Pleas as directs the payment of the balance of $7396.26 to Alexander Wilson, the appellee, be reversed and set aside, and it is now decreed, that the said sum be paid to the Phillipsburg Savings Bank, appellant, and in all other respects the said decree is hereby affirmed. The costs of this appeal to be paid by the appellee.

Opinion by STERRETT, J.

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Jan. '80, 321. April 1, 1881.

Pennsylvania Globe Gaslight Co. v. City of Scranton.

Municipal legislation—Act of May 23, 1874, secs. 4 and 29—Cities of the third class—Mayors of—Veto power—When inoperative.

The Act of May 23, 1874 (P. L. 246), sec. 29, provides, *inter alia*, that whenever Mayors of cities of the third class shall fail to return an ordinance to Councils within fifteen days after they have received it, the same shall become effective; it also gives to the Mayors power to call special meetings of Councils whenever they may deem it necessary. An ordinance was passed by the Councils of the city of Scranton (a city of the third class), authorizing the President of the select branch to enter into a contract for the purpose of lighting the city, which was sent to the Mayor and returned by him to the next stated meeting of Councils after he had received it, more than fifteen days having elapsed. Councils deeming that the ordinance became effective by operation of law took no further action, and the president made the contract. In a suit brought upon the contract:

Held (reversing the judgment of the Court below), that a return to the next meeting day was not a sufficient compliance with the terms of the Act of Assembly of May 23, 1874 (P. L. 246), section 29, and that more than fifteen days having elapsed without the ordinance being returned to Councils it became effective, and the contract entered into under it was a valid one.

Held, further, that the fourth section of the said Act applies only to cities of the first and second classes.

Whether it was competent for a member of the Common Council, who was a citizen and taxpayer, to take an appeal from an award of arbitrators in the said suit, Councils having instructed the City Solicitor not to appeal, not decided.

Error to the Common Pleas of Lackawanna County.

Assumpsit, by the Pennsylvania Globe Gaslight Company, assignee of the Maloney Manufacturing and Gaslight Company, against the city of Scranton for light furnished said city. The case was originally heard before arbitrators, who awarded the plaintiff the full amount of its claim, from which award one C. J. Johnson, a member of the Common Council of the city of Scranton, took an appeal. Plaintiff obtained a rule to show cause why the appeal should not be stricken off the record, which rule the Court (HANDLEY, P. J.) discharged, on the ground that Johnson, being a citizen and a taxpayer, had a perfect right to appeal. From the depositions taken under this rule it appeared that the City Councils had instructed the City Solicitor not to take an appeal.

The following facts appeared from a statement agreed upon by counsel as a case stated for the opinion of the Court in the nature of a special verdict:—

By Act of Assembly of May 23, 1874, clause 29 (P. L. 240), the Councils of the city of Scranton were authorized to enact ordinances, to enter into contracts for lighting the city, pursuant to which an ordinance authorizing the President of Select Council to enter into such a contract was introduced into Councils, and passed by them in the following manner, as appears from the certificate of the clerk:—

I do hereby certify that the bill entitled "An Ordinance to supply portions of the city of Scranton with Gaslights, No. 18, file of Common Council," was passed by the Common Council, Nov. 17, 1877, presented to the Mayor for approval the 20th day of Nov. 1877, returned, vetoed with objections, to the President of the Common Council, Dec. 4, 1877, and now Dec. 8, 1877, read before the Common Council, being more than than fifteen days after presented to the Mayor;* no further action taken.

(Signed) P. W. STOKES,
Clerk Common Council.

There was no meeting of Common Council upon Dec. 4, 1877, Dec. 8 being the first stated meeting after the return of the ordinance by the Mayor. By virtue of the authority given him by the ordinance, Joseph P. Phillips, President of the Select Council, entered into a contract with the Maloney Gaslight Company to furnish gas to the city, which contract was duly performed on the part of the company's assignees. The city of Scranton is a city of the third class, and has accepted the provisions of the Act of May 23, 1874, and its supplements.

If the Court were of opinion that the plaintiff was entitled to recover in this case upon the facts here stated, then judgment to be entered for the plaintiff in the sum of six thousand, one hundred and sixty dollars, with interest, from the 1st of March, 1879, and costs. If not, then judgment for the defendant with costs. Either party to be at liberty to take out a writ of error without bond or affidavit.

The Court (HAND, A. L. J.) was of opinion

* The fourth section of the Act of Assembly of May 23, 1874 (Purd. Dig. p. 1904, pl. 10), provides, after setting forth that all ordinances passed by Councils shall be sent to the Mayor, as follows: "The Mayor shall sign the said ordinance if he approve it, or return the same to the branch of Councils wherein it originated within ten days, or at the next meeting of Councils after ten days have expired if he does not approve it, with his reasons therefor: . . . if he does not return the same within ten days the ordinance shall become effective."

The 29th sec. of the same Act (Purd. Dig. p. 1913, pl. 86), in relation to cities of the third class provides as follows: "Any ordinance which shall have been passed by the Councils, shall be presented to the Mayor. If he approves he shall sign the same, but if he shall not approve, he shall return it with his objection to the Council, who shall proceed to reconsider it. . . . Every ordinance which the Mayor shall not return within fifteen days, shall have the same force and effect, as if it had been approved by the said Mayor. The said Mayor may approve ordinances in vacation of Council, and may call special meetings of Council to reconsider ordinances, which he does not approve, on one day's notice to each member of the said Council."

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that by analogy to the provisions of the fourth section of the Act of May 23, 1874, the return of the ordinance to the next meeting day of Councils was a compliance with the spirit of the provisions of the 29th section, that therefore the veto stood, and the ordinance, not having been passed over the veto, there was no authority to make the contract. He therefore entered judgment for the defendant. The plaintiff took this writ, assigning for error the refusal to strike off the appeal and the entry of judgment, as above.

W. Nelson West, J. G. Johnson (*Lemuel Amerman* with them), for plaintiff in error.

Matters in relation to the passage of the ordinance under which the contract was made cannot be inquired into.

Kilgore *v.* Magee, 5 WEEKLY NOTES, 61.

The ordinance under which the contract was entered into was valid. It was not presented to the Common Council until more than fifteen days after it had been sent to the Mayor, and therefore became effective by operation of law. No act of Councils could give it additional force; there was nothing to be done by them under the provisions of the statute. The 29th section of the Act gives the Mayors of cities of the third class power to call Councils together whenever they may deem fit. This privilege is omitted from the 4th section, which, although it is not specifically stated, must have reference only to cities of the first and second class, otherwise there would be a direct conflict between the two sections.

R. W. Archbald (*I. H. Burns*, City Solicitor, with him), for the defendant in error.

This contract has no valid ordinance to support it. The ordinance invoked was vetoed by the Mayor, and not passed over the veto. If the return to Councils at its meeting on the 8th of December was not a valid one, the Mayor would in every case be obliged to call a special meeting of Councils for the fifteenth day after he receives a bill in case he might determine to veto a bill upon the last day given him. This construction is forced and unreasonable. The power to call special meetings was given to meet emergencies which might readily occur, the Councils in cities of the third class meeting only once in two weeks.

May 2, 1881. THE COURT. On the 13th of December, 1877, a contract was executed on the part of the city of Scranton by Joseph P. Phillips, President of the Select Council, with the Maloney Manufacturing and Gaslight Company, assignor of the plaintiff, by which the company agreed to furnish the city with a certain number of street lights for the period of two years, from the 20th of December, 1877, at the rate of thirty dollars per year for each light.

It is admitted by the case stated, which the parties submitted to the Court, that this contract was fully performed on the part of the company, and that if this contract is valid and binding on the part of the city, the plaintiff is entitled to $6160.00, with interest from the 1st of March, 1879.

The single question then is, had Joseph P. Phillips, as President of the Select Council, power to bind the city by the contract, as above stated? The Court below thought not. The power of Phillips depends upon the ordinance of November 17, 1877; if it was valid, his power was undoubted, for it authorizes just what was done, and the power of the Councils to furnish the city with gaslights, by contract or otherwise, is expressly conferred by the 19th clause of the Act of May 23, 1874 (P. L. 240).

Why then was the ordinance not valid? The learned Judge of the Common Pleas answers this interrogatory by saying it was vetoed by the Mayor. But this answer is, in turn, met by the plaintiff's allegation, that though vetoed it was not returned to the Council within the statutory period of fifteen days, hence the veto was nugatory and the ordinance became a law.

As the facts of the case are not disputed, this controversy may be readily settled by reference to the certificate of the clerk of the Common Council, and the 29th section of the Act above cited. The following is a copy of the certificate: "I do certify that the bill entitled 'An Ordinance to supply portions of the city of Scranton with Gaslights, No. 18, file of Common Council,' was passed by the Common Council November 17, 1877, presented to the Mayor for approval the 20th of Nov. 1877, returned, vetoed with objections, to the President of the Common Council, Dec. 4, 1877, and now, Dec. 8, 1877, read before the Common Council, being more than fifteen days after presented to the Mayor; no further action taken."

The Act reads as follows: "Any ordinance which shall have been passed by the Councils shall be presented to the Mayor, if he approves, he shall sign the same, but if he shall not approve, he shall return it with his objections to the Council who shall proceed to reconsider it. . . . Every ordinance which the Mayor shall not return within fifteen days shall have the same force and effect as if it had been approved of by the said Mayor; and the said Mayor may approve ordinances in vacation of Council, and may call special meetings of Council to reconsider ordinances which he does not approve, on one day's notice to each member of the said Council."

This definitely settles this controversy in favor of the plaintiff. The ordinance not having been returned by the Mayor, with his objections, to the Council within the statutory period of fifteen

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days, it became a law as effectually as though it had been approved by him. The Court below endeavored to break the force of this conclusion by the application of that part of the 4th section of the Act which prescribes that "the Mayor shall sign the said resolution or ordinance if he approve it, or return the same to the branch of Councils wherein such resolution or ordinance originated within ten days, or at the next meeting of Councils after ten days have expired if he does not approve it, with the reasons therefor."

But it is manifest that this section, though the Act does not so state, must be confined to cities of the first and second classes; otherwise there is a direct and unnecessary conflict between it and the 29th section, which is expressly limited to cities of the third class. It is, indeed, only under a construction such as this that the former section can stand, otherwise the latter, being the last expression of the legislative will, must repeal the former.

But the patchwork which is attempted in order to save the defendant's case, by taking part of the 4th and engrafting it on to the 29th section, cannot be sustained.

The Court thought there was a necessity for such a construction, but in this we do not agree with it. The 4th section gives the Mayor ten days, or the further period intervening between the expiration of the ten days and the next meeting of the Council, within which to return the vetoed ordinance. The reason for this is obvious enough, since this part of the statute gives the Mayor no power to convene the Councils for the purpose of considering the rejected ordinance.

The 29th section, on the other hand, gives the Mayor fifteen days and no more, in which to consider an ordinance with the power to convene the Council for the special purpose of reconsidering those ordinances which he refuses to approve. Thus the necessity for an extension of time beyond the period of fifteen days is fully provided for, and the statute requires no judicial implication or construction for its perfection.

We are, therefore, satisfied that the ordinance under which Phillips acted in the execution of the contract with the assignor of the plaintiff was valid, and as a consequence his act bound the city.

This conclusion, as well as the fact that the parties submitted their contention to the Court below, in the shape of a case stated, renders a consideration of the question whether C. J. Johnson had the right to appeal, on the part of the city, from the award of arbitrators unnecessary.

The judgment of the Court below is now reversed and set aside, and it is ordered that judgment be entered for the plaintiff, on the case stated, in the sum of $6160, with interest from the first day of March, 1879, and costs.

Opinion by GORDON, J.

Jan. '80, 178. March 14, 1881.

Griffith v. Edwards.

Amendment—Sheriff's sale—Order confirming sale and directing acknowledgment of sheriff's deed—Errors and appeals—Discretionary powers—Writ of error to exercise of—When it does not lie.

An order confirming a sheriff's sale is within the discretionary power of the Court and will not be reviewed except for an abuse of the power.

Circumstances which the Court will not deem an abuse of such power, considered.

Error to the Common Pleas of Schuylkill County.

The facts of the case were as follows: On October 15, 1875, Maggie Whittle executed a mortgage accompanied by a bond and warrant of attorney to the Anthracite Building and Loan Association for $820.44, also for certain interest thereon, for monthly dues to said association, etc. Said bond and warrant of attorney were afterwards assigned to Anna Maria Edwards. On June 18, 1878, judgment was entered upon the bond for $1640.88 to the use of Anna Maria Edwards, a fi. fa. issued against certain real estate of defendant, was duly returned "Levied and condemned," and afterwards a vend. ex. issued, by virtue of which the said real estate was sold. Defendant, however, presented a petition setting forth that the advertisement of sale contained a misdescription, and on her motion the sale was set aside by the Court.

An alias vend. ex. then issued under which the premises were again exposed at sheriff's sale and sold, for the same price they had brought at the former sale, to the plaintiff in the execution. Defendant then presented a petition setting forth that she had married one Griffith subsequent to the date of the bond and warrant of attorney, but prior to the entry of judgment thereon, but that nevertheless the judgment had been entered and all the proceedings subsequent thereto had been taken against her in her maiden name, and that she therefore was advised that the sale was void. Plaintiff thereupon filed of record a suggestion of the marriage and obtained a rule to show cause why the record should not be amended by adding the name of the defendant's husband. The defendant and her husband being non-residents did not receive personal notice of the rule, but by their attorney in fact made answer that they were advised that the husband was not required to appear at this stage of the proceeding, he having had no notice of the sale.

The Court thereupon made the rule absolute, and allowed the amendment, BECHTEL, J., delivering the following opinion:—

On the 15th day of October, 1875, the above

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defendant, then a single woman, confessed a judgment to the plaintiff, and to secure this, the separate premises were mortgaged.

Before judgment was entered upon her bond she became a married woman, and the judgment was entered against her alone. After a prior sale had been set aside at her instance, because of misdescription, she comes into Court through her agent and objects to the acknowledgment of the sheriff's deed to the purchaser at the second sale. The objection is based upon the fact that since she executed the bond, she has intermarried with one Griffith and that all the proceedings from time of entry have been had against her alone. The judgment against her was entered in the usual way on the 18th of June, 1878, and execution had been issued and property of hers proceeded against, and this question is now presented for the first time by her. No application was ever made by her to have this judgment stricken off; when warned of the original execution she pays no attention to the fact that the name of her husband was omitted in entering judgment. It was only after a second sale that she through her agent seeks to get rid of the whole proceeding by objecting to the acknowledgment of the sheriff's deed. The ruling in Baker *et ux. v.* Lukens (11 Casey, 146) seems to hold that the better practice is to enter judgment against husband and wife. In Eneu *v.* Clark (2 Barr, 234) judgment was entered against the husband without any notice to him, and upon the motion of the plaintiff only. The Supreme Court subsequently declined to strike this off, and held he was not entitled to notice, under the circumstances, as he was not affected by the entry of judgment. With these authorities before us we concluded that the defendant's objection was as to matter of form, and not substance, and that it was amendable under the second section of the Act of 1852 (Pur. Dig. 70, pl. 3), if plaintiff presented a proper case. The above rule was therefore entered. In answer to this rule, the defendant, by her agent, and her husband, by the same agent, allege that he (the husband) is not bound to appear and answer the rule. We know of no means by which we can compel him to appear and answer the rule, but we think we can proceed to determine the rule whether he appears or not. The reason why the husband's name was omitted is because plaintiff's counsel did not know that the defendant had taken unto herself a husband at the time the judgment was entered against her. The second section of the Act of 4th of May, 1852 (P. L. 574), says: "All actions pending or hereafter to be brought, and in all cases of judgments entered by confession, the Courts shall have power in any stage of the proceedings to permit amendments by changing or adding the name or names of any party, plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made." We think the case before us is clearly within this Act. The addition of the husband's name will not affect him, it is but a matter of form, her property only can be proceeded against, hers alone has been sold. The debt, as far as we have knowledge, is an honest one. She received the consideration of this judgment, and accompanying mortgage. In the face of the above Act of Assembly, can she be permitted to avoid this proceeding by objecting to this amendment? We think not. As to the husband he declines to appear upon this rule. The authorities to which the defendant's counsel directed our attention seem to have no bearing upon the question before us.

Subsequently the Court made an order overruling the exceptions filed by defendant, confirming the sale and directing the sheriff's deed to be acknowledged according to law.

Defendant thereupon took this writ, assigning for error the entry of said order.

W. F. Shephard, for plaintiffs in error.

It is conceded that it is in the discretion of the Court to amend at any time before verdict and judgment, but no principle either in equity or in law gives the Court power to bring into Court an entirely new party, after a sheriff's sale, and place him upon the record under a rule, and then confirm a sale previously made without notice to him.

This Court will review even what is matter of discretion in the Court below, if the discretion has been abused.

Gamble *v.* Woods, 3 Sm. 158.
Neeld's Appeal, 20 Sm. 113.
Laird *v.* McCarter, 2 WEEKLY NOTES, 213.

J. W. Moyer, contra.

Error does not lie to an order confirming a sheriff's sale, and accepting the acknowledgment of the deed.

Sloan's Case, 8 W. 194.
Rees *v.* Berryhill, 1 W. 263.
Bradde *v.* Brownfield, 2 W. & S. 271.

The husband was merely a nominal party.

Baker et ux. *v.* Lukens, 11 Casey, 146.
Glyde *v.* Keister, 8 Casey, 85.
Bear, Admr., *v* Bear, 9 Casey, 525.
Eneu *v.* Clark, 2 Barr, 234.
Bering *v.* Burnet, 2 Clark, 399.

March 28, 1881. THE COURT. There does not lie a writ of error to an order confirming a sheriff's sale and receiving an acknowledgment. It is in the judicial discretion which this Court will not review, unless indeed in a case of very gross abuse of discretion, which we certainly think this case is not. The Court had the power of amendment beyond a question, and of this plaintiff in error cannot complain, as they had opportunity to make this objection when the

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first sale was set aside. We affirm the order on the opinion of the learned Court below.

Order affirmed. PER CURIAM.

Oct. & Nov. '80, 250. Oct. 28, 1880.

Shearer's Appeal.

Bill of review—Orphans' Court—Principal and surety—Recognizance will not be reformed to prejudice of surety.

Where an error has been made in a decree of Court as to the nature of the recognizances to be given by one to whom land has been adjudged in partition, and the allottee enters with surety into the recognizances as specified in the said decree, the Court will not subsequently, on a bill of review, decree that the surety shall enter into any new recognizance whereon his liability may be different from or extended beyond that incurred by him on the former ones.

Appeal of Hiram Shearer from a decree of the Orphans' Court of Westmoreland County.

David Evans died intestate seised of a certain tract of land, leaving a wife, Ellen, and eight children, of whom one was Lazarus, intermarried with Mary Evans. Lazarus Evans died prior to 1875, and after his father's death. In May, 1875, proceedings were instituted by the heirs of David Evans for the partition of the said tract of land in the Orphans' Court of Westmoreland County, and the same being found incapable of partition was awarded on November 13, 1875, to one W. J. Ross, in right of his wife, a daughter of said decedent. The Court decreed that Ross should give recognizances to the other heirs for their shares, and to Ellen, widow of decedent, to pay to her the interest annually during her natural life on the one-third of the valuation, and at her decease to pay the said one-third to the heirs of said decedent; and, also, that he enter into recognizance to pay to the heirs of said decedent the remaining two-thirds of the valuation in one year from said date, with interest, etc.

And the Court further decreed, that as to the share of Lazarus, that the said Ross enter into recognizance to pay interest on one-half of his share to his mother, during her natural life, and as to the remaining half, to pay the interest during life to Mary, the widow, during her natural life, and at their respective deaths to pay said share to the heirs of decedent.

Ross accordingly took the land and entered into all the recognizances stipulated, in which recognizances Hiram Shearer and one Hugh Ross were his sureties. Hugh Ross subsequently died. W. J. Ross becoming insolvent, failed to pay the amount secured by the recognizances; judgment was accordingly obtained by several of the heirs against him and Shearer, and the tract in question levied upon and sold. Shearer became the purchaser to protect his interest. All that was due on the recognizances was either paid out of the proceeds of said sale or else subsequently paid by Shearer, including the interest due to Ellen, widow of David Evans, and Mary, widow of Lazarus Evans.

Subsequently said Mary, widow of Lazarus Evans, filed a bill or petition of review, setting forth the foregoing facts, and also averring that the clerk of the Orphans' Court failed to obtain from Ross a recognizance in favor of the petitioner, in the event of her surviving Ellen Evans, the widow of David Evans, to pay her interest on one-half of one-third of the share of Lazarus; or recognizance to pay one-half of one-third in the event of the death of the petitioner, if she survived Ellen, to the heirs of Lazarus. Wherefore petitioner prayed that the former decree might be reviewed and that Ross, with Shearer as his surety, be decreed to enter into new recognizances in the form above set forth.

The matter was referred to an auditor, who reported in favor of granting the prayer of the petitioner. To this report exceptions were filed by Shearer and dismissed by the Court in an opinion by HUNTER, P. J., and a decree was entered in accordance with the prayers of the bill or petition.

Shearer thereupon took this appeal, assigning for error the decree of the Court.

H. P. Laird, for appellant.

Hazlette (with him *Cowan*), for appellee.

Nov. 8, 1880. THE COURT. The main question involved in the several assignments of error is, whether the facts were sufficient to justify the Orphans' Court in vacating the recognizance given to secure the interest of Mrs. Evans, the elder, in the real estate of her deceased husband, and in requiring appellant, as surviving surety in that recognizance, to enter into a new obligation in lieu thereof, and also to give a recognizance to secure the interest of appellee, as widow of Lazarus Evans, in the share of the valuation money to which he would have been entitled if living, etc. We are clearly of opinion that they were not. The personal liability of appellant, either to the widow or any of the heirs of David Evans, was measured by the recognizances to which he became a party in 1875, as one of the sureties of W. J. Ross, to whom the real estate was then allotted; and the Court was powerless to impose on him any obligation which he did not then or afterwards voluntarily assume. The recognizances that were given by Ross and his sureties were all that

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were then demanded and, as all parties supposed, in due form. If the land, of which appellant subsequently became terre-tenant, continues bound in his hands, it must be by virtue of the original decree, or the recognizances given in pursuance thereof. It appears that suit was brought on one or more of the recognizances and prosecuted to judgment and execution, under which appellant purchased the land now in his possession. The effect of the sale thus made was to divest the liens in favor of the heirs and both of the widows, except as to the annual interest thereafter to become due and payable to each of the widows, and the principal on which that interest is payable. The testimony of appellant was that he purchased the land for the purpose of protecting himself as surviving surety in the recognizances; that the respective heirs received the full amount then due and payable to them by the terms of the recognizances, and that he paid each of the widows the arrears of interest due her in full. So far then as appellant is concerned, it is clear that he cannot be called upon to assume, against his will, any new or additional obligation, nor can the land in his possession be charged with any incumbrance that was divested by the sale. The arrears of interest in the nature of dower, to each of the widows, and the amounts past due and payable to each of the six heirs, were thus divested and appellant, as purchaser at a judicial sale, took the land, subject only to the fixed incumbrances, viz., the interest thereafter due to the two widows, and the principal on which it is payable, and the record as it thus stood must be resorted to for the purpose of determining what those incumbrances were. After the recognizances passed into judgment, which was finally executed by sale of the land on which they were a lien, it is too late to go behind all these proceedings and seek to impose additional burdens on the sureties in the recognizances or on the land in the hands of the sheriff's vendee. And moreover, if appellant as surety paid part of the recognizance given to secure the widow's interest, he has a right to call upon the personal representatives of his co-security, for contribution, and hence he might be seriously prejudiced by the decree vacating the recognizance. The heirs also might be injuriously affected, but they are not here complaining; and it does not appear that they were made parties to the proceeding.

The errors in the original proceeding, of which the appellee complained, were quite apparent, but they are not in any degree chargeable to appellant or his principal in the recognizances. They gave the recognizances in the form in which they were presented. If the parties who were prejudiced by the errors of the Court or its clerk failed to discover them or slept on their rights until after the death of one of the sureties, the insolvency of the principal, and sale of the land by virtue of proceedings on one or more of the recognizances, it is too late to insist on such modification of the original proceedings as will impose any additional burden on the surviving surety, or on the land in his possession as terre-tenant. But if, upon notice to all parties interested, and without prejudice to either of the sureties, the original decree can be so amended as more clearly to define and better secure the interest to which each of the widows is entitled, there is no good reason why it should not be done, and to the end that such further proceedings may be taken in the Court below, the decree should be reversed without prejudice. We see nothing in the circumstances of the case to justify the imposition of the costs, or any part thereof on the appellant.

The decree of the Orphans' Court is reversed at the costs of the appellee, and the record is remitted for such further proceedings as may be taken in accordance with the foregoing opinion.

Opinion by STERRETT, J.

Common Pleas—Law.

C. P. No. 2. March 12, 1881.

Strouse v. McCouch.

Practice—Replevin—Failure to give additional security ordered—Quashing of writ—The proper practice in case of failure to furnish additional security is to nonsuit.

Rule to show cause why sheriff should not assign replevin bond to defendants.

A writ of replevin had issued, and was returned "Replevied as commanded, and summoned as to bailiff, and *nihil habet* as to landlord." The property so replevied was delivered to plaintiff.

Later a rule was entered for additional security, which was made absolute, and security not having been entered the writ of replevin was quashed.

Winship, showed cause.

The writ having been quashed the sheriff submits that the bond is dead.

Boyd, for the rule.

THE COURT. MITCHELL, J. The better practice is, instead of quashing the writ for failure to furnish additional security, to nonsuit. The Act

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of Assembly provides, however, that the sheriff shall assign the bond to the avowant, and we see no reason why he should not do so in this case. Whether it still has sufficient vitality to support an action can be better decided when the question shall arise regularly between the present avowant and the obligors.

Rule absolute.

C. P. No. 4. May 28, 1881.

Rohrbacker v. Pugh.

Practice—Motions for a new trial and in arrest of judgment—A motion in arrest of judgment is technically a waiver of a motion for a new trial, but where the established practice has been to allow both motions the Court will not depart from it.

Rule to show cause why motion for a new trial and reasons therefor should not be stricken off.

Capias, case. On April 8, 1881, a verdict was rendered for the plaintiff. April 12, 1881, defendant moved in arrest of judgment, and *eo die* moved for a rule for a new trial, and filed reasons.

Alex. Simpson, Jr., for the rule.

After a motion in arrest of judgment it is too late to move for a new trial; a motion in arrest of judgment tacitly admits that the verdict is good, and is a waiver of a motion for a new trial.

Respublica *v.* Lacaze, 2 Dall. 118; s. c., 1 Y. 55.
Hall *v.* Nees, 27 Ill. 411.
1 Troub. & H. Prac., § 744.

[THAYER, P. J. Technically you may be right, but the practice has long been to allow both the motion in arrest of judgment and for a rule for a new trial.]

Aaron Thompson, contra.

Rule discharged.

C. P. No. 4. June 15, 1881.

City of Philadelphia v. Wistar.

Practice—Municipal claim filed against an "estate owner," etc., without naming any person—Validity of.

Sur rule to take off nonsuit.

Issue framed between the City and Richard and W. Lewis Wistar, to determine the ownership of a fund paid into Court under the Act of Feb. 21, 1862 (Purd. Dig. 1091, pl. 38, 39). The city's claim to the fund rested on the validity of a lien filed against the defendants' property for the removal of a nuisance, which lien was filed by name against the "Wistar estate, owner or reputed owner," etc. It was suggested on the record that Richard Wistar was the actual and present owner of the premises, and the scire facias was returned "made known to Richard Wistar actual and present owner, and *nihil habet* as to Wistar estate, owner," etc. A feigned issue having been awarded, at the trial a nonsuit was granted on the ground that the claim should name the owner of the premises, and was invalid as filed.

Francis A. Osbourn, for the rule.

This is a proceeding *in rem*, and not *in personam*; the property being accurately described, the name is not material.

Wistar *v.* City, 5 Nor. 215.
Northern Liberties *v.* Coates's Heirs, 3 Har. 247.
Delaney *v.* Gault, 6 Cas. 66.

N. H. Sharpless, contra.

The claim is void on its face. An "estate" cannot be said to be an owner. A claim may be filed against "heirs," as they are persons; but not against an estate, as was ruled in—

Northern Liberties *v.* Myers, 2 Parsons, 239.

June 16, 1881. THE COURT. Rule absolute.

Orphans' Court.

June 22, 1881.

Gassman's Estate.

Decedent's estate—Conditional legacy—Consideration for—Deficiency of assets—Abatement—Volunteers.

Sur exceptions to adjudication.

At the audit of the final account of the executor of Juliana F. Gassman, the testatrix, it appeared that by a codicil to her will she devised to one Mrs. Marley a life estate in certain realty, and also bequeathed her the sum of five hundred dollars on condition that she continue to live as housekeeper with decedent's husband, who was an invalid, until his death. After payment of debts there was not enough to satisfy the legacies without abatement.

Before the Auditing Judge, Mrs. Marley proved that she had lived with the testatrix's husband as housekeeper, until his death, which occurred in November, 1878, and she claimed her bequest in full, it being urged in her behalf, that her legacy was not a general one, but was a remuneration for certain services. This was resisted by the other legatees, who argued that

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Mrs. Marley had received wages for attendance on testatrix's husband until his death, so that the consideration for decedent's bounty had disappeared.

For the reasons stated in the opinion *infra*, the Auditing Judge allowed the legacy in full.

Exceptions were accordingly filed in behalf of the other legatees.

J. S. Simpson and *Pierce Archer* for exceptants.

R. Alexander and *Richard P. White*, contra.

July 2, 1881. THE COURT. It is undoubtedly the general rule that, among legacies in their nature general, there is no preference of payment; they shall all abate together, and proportionately, in case of a deficiency of assets to satisfy them all. "But this," says Mr. Williams (Williams on Executors, *1169), "must be understood only as among legatees who are all volunteers, for if there be any valuable consideration for the testamentary gift . . . such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties." (To the same effect, also, is Theobald on Wills, p. 459. See also Heath *v.* Dendy, 1 Russ. 543; Norcott *v.* Gordon, 14 Sim. 258; Reed *v.* Reed, 9 Watts, 263, etc.)

In the present case the legacy to Mrs. Marley is given upon the express condition that "she shall continue to live as housekeeper with" the husband of testatrix. The will was admitted to probate in July, 1872, and it is found as a fact by the Auditing Judge that Mrs. Marley did continue to live as housekeeper with the husband of testatrix until his death, which occurred in November, 1878.

Having thus performed the condition, she cannot be regarded simply as a volunteer. The legacy was given in consideration of her continuing to act in a certain employment. After full performance on her part she has the right to demand payment in full.

It is immaterial that her wages were regularly paid by the husband. The testatrix wished to make certain that, after she herself had gone, one in whom she had confidence should look after the comfort and welfare of her husband, and, while he lived, should accept no other employment. And, supposing that she might receive from others an equal or greater amount as wages, the legacy, with the condition imposed, was given as an additional inducement to remain.

Exceptions dismissed, and adjudication confirmed.

Opinion by PENROSE, J.

May 18, 1881.

Porter's Estate.

Agreement of executor to waive commissions—When not binding upon co-executor—Admissibility of declarations in evidence.

Sur exceptions to adjudication.

Daniel Porter died in May, 1854, leaving a will, of which he appointed James Rea and George Powell, executors.

In a former account of the executors commissions were allowed to them by the auditor, but were never drawn, and were allowed to remain among the assets of the estate.

In the present account of the executors commissions were claimed by George Powell, surviving executor, and by the executor of James Rea, deceased. Objection was made to the allowance of commissions on the ground that Mr. Rea, who had been the acting executor, had never taking any commissions, and had frequently expressed his intention not to charge any. The Auditing Judge (PENROSE, J.) held that there was not sufficient evidence to establish a gift to the estate of the commissions, and that something more than a declaration of intention not to claim them would be required, and found that the fact, that for a number of years they were not deducted from the estate in the hands of the executors creates no estoppel, for the parties to whom the estate belongs were benefited and not injured by such course on the part of the creditor. (See Wister's Appeal, 35 vol. Leg. Int., 1878, p. 79.)

To the allowance of commissions exceptions were filed.

C. B. Taylor, for exceptions.

T. B. Prosser and *J. C. Stillwell*, contra.

May 28, 1881. THE COURT. The error of the exceptants is, in supposing that even if the deceased executor agreed to waive commissions or compensation for his services, it would be binding upon him; or that he had authority to make any agreement in relation thereto, in the absence of his co-executor. The amount awarded by the auditor, whose report was confirmed, was not to the acting executor alone, but to the two executors jointly, and neither the auditor nor this Court, without their consent, could apportion the commissions between them. (Carnell's Estate, 9 Philada. Reports, 322.) The acting executor was liable, at any time, to be called upon by his colleague for his proportion; and that no such demand was made in the lifetime of the former is immaterial. Upon his decease the surviving executor became entitled to the custody and management of the estate; and if now he deems it proper to deduct the commissions awarded upon the settlement of the first account, but which were not then taken from the *corpus*

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of the estate, by reason of the executors retaining the investments unconverted, we see no objections to their allowance as a credit in the present account. The tenants for life should not complain, at the indulgence shown by the executors, when their income was correspondingly increased. While there may be some doubt as to the admissibility of the declarations of the deceased executor, yet irrespective of this testimony, and excluding it, there was sufficient evidence to warrant the allowance of the commissions claimed.

The credit was proved by the record, and no matter what was said or done by the deceased executor, it could not prejudice the rights of his surviving colleague.

The exceptions are dismissed and adjudication confirmed.

Opinion by HANNA, P. J.

U. S. Circuit Court—Admiralty.

April 29, 1881.

Wood et al. v. The Phœnix Insurance Co.

General average—Cargo loaded on deck, when jettisoned, is entitled to benefit of contribution if there is a general custom so to load—Burden of proof of such custom is on shipper—Proof of custom so to load iron pipe.

Appeal from decree of District Court.

This was a libel filed by the owner of a cargo of iron pipe, against the insurers of the portion below deck, to recover contribution for the loss of the portion above deck which had been jettisoned. The facts were as follows:—

On the 4th of October, 1879, the libellants shipped on board the "Mary and Eva," then lying at Millville, New Jersey, a cargo of iron pipe, loaded in part above, and in part under, deck; thirty-one tons of which were to be delivered in New York, and the remainder at West Point. In the course of the voyage the vessel encountered tempestuous weather, and it became necessary to throw a portion of the deck cargo overboard. The respondent had insured what was under deck, with knowledge that similar cargo was to be carried above. The libel asserted "that it is the custom of the trade in shipping cargoes of iron pipe to load a part thereof on deck;" and claimed that the respondent is liable to contribution by general average. The answer denied the existence of such a custom, and of all liability for the loss. The deck load was not included in the policy, because the libellants were not willing to pay the respondent's terms for such insurance. The propriety of the jettison was not questioned.

The Court below (BUTLER, D. J.) dismissed the libel, delivering the following opinion:—

"The doctrine of general average, for property thus lost, was a part of the celebrated maritime code of the ancient Rhodians, in which it was thus stated: 'If goods are necessarily thrown overboard for the purpose of lightening the ship, the loss is to be made good by the contribution of all, because it was incurred for the benefit of all.' No clearer statement has been made since. The doctrine is founded in pure equity. The sacrifice being made for the safety of the vessel and remaining cargo, the owner of the goods should bear no more than his just proportion of the loss thus incurred.

"From the benefit of this right to contribution, the owner of goods loaded above deck was excluded, on the ground that such loading is improper, tending to embarrass the movements of the crew and the working of the ship. To the universal application of this rule (excluding deck cargo), however, serious objection has been made from the outset, and strenuous effort used to limit its operation. It has been urged that some goods may be placed on deck without embarrassing the crew or the movements of the vessel, and especially in short voyages from port to port; that custom has established the safety of such loading in some kinds of cargo, and in voyages between certain places; and that where such loading is in pursuance of *contract* with the carrier, *he* cannot urge the objection that it is improper. From the beginning most, if not all, elementary writers on the subject have stated the rule with exceptions. Valin says: 'The doctrine excluding goods carried on deck (and jettisoned) from general average, ought to be controlled by the *usages of trade;* and accordingly contribution may be claimed for goods thrown overboard from the decks of small coasting vessels, or river craft, which usually carry part of their cargo on deck.' (Valin Ord. de la Mar. Art. 13.)

"The only exception which seems well supported, of an early date, is one in favor of goods carried on deck in pursuance of *custom.* What is said in the older cases and elementary works, respecting goods so carried on small coasting vessels, must be referred to custom, and is true only to the extent that such custom is shown to exist. As the reason for exclusion is the unsafe and improper loading, it might be supposed that the

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rule would not apply in any case where it could be shown by testimony that (from the character of the cargo or the voyage) the loading is safe and proper. A careful examination of the authorities, however, will show that this question of safety is referred to the judgment of the trade, as expressed in its customs, and cannot be inquired of in any other way.

"When steam was applied to purposes of navigation, it was found that cargoes could be carried on the decks of vessels thus propelled, with safety, and the rule has not, therefore, been applied to cargoes so carried.

"At the present time a further exception is allowed, in most maritime countries, *against the vessel and its owners*, where the cargo is carried on deck by *agreement* between the owner of the cargo and the vessel.

"In England, until the year 1837, no exception whatever was allowed. Goods carried on deck were, under all circumstances, excluded from the benefit of contribution. In that year, however, the cases of Gould *v.* Oliver (4 Bing. N. C. 140), and Hurley *v.* Milward (1 Jones & Carey, 224) arose; and were followed in 1842 by Milward *v.* Hibbert (3 Ad. & El. N. S. 121). Since the decisions in these cases, the exceptions allowed elsewhere—in favor of goods carried on deck in pursuance of custom; carried on the decks of steam vessels generally; and by contract, where the claim is against the vessel—may be regarded as well established there. Elementary writers and Judges, in numerous instances, have used language indicating a belief that the exceptions are more extensive, embracing deck cargo in all coastwise trade, and justifying claims against the owners and insurers under deck, where previous knowledge is shown of an agreement to load above. No case, however, has been cited by counsel, nor found by the Court, in which this has been allowed. In Johnson *v.* Chapman (35 L. J. C. P. 23, decided in 1865), which followed the ruling in Gould *v.* Oliver and the other English cases cited, the learned counsel, who depended on these cases, said (as appears by the report): 'It was decided in Gould *v.* Oliver that as between the *shipper on deck* and the *vessel*, where the goods are so carried by agreement, the *latter* is liable to contribution for jettison, but *not the owners*, or the *underwriters*, of the under deck cargo.' In Huley *v.* Milward, Johnson *v.* Chapman, and in every other case found, in which the claim for contribution was based on an agreement to carry on deck, the suit was against the vessel or its owners, alone. Lowndes on General Average, at 41 and succeeding pages, says (after noticing the change effected by Gould *v.* Oliver and the other cases cited): 'Where the provision for carrying on deck is inserted in the charter party, the loss for jettison is replaced by contribution between the *ship owner* and the owner of the deck load. It is adjusted in the same manner as a general average would be, but it is a *general contribution*. Payment by general contribution is enforced from no one who has not by *express contract* made himself a party to the stowage on deck. If there are on deck goods belonging to a third party, such party is not held liable to pay any share in the contribution. No insurer is asked to replace what his assured has contributed, unless there is a clause in the policy assenting to the deck shipment. The principle of these adjustments is, that as between the assenting parties to such stowage, the deck must be taken to be a proper place for such stowage, which is thence to be treated as if stowed below; but as regards all parties who have not thus assented, the old rule remains in force, and from them there is no general average.' There is no proper warrant for the suggestion that owners below deck, and underwriters, may be held to an implied assent that goods shall be carried above, from knowledge that the master has contracted so to carry. The author just quoted, when remarking upon the general terms employed by the Court in Johnson *v.* Chapman and other cases, says: 'These observations must be understood with reference to the question before the Court, that is, to the right of the owner of the deck load to contribution from the *owner of the ship*.'

"In our own country the question has escaped the Federal Courts, except in a single instance, which will be noticed directly. In the State Courts, down to 1837, the English rule (as then applied) was followed, and the exceptions allowed elsewhere disregarded. Since that date these Courts have disagreed—some of them adopting the exceptions now recognized in England, and others disregarding them. Chancellor KENT (3 Kent's Com. 11 ed. p. 323) and Mr. Parsons (in his work on Shipping, p. 334) express a belief that the weight of authority here is against the exceptions. While this view may have been correct at the time it was expressed, it is not, in my judgment, at this time. (Gillette *v.* Ellis, 11 Ind. 578; Meaher *v.* Lufkin, 21 Texas, 383; Harris *v.* Moody, 4 Bosw. 210; Insurance Co. *v.* Spears, Harris *v.* Moody, 30 N. Y. 270; 4 Bosw. 210). "Mr. Phillips, in his work on Insurance, sec. 1282, after noticing the cases decided in this country and abroad, says: "Taking into consideration the whole jurisprudence on the subject, the better doctrine, though opposed to some of the adjudications cited, seems to be that a jettison of deck load is to be contributed for in general average *when the stowing of the jettisoned articles on deck is justifiable*, and the other parties interested have notice, by the policy, or by usage or

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otherwise, that such articles may be so carried, and there is no plainly established usage denying the right to claim contribution.' While this language is not free from ambiguity, it will not admit of any other reasonable interpretation than that where the storage on deck is justifiable and proper (as in cases of general custom or under contract), contribution may be had; unless, indeed, there be a usage to the contrary. All the author says is predicated of the stowage being *proper*. "Mr. Parsons (2 Par. on Mar. Ins. page 221), after reviewing the cases, says: 'The rule should be, that whenever, from the peculiar nature of the goods, or of the voyage, or in fact for any reason, a *custom exists* to carry on deck, and this custom is so well established and known that the insurers must be presumed to have known it, they should not only pay for them if lost, but should pay the owners of the goods' [carried under deck] 'for their contribution for the goods, if jettison to save the ship and cargo.' Where a custom is shown, knowledge of its existence is presumed.

"As before remarked, the question has escaped the Federal Courts, except in the single instance of the 'Milwaukee Belle' (2 Biss. 197). Lawrence *v.* Minturn (17 How. 105) turned on a different point. The suit was for *non-delivery* of merchandise carried on deck by contract. Being lost by peril of the sea (for loss by jettison is such), without fault of the vessel, it was not responsible for non-delivery. Had the claim been for *contribution*, a different case would have been presented. Some observations are made by the Court on the general subject of contribution for goods jettisoned, but the citations show that the particular aspect of the subject now under consideration was not in mind. The Court was indeed careful to distinguish the claim before it from one for contribution, saying that the libellant's 'right to contribution is not involved in the case.'

"'The Milwaukee Belle' was decided by the District Court for the Eastern District of Iowa. The claim was against the *vessel* for contribution. The goods jettisoned from the deck had been placed there under a *contract* with the owner of the vessel, made at his instance, and for his especial benefit. The Court dismissed the libel, relying on Lawrence *v.* Minturn for doing so. It is submitted, with great respect and deference for the judgment of the Court, that the review of this subject already made, shows that this decision cannot be followed, consistently with the well-established doctrine abroad, or the weight of authority at home.

"The question in the Federal Courts must be regarded as still open; and it may well be regretted that this case cannot reach the Supreme Court, and the danger of conflicting decisions and confusion, respecting a subject of so much importance, be avoided. In my judgment the rule with its exceptions, as established abroad, is wise and just, and I am unable to see any good reason why we should not follow it. The importance of uniformity in commercial and maritime laws and usages throughout the world, cannot be disregarded in considering this question.

"Does the case in hand fall within either of the exceptions? The only one the libellants can invoke is that which rests on *custom*. The vessel was not propelled by steam, nor was the respondent party to a contract to carry on deck. Has a custom so to carry been shown? The voyage, as we have seen, was from Millville, N. J., to New York and West Point, and the cargo consisted of iron pipe. The respondent knew that a part was to be carried on deck; but this knowledge, in the absence of a general custom rendering such carriage proper, is unimportant. It imposed no obligation; if any existed, it is because the trade had determined, and declared by its custom, that such carriage is safe, and therefore proper. Nor can importance be attached to the respondent's payment for a previous loss. It is not clear that the circumstances were correctly understood; and if they were, the payment is entitled to no weight in determining the legal responsibility involved here. Was the cargo carried on deck in pursuance of a general custom of the trade? On this point there is the testimony of a single witness, the libellant's former bookkeeper. His knowledge on the subject does not seem to extend beyond his employers' business, and his testimony is virtually confined to a statement of their practices. His general expressions of belief are of no value. There is no evidence that it is customary to carry, generally, on deck between Millville, or other adjacent ports, and New York and West Point, nor so to carry freight of the particular description here involved. The testimony need not have been confined to the carriage of iron pipe, for it may be that this has not been sufficient to establish a custom. It might have extended to other bulky cargo, of similar character.

"The burden of proof is on the libellants; and to establish a custom so as to take their case out of the general rule of law, the evidence should be clear. It is not; and the claim cannot therefore be allowed. (Coxe *v.* Heisley, 19 Penn. St. 243.) In this connection the language of Judge STORY, in the case of 'The Schooner Reedside' (2 Sumner, 567), may be read with advantage: 'I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages in almost all kinds of business and trade, to control, vary or annul the general liability of parties under the common law as well as under the commercial law.'

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"It is proper to say that I do not attach any weight to the fact that the respondent declined to insure the deck cargo. The claim is not founded on the contract of insurance, but on the obligations which the law is supposed to attach to the relations of the parties. Nor do I consider it important that the under and over-deck cargo belong to the same person. The risk of that under, was on the respondent, and if that above had been properly there—as in pursuance of general custom so to carry—the sacrifice of it for the respondent's protection would render him liable."

The libellant appealed, and in the Circuit Court took the testimony of five additional witnesses, by which it appeared that owing to the light weight of iron pipe in proportion to its bulk a vessel loaded with it cannot carry her full cargo unless a portion is loaded upon deck, and that it was the general custom of trade so to load.

Henry G. Ward, for appellant.

The rule that a deck cargo is excluded from the benefit of general average does not apply where there is a general custom to carry on deck.

Johnson *v.* Chapman, 35 L. J. C. P. 23.
The Watchful, 1 Br. Adm. 469.
Gould *v.* Oliver, 4 Bing. N. C. 140.
Milward *v.* Hibbert, 3 Ad. & El. N. C. 121.
Harris *v.* Moody, 30 N. Y. 266.
Lowndes on General Average, 39.
Arnold on Insurance, 766.

The respondent is presumed to know the practice of the trade and the nature and usual course of the voyage insured.

Pelly *v.* Ins. Co., 1 Burr. 341.
Eyre *v.* Ins. Co., 5 W. & S. 120.
Ins. Co. *v.* Dravo, 2 WEEKLY NOTES, 194.
Duer on Ins., vol. i. p. 195.
Salvador *v.* Hopkins, 3 Burr. 1707.
Cox *v.* Ins. Co., 3 Rich. (S. C.) 331.
Noble *v.* Kennoway, 2 Doug. 510.

The custom need not be uniform; if general, it will bind the underwriter.

Vallance *v.* Dewar, 1 Camp. 503.

Henry Flanders, for appellee.

The general rule is, that for goods laden on deck there is no contribution.

Lowndes on Gen. Average, 40.
Machlachlan on Shipping, 617.

The weight of authority in the United States is against allowing any exception to the rule.

3 Kent's Com. (11th ed.) 323.
Cram *v.* Aiken, 13 Me. 229.
Parsons's Shipping, 356.
Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.
Dodge *v.* Bartol, 5 Greenl. 286.
Lenox *v.* U. Ins. Co., 3 Johns. Ca. 178.

It is universal law that there is no contribution when the property lost had been placed on deck with the consent of the owner.

Lawrence *v.* Minturn, 17 How. 110.
The Milwaukee Belle, 2 Biss. 197.
The Paragon, Ware's Rep. 322.

The shipper must prove not only a usage to carry on deck, but also a usage that the underwriters pay for a loss occasioned thereby.

Taunton *v.* Merchants' Ins. Co., 22 Pick. 115.

In no case has the underwriter been held liable when, as in this case, he has limited his insurance to the cargo below deck.

C. A. V.

July 1, 1881. THE COURT. The learned Judge of the District Court who decided this cause, so clearly and accurately stated the law which governs it, as I think it ought to be held to exist, that I do not propose to amplify or repeat his statement. I adopt it fully.

As a general rule the jettison of a deck cargo would not entitle its owners to contribution in general average from the cargo stowed below deck. But where, in pursuance of the general custom of the trade to which the special kind of cargo belongs, the vessels engaged in its transportation are loaded partly on deck and partly under deck, and the deck cargo is necessarily sacrificed for the safety of the rest, the general cargo may be subjected to contribution to the loss.

In the Court below the case turned upon the existence of such a custom, and was properly decided upon the insufficiency of the proof of it. Since the case came into this Court, further evidence has been taken, which shows it to be the custom, where a full cargo of gas pipe is shipped, that part of it is stowed above and part below deck. This is the uniform usage among manufacturers of gas pipe east of the Alleghenies, who employ water transportation, and for the reason that, on account of the light weight of the article compared with its bulk, the full capacity of the vessel cannot be made available without such distribution of the cargo. It is coeval with the manufacture and transportation of gas pipe on a large scale, and it is, therefore, shown to have been of such general prevalence and long continuance as to entitle it be recognized as a general custom of the trade.

There must then be a decree for the libellant against the respondent for its contributory portion of the loss caused by the jettison. This is admitted to be $77.50, and for this sum, with interest from the date of filing the libel, and costs in this Court alone, decree will be entered.

Opinion by MCKENNAN, Circ. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, AUG. 11, 1881.* [No. 17.

Supreme Court.

May, '81, 98. May 5, 1881.

Harberger's Appeal.

Executors—Acts of March 29, 1832, and May 1, 1861—Until after the grant of letters testamentary the Court cannot compel a resident executor to give security—Allegations of probable mismanagement.

Where a person has been nominated as executor in a will, who is a resident of the State, the Orphans' Court has no authority to direct the Register of Wills only to issue letters testamentary to him on condition of his entering security for the faithful performance of his duty as executor.

It is only in the case of a non-resident of the Commonwealth, that the Register or the Court can require bond from the executor before the issuing of letters testamentary to him. Proof that the person named in the will as executor is insolvent, untrustworthy, and a resident of a county in the State other than that of the testator's residence, and where his personal estate is situated, is insufficient.

The Acts of March 29, 1832 (Purd. Dig., 453), and May 1, 1861 (Ibid. 464), which authorize the Court to require security from or to vacate the letters of an executor who is wasting the estate, do not become operative until after the granting of letters.

Appeal of Louis B. Harberger from the decree of the Orphans' Court of Lancaster County, directing the Register of Wills only to issue letters testamentary to Louis B. Harberger under the will of Elizabeth B. S. Harberger, deceased, upon his entering security in the sum of $25,000.

The material facts of this case were as follows: Mrs. Elizabeth B. Stowers Harberger, by her will, dated in 1873, appointed as her executors two of her sons, Louis B. Harberger and Alexander J. Harberger, whom she authorized to sell her real estate, without liability on the part of the purchasers to see to the application of the purchase-money. At the date of the will, Mrs. Harberger resided at Philadelphia, of which city her son, Louis B. Harberger, was and still remains a resident. Her son, Alexander J. Harberger, was and is a resident of Lancaster, to which place Mrs. E. B. S. Harberger removed her residence several years prior to her death, which happened there, May 10, 1879.

Several caveats were filed with the Register of Lancaster County, and upon the offering of Mrs. Harberger's will for probate there was a contention as to whether letters testamentary should be issued to Louis B. Harberger as one of the executors. The Register decided to issue letters to Louis B. and Alexander J. Harberger jointly. From this decision an appeal was taken by A. J. Harberger *et al.* to the Orphans' Court of Lancaster County, and the Court made an interlocutory order, directing the Register to withhold the issuing of letters testamentary to Louis B. Harberger, until the determination of the appeal; and it appearing that by some mistake letters had been issued, the Court also granted a rule to show cause why the letters granted to Louis B. Harberger should not be revoked, or he be ordered to give bond with security for the faithful performance of his duty as executor. On the same day, August 20, 1880, the Register issued letters to Alexander J. Harberger. On August 30, 1880, Alexander J. Harberger filed an inventory and appraisement of the personal effects of the deceased, amounting to $539.54.

The testimony, taken under the above rule to show cause, tended to show that Louis B. Harberger was a man of no property, indebted to the extent of about $2000, and was on bad terms with the members of his family. Some evidence was given to show that he had proved himself untrustworthy in money matters as secretary of a cemetery association, and also that his mother had lost confidence in him after the date of her will.

After argument, the Court, in an opinion by LIVINGSTON, P. J., held, that Louis B. Harberger had a *prima facie* right to letters testamentary jointly with A. J. Harberger, "but inasmuch as Louis B. Harberger is a non-resident, the estate apparently large, and the will does not require the purchaser to see to the proper application of the purchase-money, but expressly relieves him from so doing, we think, as he is a man of no estate, he should give security for the performance of his duty as executor, and the proper accounting for and payment over on distribution of all moneys which may come to his hands and possession as executor of the will of E. B. S. Harberger, deceased."

The following decree was entered: "We, therefore, order and direct the Register of Wills of Lancaster County, from whose decision this appeal was taken, to issue letters testamentary to Louis B. Harberger upon the estate and under the will of E. B. Stowers Harberger, deceased, upon the presentation of a bond by said L. B. Harberger, approved by this Court, in the sum of $25,000. The appeal of L. B. Harberger is dismissed."

Louis B. Harberger took this appeal, assigning for error, *inter alia*, the above decree.

H. M. North (with him *H. B. Swarr* and *J. Joseph Murphy*), for the appellant.

There is no authority in law for the Court to

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require a person who is nominated an executor by a will, who is a resident of this State, to enter security in advance of his receiving the grant of the letters testamentary. It is the right of a testator to name his executor, and the Court cannot, in the absence of some rule of public policy or express statute, impose restrictions on that right. The Acts of March 29, 1832 (Purd. Dig. 453), and May 1, 1861 (Ibid. 454, pl. 242) authorize the Court to require security from, or to vacate the letters of an executor who mismanages the estate, etc. But those Acts have no application until after the grant of letters and proof of misconduct.

Cohen's Appeal, 2 Watts, 175.
Webb *v.* Dietrich, 7 W. & S. 401.
Parson's Appeal, 1 Norris, 465.

J. L. Steinmetz, for the appellees.

The position that L. B. Harberger could not come within the terms of either Act, as he had not received letters, is untenable.

Piper's Appeal, 8 Harris, 70.
Cornpropst's Appeal, 9 Casey, 537.

An executor derives his office from the will; the letters testamentary are but official evidence. The object of the Acts of Assembly, authorizing the Court to remove executors or require security, is to protect the estate, and it is but an illusory construction of those Acts to hold, that, where it is clearly shown to the Court, in a preliminary proceeding, on appeal from the Register, that the executor named in the will is a pauper and in debt, a non-resident of the county, and utterly untrustworthy, the Court is powerless to require security until after he is afforded recognition by the granting of letters, and full opportunity to defraud the estate.

McKennan's Appeal, 3 Casey, 237.
Chew's Estate, 2 Parsons, 153.
McKennan *v.* McCahan, 2 Phila. 215.

June 13, 1881. THE COURT. The appellant's right to letters testamentary was received, not from any Act of the Legislature, but from the will of his mother, Mrs. Harberger, and to these letters he was entitled without regard to his pecuniary circumstances. As his mother had a right to devise to him the whole of her property, had she been so disposed, so had she the right to commit to him the charge of it, in whole or in part, as to herself might seem proper, and this right no one can be permitted to call in question.

It is only after letters have been committed to an executor that the Act of March 29, 1832, and of May 1, 1861, become operative, and until that time the Orphans' Court has no jurisdiction either to control the issuing of letters to him, or to compel him to give bail.

After that time for any of the causes specified in the Act, and for none other, the Court may dismiss him or require sureties for the proper administration of the estate committed to his charge. (Cohen's Ap., 2 Watts, 175; Webb *v.* Dietrich, 7 W. & S. 401.)

Whilst, therefore, the Court below did that which was proper in refusing to vacate the letters testamentary issued by the Register to the appellant, Louis B. Harberger, it did wrong in imposing upon him the giving of a bond conditioned for the faithful performance of his duties as executor. Such an order can only be imposed upon one "not being an inhabitant of this Commonwealth," who claims the right to act as executor, but not upon one merely resident in a different county from that from the Register's office of which the letters testamentary must issue. If the executor indicated by the will be an inhabitant of the State he is relieved from the necessity of giving a bond, and for this reason the decree of the Orphans' Court must be reversed.

It is now ordered and decreed that that part of the decree of the Orphans' Court requiring Louis B. Harberger to give an approved bond in the sum of $25,000 be reversed and set aside, and that that part of said decree which directs the Register to issue letters testamentary to the said Harberger be affirmed. And it is further ordered that the appellee pay the costs of this appeal.

Opinion by GORDON, J.

May, '81, 148. May 4, 1881.

Lehr's Appeal.

Orphans' Court—Bill of review—Not grantable after fund actually paid to distributees—Act of October 13, 1840—Proviso—Laches.

The Orphans' Court has no jurisdiction, upon a petition for a review under the Act of Oct. 13, 1840 (Purd. Dig. 1109, pl. 49), to vacate a decree confirming an auditor's report distributing a fund, after actual payment to the distributees in accordance with the decree.

The report of an auditor, making distribution of a decedent's estate to certain legatees and others, was confirmed by the Orphans' Court without exceptions, and the fund was paid over to the distributees. Several months afterwards, one of the distributees presented a petition for review, on the ground that the auditor had misconstrued the decedent's will, whereby the petitioner received less than he was justly entitled to. The petitioner averred that owing to non-residence and absence, he had been unable to appear at the audit or file exceptions to the report. The Court granted the prayer of the petition and referred the matter back to the auditor, with instructions to amend the report of distribution in accordance with the construction of the will set forth in an opinion filed, and subsequently dismissed exceptions to and confirmed the amended report:

Held, to be error. Under the proviso in the Act of October 13, 1840 (*supra*), the petition for review must aver, as an essential requisite to jurisdiction, that the money has not been paid under the decree.

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Appeal from the decree of the Orphans' Court of York County, dismissing the exceptions of Adam Lehr to the amended report of the auditor in the matter of the distribution of the estate of Philip Lehr, deceased.

The material facts are concisely stated in the opinion of the Supreme Court, as follows: "The executors of Philip Lehr's estate filed their account in the Register's office of York County, on the 27th of July, 1866, which was duly presented to the Orphans' Court and confirmed. An auditor was appointed, September 18, 1866, to distribute the balance of money found to be in their hands. On the 22d of the succeeding November the auditor filed his report, which was, so far as appears by the record, confirmed without opposition, and in December following the executors distributed the money in their hands to the legatees as directed by the decree of the Court. Thus was the matter fully closed up in regular order in accordance with the terms and conditions prescribed by the Act of Assembly.

"Then, on the 9th of May, 1867, we have the petition of John Lehr, the appellee, for a review of the previous proceedings, on the ground that the auditor had misconstrued the will of Philip Lehr, and that he, the petitioner, had not received as much of the estate as lawfully belonged to him. This petition was entertained by the Court, which, after reviewing the former report, came to the conclusion that it was wrong, and referred it back to the auditor, with directions to rehear the parties and make distribution according to the principles expressed in the opinion of the learned Judge who delivered it. On the 9th of December, 1868, this second report of the auditor was filed, and upon it the decree was rendered which is the subject of the present appeal."

This decree was not entered until March 23, 1881, and was simply, "Exceptions dismissed and report confirmed," no opinion being filed. Adam Lehr took this appeal, assigning for error, the decree dismissing his exception, *inter alia*, "that the Court had no jurisdiction to make the order and decree dated July 7, 1868, and to order the auditor to rehear his former report of distribution and report a distribution in conformity to the opinion and instruction contained in said decree."

Cochran and *Hay*, for the plaintiff in error.

John Lehr, by his failure to present his claim at the audit, and his laches in permitting six months to elapse after the money had been actually distributed under the decree before presenting his petition of review, was estopped from claiming an amended distribution. Under the Act of October 13, 1840 (Purd. Dig. 1109, pl. 49), a petition for review must allege that the balance found due by the decree has not been paid over by the accountant. As the petition in this case did not so aver, and as the balance had in fact been paid over and releases taken, and as there is no allegation of fraud, or of ignorance by the petitioner at the time of the filing of the first report, or of error in law appearing upon the face of the original decree, the Court had no jurisdiction to grant the review.

W. C. Chapman, for the appellee.

If the construction of the will of Philip Lehr, as finally adopted by the Court below, be correct, there would have been a failure of justice, if the mistake in the first decree had not been corrected. The only effect of the final decree is to require those who have received John Lehr's money by mistake, and who still hold it, to make restitution. If any of the legatees who received his money have become insolvent, the loss of course must be his.

June 13, 1881. THE COURT. (After stating the facts as above.) It may be that the interpretation of Philip Lehr's will, put upon it by the learned Judge of the Orphans' Court, was the right one, and that the appellant, had he presented his claim in time, would have been entitled to the full amount awarded to him by the Court's decree. This, however, is a matter which we do not propose to discuss, since the discussion would be fruitless. The appellee's petition for a review came too late, and it was, in itself, fatally defective, hence it ought not to have been entertained. This proceeding is under the Act of 13th of October, 1840, which provides for petition of review, and gives the Judges of the Orphans' Court power to open their decrees of confirmation, and to re-examine the accounts of executors, administrators, and guardians. But the proviso to that Act expressly stipulates that its provisions shall not extend to any case where the balance found due shall have been actually paid and discharged.

As, in the case in hand, distribution had been made by the executors to the parties entitled under the original decree, it is very clear, if we are to be governed by the statute, that the Court had no jurisdiction to entertain the petition, hence its decree thereon was void and of no effect.

Moreover, the petition is defective in this, that it does not allege that the balance found to be due was not paid over by the accountants. The petition is in the nature of a bill in equity, and must set out all things necessary to give the Court jurisdiction; here, however, the one thing, of all others, necessary to give the Court jurisdiction is omitted. This was, of itself, fatal to the plaintiff's case, and his petition for this reason, were there none others, ought to have

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been refused. (Russell's Administrators' Ap., 10 Ca. 258.)

The decree of the Court below is now reversed and set aside, and the petition of the plaintiff dismissed, at the costs of the appellee.

Opinion by GORDON, J.

[*Cf.* Gillen's Appeal, 8 WEEKLY NOTES, 499].

Jan. '81, 174. March 23, 1881.

Wentz's Appeal.

Mortgage — Description — Mistake — Rights of judgment-creditor.

On distribution of the proceeds of a sheriff's sale, evidence that a mistake has been made in the description of the property covered by a recorded mortgage, so as to render it inapplicable to the premises upon which it was intended by the parties to take effect as a lien, is inadmissible as against a subsequent judgment-creditor of the mortgagor whose judgment was a lien upon the premises sold.

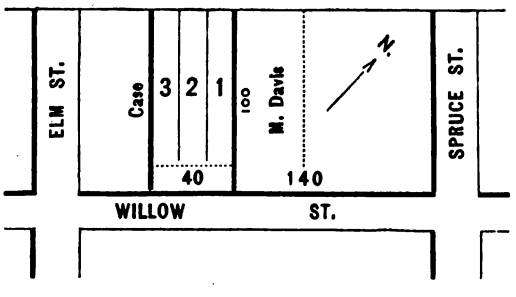
Appeal of Thomas H. Wentz from a decree of the Common Pleas of Montgomery County, distributing the proceeds of a sheriff's sale of certain real estate of Cyrus Baker.

The facts as found by the auditor appointed to report upon the special return made in the case were as follows:—

In 1872 Henry Freedley conveyed to Cyrus Baker a lot of ground situate on the northwest side of Willow Street in the borough of Norristown, one hundred and forty feet southwest from Spruce Street, being forty feet front on Willow Street, and one hundred feet deep.

Baker divided this lot into three equal parts (lots Nos. 1, 2, and 3), each containing in front about 13 feet 4 inches, and erected a house on each part.

PLAN.



By a mortgage recorded November 11, 1872, Baker mortgaged the three houses and the lot of land forty feet front on Willow Street and one hundred feet deep to "the Second National Saving Fund and Loan Association" to secure the sum of $4000. On Sept. 27, 1875, Baker procured a release from the Second National Association exonerating from the lien of their said mortgage a lot which was described in the release "beginning at a point on the northwest side of Willow Street, at the distance of one hundred and *forty* feet southwesterly from Spruce Street, being a corner of this ground now or late of Marple Davis, thence by said Davis's ground northwesterly one hundred feet to ground now or late of Henry Freedley *et al.*, thence by said Freedley's land northeasterly and parallel to Willow Street thirteen feet and four inches to the line of other ground of the said Cyrus Baker, thence by said ground southeasterly, passing through the middle of the partition wall, dividing this and the house erected on the adjoining lot, one hundred feet, to the northwesterly side of said Willow Street, thence along said side of said street southwesterly thirteen feet four inches to the place of beginning; *being the one-third part of said mortgaged premises.*"

This release was prepared by the secretary of the association, who was furnished by Baker with the courses and distances. Baker then mortgaged the premises *as described in the release* to "The William Penn Building and Loan Association," by mortgage recorded September 27, 1875, to secure the sum of $1200.

On the 5th of September, 1876, Thomas H. Wentz obtained judgment against Cyrus Baker for $3124.88.

On the 17th of May, 1878, "The William Penn Building and Loan Association" entered judgment on the bond accompanying their mortgage above mentioned for $1200.

On the 27th of July, 1878, "The Second National Saving Fund and Loan Association" entered judgment on the bond accompanying their mortgage above mentioned for $4000; and under a fi. fa. issued to June Term, 1878, levied upon lots No. 1 and No. 2, which were sold by the sheriff, under a vend. ex., to the plaintiff in the execution, a special return made and confirmed, and a deed executed.

Under a fi. fa. to March Term, 1879, "The William Penn Building and Loan Association" (the writ having indorsed thereon that the judgment was on the bond accompanying the mortgage) levied upon the house and lot No. 3, correctly described in the fi. fa., and sold it under a vend. ex. The plaintiff in the execution became the purchaser thereof, and claimed the right to receipt to the sheriff as the first lien creditor, and the sheriff made a special return of said sale in accordance with said claim.

To this special return Wentz filed exceptions and the matter was thereupon referred to B. E. Chain, Esq., as auditor. From the evidence taken before him, it appeared that the intention of all the parties concerned was by the release of September 27, 1875, to exonerate lot No. 3 from

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the lien of the Second National Association's mortgage, that it had likewise been the intent of all parties to mortgage said lot No. 3 to the William Penn Association, and that it was entirely through a mistake that another lot of ground was described in said release and mortgage. The auditor was of opinion that under these circumstances the William Penn Association were entitled to the first lien upon the fund, and therefore reported that they should be allowed to have the special return made.

Exceptions were filed by Wentz to this report, and were dismissed by the Court, Ross, P. J., saying, in an opinion filed: "I affirm the auditor's report on the distinct ground, that as the defendant does not object, but admits the mistake, his judgment-creditor cannot avail himself of it. The facts would constitute equitable estoppel as to Baker, and Mr. Wentz, his judgment-creditor, is affected in the same way. Of course, if Mr. Wentz had been a mortgagee or a grantee for value without notice, the ruling would be the other way.

"I am not satisfied entirely with the propriety of this conclusion. It opens a wide door for fraud, it encourages carelessness, and to some extent it allows the lien of mortgages to be proved by parol, and that, too, in the very teeth of the record; but still I am not prepared to sustain the exceptions and set aside the report. So many cases of little moment find their way to the Court of last resort that I hope this grave and important point may be finally ruled by that tribunal."

A decree was entered ordering distribution of the fund in accordance with the principles of the auditor's report. Wentz thereupon took this appeal, assigning for error the decree of the Court.

C. H. Stenson, for appellant.

It is clear that the appellant is entitled to the fund. His judgment was the first lien upon the property, there being at the time of its entry no mortgage of record, the description of which covered its limits. Nor had appellant any other notice of the mortgage. On the day of the sheriff's sale, when the rights of the parties were fixed, the mortgage was not a lien on the premises sold. The auditor and Court have since virtually made a new mortgage, on parol evidence, have taken the fund from the first lien creditor of record, and have appropriated it to this putative mortgage. The mistake was a mistake of the appellees and their scrivener, of which the appellant not only had no notice, but by which he was lulled to security by finding of record that the mortgage covered other property. The description being the same in the release and in the new mortgage tended to confirm the record and negative the idea of mistake. A judgment-creditor has the right and the duty to rely on the records of liens, and is not responsible for a mistake, nor liable to lose his lien by parol evidence of the intentions of other parties. The cases cited by the auditor, Court, and appellee are inapplicable.

H. K. Weand and *Chas. T. Miller*, for appellee.

The appellant is a judgment creditor and stands precisely in the shoes of the defendant, and cannot question the accuracy of the description of the mortgaged premises more than the defendant could have done had he desired to do so. The defendant himself furnished the description contained in appellee's mortgage, and does not seek to question the validity of the mortgage upon No. 3.

Act March 18, 1775, Purd. 473.
Rodgers *v.* Gibson, 4 Yeates, 112.
Heister *v.* Fortner, 2 Binney, 45.
Cover *v.* Black, 1 Barr, 494.
Reed's Appeal, 1 Harris, 476.
Morris *v.* Ziegler, 21 P. F. Smith, 450.

A judgment-creditor is not protected by the recording Acts against secret conveyances of the land or secret trusts in the land of the defendant. A mortgage is a conditional conveyance of the land within the purview of the Act of 1775.

Heister *v.* Fortner, 2 Binn. 43.
Reed's Appeal, 1 Harris, 478.
Tryon *v.* Munson, 27 P. F. Smith, 258.

If an unrecorded conveyance, of which a judgment-creditor had no notice, is good against such creditor, how much more should a recorded mortgage be valid as against a judgment-creditor, even if there is an error in the description of the mortgaged premises. After Baker executed his original mortgage he had only an equity of redemption, and Wentz's judgment, entered a year afterwards, bound only that.

Whatever puts a party upon inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, where the inquiry if pursued would lead to knowledge of the requisite facts.

Mulliken *v.* Graham, 22 P. F. Smith, 490.
Parke *v.* Neeley, 9 Norris, 52.

There was enough on the record to put any one inspecting it on inquiry, and affect him with notice of the mistake. The release expressly purported to release a portion of the premises included in the first mortgage, in which the description was accurate. That the starting-point of the description in the release and new mortgage was erroneous was also shown by the rest of the description.

May 2, 1881. THE COURT. It is not questioned that the appellant's judgment was a lien from the date of its entry, upon the land which was sold by the sheriff. The appellee claims the proceeds of the sale, under its mortgage, because it was prior in date to the

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appellant's judgment, and the claim would be good, if in truth it was a lien as against the appellant. But the latter alleges that it was no lien at all because the land described in the mortgage, is not the land sold by the sheriff. The sale was made, not under the mortgage, but under a judgment given to secure the same debt; not entered however until after the appellant's judgment. The appellee must therefore stand upon the mortgage. If that is not a lien as against the appellant, it is of no avail and the decree must be reversed. The land sold was the lot described as No. 3 in the plans printed in the paper books, the description commencing at a point 180 feet southwest from Spruce Street. The land covered by the mortgage is a lot of the same dimensions, but commencing at a distance of 140 feet southwest of Spruce Street. As the whole width of the lot sold, and also of the lot described in the mortgage is but 13 feet 4 inches, no change in the courses given in the mortgage, would make the descriptions cover the same ground. If the courses of the two end lines of 13 feet 4 inches each are reversed, it would simply result in describing the lot No. 1, which was in no circumstances intended to be included in the mortgage. The radical defect was in describing the distance from Spruce Street to the point of commencement as 140, instead of 180 feet. But it is a fatal defect because it excludes the possibility of applying the description of the ground covered by the mortgage to the ground sold by the sheriff. In these circumstances, can the appellant be deprived of his undoubted right as a first lien creditor, simply because there was a mistake in the description, which, as between the mortgagor and the mortgagee, would be corrected upon proper proceedings, or which, in equity, would be treated as corrected? The fact and the character of the mistake are entirely undisputed, and also that it was the mistake of the mortgagor. Of course its non-discovery was due to the negligence of the mortgagee in not certainly ascertaining the error at the time. For these faults, whether of omission or commission, the appellant is in no manner responsible. Why then shall he be deprived of the plain legal right, for it is a legal and not an equitable right that he claims? Moreover he does not claim under, but against the mortgagor. He owes no duty, either to the mortgagor or mortgagee. What consideration which may or does apply as between them, can possibly affect him or his rights? It is no answer to say that the same error occurred in the original release of the lot No. 3, given by the holders of the first $4000 mortgage, and if the second mortgage is no lien the first one is. That mortgage is not before us, no claim is made under it, and lots Nos. 1 and 2 were sold to pay it. But it is contended that the appellant is a judgment-creditor of the mortgagor, and as such he has only the rights which the latter possessed against the mortgagee, and that under the recording Act of March 17, 1775, he is not entitled to the protection of subsequent purchasers and mortgagees for value against secret conveyances. This view was adopted by the able auditor in the Court below, and was concurred in though with great reluctance and much doubt by the learned Judge of the Common Pleas. In this we think there was error. The learned Judge admits that if the appellant held a mortgage instead of a judgment, his decision would have been the other way. We fail to see any reason for this distinction. The appellant was a *bona fide* creditor who has a right to the benefit of the proposition that he parted with his money on the faith of the record as he found it. He was bound by the record of the appellee's mortgage. When he examined it, he found it was not a lien upon that part of the mortgagor's land which was subsequently sold and produced the fund in Court. He was not bound to go further. There was no question of a secret lien or a secret conveyance. The instrument now set up against him is the very one which he saw when he examined the record. It is that particular instrument and no other, secret or open, against which he sets up his right. He is a creditor as well as the appellee, and therefore their equities are equal. His legal right is better, and we know of no reason why he may not assert it. In truth, the appellee was guilty of a fault in not duly caring for its own interests. But the appellant was not derelict in any respect. When he found that the appellee's mortgage covered other ground than that in dispute, he was under no obligation to go to the appellee and inquire if there was not a mistake in the description. Why then shall he be deprived of his plain manifest legal right of priority? It is no answer to say that he cannot claim an advantage which his debtor had not. He is not claiming any such right, nor any right of the debtor. He is claiming only his own right, and it is a right adverse to the debtor. The learned auditor argues that the debtor could not resist the right of the appellee to have the mistake corrected, and he concluded from that premise, that the appellant cannot assert his right of priority, which the law gives him. Herein is the fallacy. The conclusion does not flow from the premise. The right of the debtor to resist the correction of the mistake in the mortgage, is not the right which the appellant either claims or requires in the controversy. It is his *own right* both as against the mortgagor and the mortgagee which he asserts, to wit, the right to have a lien upon his debtor's land not embraced in the appellee's mortgage. If the opposing doctrine were to prevail the con-

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sequences would be of the most serious and alarming character. It would then be competent for a mortgagee to prove by parol testimony, in any case, as against a subsequent judgment-creditor, that although he had taken a mortgage upon one piece of real estate belonging to his debtor, it was the intention of himself and his debtor to include another portion of the latter's land in the mortgage, and that it was omitted by mistake. According to the decision of the auditor and Court below in this case, such subsequent judgment-creditor could not claim his lien upon the land not included, because the debtor could not resist the claim of the mortgagee to have the mistake corrected. If such were the law citizens could never know when they were safe in lending money upon the security of judgments, in any case where there were prior mortgages upon any portion of the debtor's land. And upon the same principle, a subsequent judgment-creditor would be postponed to a prior unrecorded mortgage, of which he had no notice, simply because the mortgage was a good lien against the mortgagor, who could not resist its payment. Yet we held in Britton's Appeal (9 Wr. 172), that even in the case of an unrecorded mortgage given for purchase-money of real estate, the mortgagee was only entitled to priority in the distribution of the proceeds over judgments subsequently entered, upon proof that the judgment-creditors had actual knowledge of the mortgage before the debts were contracted for which their judgments were obtained. And in Nice's Appeal (4 P. F. S. 200), it was held that a debt secured by an unrecorded mortgage without possession taken under it, in the lifetime of the mortgagor, cannot upon his death, take precedence of his general debts, but must come in for its share as one of them. On p. 201, AGNEW, J., says, "We are asked to extend the exemption of an unrecorded mortgage lying dormant at the death of the mortgagor, from the legislation which forbids it and limits its operation, and to give it precedence over the lien of the general debts of the decedent. The argument to support this claim is specious, that as the mortgage was good against the mortgagor himself while he lived, it must intercept claims which attach only at death and must be, in the order of time, an instant later. However plausible this might appear against heirs and devisees whose rights are inferior to those of creditors, it is inadmissible against the lien of the general debts."

In Semple *v.* Burd (7 S. & R. 286), a case constantly followed and never questioned, we held that a mortgage not duly recorded, is not a lien on the land against a subsequent judgment-creditor. On page 290, DUNCAN, J., defines the relative rights and positions of judgment and mortgage-creditors: "The judgment gives the creditor a general lien; the mortgage a specific one. This is the only difference, for the mortgage is but a security for the debt specific and limited, the judgment unlimited, the securities are equal, there is no priority."

The authorities cited by the auditor, and relied upon here, do not touch the point in controversy. They relate only to the right of judgment-creditors, as purchasers or mortgagees within the meaning of the Act of 1775. The two latter classes are protected against unrecorded deeds and conveyances because they are expressly named in the Act. Of course a judgment-creditor is neither a purchaser nor a mortgagee and is therefore not entitled to the benefit of provisions which apply to them only. But this is in no manner a question of protection against an unrecorded deed or other secret conveyance. The title of the mortgagor is not in controversy, nor is there any allegation that it did not duly appear of record. The appellee's mortgage was recorded, and the appellant is bound by everything that appears in it. But the contention relates to something entirely outside and independent of the mortgage, and which no amount of examination of the record would have disclosed. The mortgage contained nothing which indicated that it included the lot No. 3, and hence there was no duty resting upon the appellant to inquire whether it did, or could, or was intended to include it. For these reasons, the decree of the Court below must be reversed and the proceeds of sale awarded to the appellant's judgment.

Decree reversed and record remitted for further proceedings, the cost of this appeal to be paid by the appellee.

Opinion by GREEN, J.

Oct. and Nov. '80, 71. Oct. 22, 1880.

Detrick v. Sharrar.

Statute of Frauds—What necessary to take parol sale out of—Former adjudication—When record discloses that it is not on merits not conclusive on parties.

In order to take a parol sale of land out of the Statute of Frauds, the vendee must take actual, open, notorious, and exclusive possession of the premises in pursuance of the contract, and make such improvements thereon as cannot be compensated in damages.

The sustaining of a demurrer to a bill in equity is simply a decision that the complainant has not set out a case entitling him to relief. It is not a decision on the merits, and hence cannot be put in evidence against the complainant in a subsequent proceeding on the same cause of action as a bar to his relief or recovery.

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Error to the Common Pleas of Venango County.

Ejectment, brought Feb. 20, 1878, by John, William, Samuel, and Ebenezer Sharrar, heirs of one Jacob Sharrar, deceased, against William, Levi, Elias, Martin, and Jeremiah Detrick, heirs of one Jacob Detrick, deceased, to recover a certain tract of land in Pinegrove Township.

On the trial, before TAYLOR, P. J., the plaintiffs showed title as follows: Jacob Sharrar, who was Jacob Detrick's son-in-law, on August 23, 1853, entered into articles of agreement with Derickson and others for the purchase of a certain tract of land, of which the lot for which this ejectment was brought was part, paid the vendor the sum of $14, and gave to them a bond wherein Jacob Detrick was surety for the residue of the purchase-money. Sharrar at once entered into possession of said tract and retained the same until his death, which occurred on May 25, 1857. Plaintiffs further showed that said Sharrar died intestate, and that they were his heirs. They then proved that Detrick, on April 21, 1869, paid to the vendor of the land the residue of the purchase-money, and obtained a conveyance thereof to him; also that subsequently Detrick sold portions of the land to various purchasers, receiving therefor sufficient to reimburse him for his outlay thereon. Plaintiffs brought this ejectment to recover the portion of the tract not so sold, to which defendants claimed title through Detrick.

Defendants proved that Detrick took possession of the land in question after Sharrar's death, that he improved it by clearing, and that he retained possession thereof until his death in 1876, since which time defendants had been seised of the same. They further proved by the testimony of one Elizabeth Fox, that Jacob Sharrar in his last illness, about five weeks before his death, told Detrick "to take the land and do the best he could, for he (Sharrar) could not pay for it; if he (Detrick) would pay for it, it was his, and to try and raise his (Sharrar's) children." They further proved that Detrick had assisted in maintaining Sharrar's children, and that upon one occasion when he was endeavoring to borrow money to pay for the land, he had asserted that "he wanted to pay off the land and to save the balance, what he could, for Sharrar's children," also that when he sold a part of the land he had said "he had a right to sell it for Sharrar; that Sharrar requested him to sell it before he died, to sell part of the land and to save part of it for the children, and he was going to do so."

Defendants then offered in evidence the record of a suit in equity of April Term, 1877, whereby it appeared that plaintiffs to the present suit, and others as complainants had filed their bill against defendants to the present suit, and others, as defendants, in which bill the complainants averred that Detrick had entered into a verbal agreement with Sharrar in his lifetime, whereby he agreed to take care of the land in question, and after selling so much of it as would pay the purchase-money, to keep the balance safely for the family of Sharrar; that in pursuance of this agreement Detrick had taken possession of the land after Sharrar's death, and had taken a conveyance of the title, paid the balance of the purchase-money, and sold enough of the land to reimburse himself for said outlay, wherefore said bill prayed for a conveyance of said tract by defendants, heirs of Detrick, to complainants as heirs of Sharrar, and for an account, etc. Said record also showed that the defendants had demurred to the bill for a misjoinder of parties, because complainants had an adequate remedy at law, because the alleged trust was barred by the Statute of Limitations, because as to the account prayed for complainants were barred by said statute, and also because the Court had no jurisdiction in the premises. Said record further showed that said demurrer had been sustained by the Court, and the bill in consequence dismissed. This record was offered to show that the matter in question had been formerly adjudicated by the Court.

Objected to by the plaintiffs; objection sustained, and evidence excluded—exception.

Defendants presented, *inter alia*, the following points: (1) If the jury find from the evidence that Jacob Detrick, the ancestor of defendants, entered into a parol agreement with Jacob Sharrar for the purchase of his equitable interest in the lands in question, acquired by Sharrar under his article of agreement, whereby Sharrar sold to Detrick his interest in said lands under said contract, and that Detrick shortly thereafter and in pursuance of such parol agreement or understanding entered into the possession of the said premises, and made valuable improvements thereon, and continued thereafter in possession and occupancy thereof under a claim of title derived from Sharrar, such parol sale of his (Sharrar's) interest in said contract is not within the Statute of Frauds, and the verdict should be for the defendants. *Answer.* The point is affirmed as explained in the charge as to what constitutes a valid title under the Statute of Frauds.

(2) If the jury should find from the evidence, as claimed by the plaintiffs, that Jacob Detrick took the title to said lands by parol, subject to a parol agreement on his part "that he should hold the lands in trust for the children of Jacob Sharrar," that such agreement having been made more than five years prior to the bringing of this action, the plaintiffs are not entitled to recover under it. *Answer.* "This point is affirmed if

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you further find the parol contract established, under the instructions as to what constitute a valid parol agreement."

The Court in its charge said, *inter alia*, after referring to the testimony of Elizabeth Fox: "If Detrick did not enter in pursuance of this parol contract, then the contract would not be good; it would be void, for the reason that possession must be taken in pursuance of a parol contract, and if Detrick was in possession before that time, he did not take possession in pursuance of the contract, and the contract is void under the Statute of Frauds and Perjuries. So that so far as the possession of this land is concerned, if Jacob Sharrar was in possession of it five weeks prior to his death, and Detrick did not take possession in pursuance of this parol contract, then the contract is void." . . . . . "And, gentlemen, did Detrick take possession of this land in pursuance of a contract? Did he take an actual, open, notorious, and exclusive possession of that land in pursuance of that contract? How is the evidence? It is for you. There must be still another thing to make a valid contract. There must be valuable improvements made upon the land, and these improvements must be of such value that they could not readily be compensated in damages. How is that? Have you any evidence before you of the value of the improvements made upon this land by Detrick? The evidence, as we understand it, is, that there has been some clearing—how much, has been left uncertain, so far as we remember the testimony. We do not remember how much land has been cleared. Could not all the improvements upon this land be compensated in damages? If so, the Statute of Frauds says it is void. We are left entirely in the dark as to the improvements so far as my recollection goes, but that is for you. If the improvements are so valuable that they could not be compensated it is fair to presume that it could be proven. Now, gentlemen, so much for the parol contract. If these matters are not as stated, this parol contract so far as it is concerned, would be void under the Statute of Frauds and Perjuries, and the defendants would take no title to this land."

Verdict and judgment for the plaintiffs. Defendants took this writ assigning for error, *inter alia*, the rejection of their offer of the record of the equity suit in evidence, the answers to their first and second points, and the portions of the charge above cited.

J. H. Osmer (with him *John McKissick*), for plaintiffs in error.

The statement by the Court of the law as to what is necessary to take a parol sale out of the Statute of Frauds was erroneous, because exacting too much from the vendee.

Miliken *v.* Dravo, 17 Smith, 230.

The record of the suit in equity was an adjudication of the same cause of action between the same parties, and constituted a bar to plaintiff's claim.

Hasbrouck (with him *Mc Calmont* and *Osborn*), for defendants in error.

The instructions of the Court were right as to the parol sale.

The record of the equity suit showed that the decree was not on the merits, and it was therefore not binding on plaintiffs below.

Duchess of Kingston's Case, 2 Sm. L. Ca. 667.
Keller *v.* Commonwealth, 1 Am. L. J. 156.
Fleming *v.* Insurance Co., 2 Jones, 391.
2 Wharton on Evidence, 782.

November 8, 1880. THE COURT. In 1853, Jacob Sharrar bought the land by articles of agreement, paid a small portion of the purchase-money, gave his bond with Jacob Detrick as surety for the balance, took and kept possession till his death in 1857. With full knowledge of Sharrar's equitable title, Jacob Detrick paid the balance of purchase-money and took deed to himself, dated April 21, 1869. Being liable as surety, it was reasonable that he should so pay and take the title. Soon after Sharrar's death, Detrick took possession and used the land as his own until 1876, when he died.

After taking the deed, Detrick stood in the place of the vendors who sold to Sharrar, and on its face and the written contract, he was bound to convey on payment to him of the purchase-money. (Donovan *v.* Driscoll, 8 W. N. C. 369). He knew he took only the legal title. His rights were those of a vendor who had peaceably got possession from his vendee; and on performance by the vendee of his part of the agreement, he would be entitled to recover possession. The plaintiffs as heirs of Sharrar, are invested with such title as he had; and the defendants, devisees of Detrick, hold his title, but in no sense are innocent purchasers. As the cause was tried, there is no question but Detrick had fully reimbursed himself for the purchase-money by sales of land not embraced in the suit, but a part of that in his deed.

The first ground of defence is, a parol sale by Sharrar to Detrick. What is the actual proof of an oral contract? Mrs. Fox testifies, that about five weeks before Sharrar's death, he "told Detrick to take the land and do the best he could, for he could not pay for it; if he would pay for it, it was his, and to try and raise the children." That is all, Detrick did not reply. His conversation with his neighbors after the death of his son-in-law, does not indicate that he had purchased from Sharrar; but those conversations as proved, cast scarcely any light on the question. His possession, cultivation, and improvements for a long time, make little as

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against his young grandchildren. This is not a case for relaxing the strictness of proof of the alleged oral contract because of the lapse of time. As applied to the testimony, we find no error in the instructions of the Court, in answer to defendants' first point.

The parol contract set up not being established by the verdict, no question arises under the Act of 1856. Hence the second specification of error requires no remark.

The second ground of defence is former recovery; and it is urged that error was committed in rejecting the record in the case of Sharrar and others against Detrick and others in equity. That record shows that the bill relates to the same subject of this suit, but as it did not set out a case entitling the plaintiffs to relief, the defendants demurred. Among the causes for demurrer, were misjoinder of parties, full and adequate remedy at law, bar of the statutes of limitation to part of the claim, and want of jurisdiction to another part. The judgment is, "that said demurrer be and is sustained and the said bill be dismissed, with the costs to be paid by the plaintiffs." Is this decree or dismissal of the bill upon its merits? If so, by all authority, it is conclusive between the same parties upon the same matter directly in question in another Court.

It has been stated as a general rule, that a decision in favor of the defendant on a demurrer at law, or to a bill in equity is simply a decision that the plaintiff has not set forth a case entitling him to relief or compensation. It does not, and in the nature of things, cannot determine that he has no case, and shall not have relief in a subsequent proceeding, on grounds different from those disclosed in the first. Several persons joined in a petition which was dismissed on demurrer, the judgment being that the demurrer be sustained, the petition dismissed, and that defendant recover his costs. Afterwards, one of the same plaintiffs filed a petition for the same subject matter, valid and sufficient to entitle her to relief. The former recovery was set up as a bar. But the Court said: "That judgment merely pronounced the former petition insufficient. It decided that the case as presented by that petition was without merit, and to that extent only can it be said to have been a decision upon the merits. But the facts set out in the subsequent case, have never been litigated, or passed upon in any way, and it is therefore illogical and an abuse of terms to say that the judgment relied upon is a judgment upon the merits of the present case, and for that reason must operate as a bar to any relief." (Birch *v.* Funk, 2 Met. (Ky.) 544.) A judgment sustaining a demurrer to a petition for want of form and of proper parties, merely decides that the suit cannot be sustained in that form against these parties, and is not a bar to another suit for the same cause of action. (Nickelson *v.* Ingram, 24 Tex. 630.) When it appears that the bill was dismissed on the hearing of the case, it is to be inferred that it was upon the merits; but when not upon the hearing, if the record does not show, and it is not proved that dismission was upon the merits, there is no bar. (Loudenback *v.* Collins, 4 Ohio N. S. 251.)

At law, a judgment of nonsuit is no bar to another action for the same cause. So if the plaintiff mistake the form of his action, and his writ be adjudged bad on demurrer, the judgment will not bar an action in proper form. So if the plaintiff mistake his cause of action, and the defendant demur and have judgment, this will not preclude a fresh action setting forth the right cause. So also if the declaration be demurred to and judgment sustaining the demurrer because of the insufficiency of the declaration, it will not estop the plaintiff to bring another action to enforce the the same right; because the case as stated in the last declaration was not tried in the first. In these and like cases, if the defendant plead the former recovery in bar, the plaintiff may reply that it was not obtained on the merits. (Wilbur *v.* Gilmore, 21 Pick. 250.) Like principle should apply whenever a decree in equity not obtained on the merits is pleaded in bar to an action.

We are of opinion that the record offered showed on its face that the decree was not on the merits, even of the case presented. But farther, the gravamen of the charge in the bill was an alleged verbal agreement between Jacob Sharrar and Jacob Detrick. As set out, it was insufficient to entitle the plaintiff to relief. In this suit they claim an equitable title under a written contract, and rest thereon; they allege no oral agreement. In every view, the merits of the claim in this suit were not passed upon in the former.

Judgment affirmed.

Opinion by TRUNKEY, J.

Common Pleas—Equity.

C. P. No. 1. March 14, 1881.

Swinney et al. v. The Fidelity Insurance, Trust, and Safe Deposit Company.

Will—Equity—Religious corporations—Executors—Courts of equity have power to compel executors to carry out the provisions of a will.

Hearing on bill, answer and proofs.

This was a bill in equity, filed by Elisha Swin-

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ney and others, members of the Macalester Memorial Church of Torresdale, on their own behalf, and that of the said church, and of any of the members of the church, or any other parties in interest who might desire to be made parties thereto, against the Fidelity Insurance, Trust, and Safe Deposit Company, executors and trustees under the will of Charles Macalester, deceased, to compel them to carry out the directions of his will in regard to building a memorial church at Torresdale.

The bill set forth the will of the testator, the sixth clause of which was as follows:—

"The erection of a Presbyterian Church at Torresdale has been a favorite object with me, and would have been carried out before this time, but for the want of sufficient Presbyterian element in the neighborhood. And I hereby direct my executors, in case, within the period of five years after my decease, a respectable number of persons can be found to form the nucleus of a congregation, to set apart about an acre of ground anywhere on Grant Avenue, in Torresdale (in the Twenty-third Ward of the city of Philadelphia), which may be regarded by them as a desirable location, and to erect a church building thereon, at a cost of five thousand dollars; and when the said building has been completed, to grant and convey the said premises to the Trustees of the General Assembly of the Presbyterian Church in the United States of America, their successors and assigns, in trust, for the use and benefit, as a place of worship, of a church and congregation duly organized at Torresdale, and being in connection with the Presbyterian Church of the United States of America, with power to the said trustees, if they shall at any time deem it expedient, to grant and convey the said premises to such church and congregation in fee, but always on condition that the same shall be used as a place of worship for a church and congregation in connection with the said Presbyterian Church in the United States of America forever. And I further direct my executors, on the completion of said church building, to deposit with the 'Fidelity Insurance, Trust, and Safe Deposit Company,' the sum of five thousand dollars, to be held by them in trust, to pay the net income thereof towards the support of the pastor for the time being of said church and congregation forever. And in case no congregation connected with the Presbyterian Church is formed at Torresdale, as aforesaid, within the said period of five years, then I direct that the said two sums of five thousand dollars each, intended for the erection and support of said church, shall fall into and become part of my residuary estate."

The bill further set forth that shortly after the decease of Charles Macalester, and before April, 1874, the executors sent a copy of the aforesaid will to the Presbytery of Philadelphia North, within whose ecclesiastical jurisdiction Torresdale lies; from that time until after May 14, 1878, the executors did nothing to carry into effect this bequest. That on April 22, 1874, shortly after defendants had transmitted to them the copy of the will the Presbytery appointed a committee to attend to the matter.

That this committee made report on September 30th following, and, on their recommendation, another committee was appointed to organize a church at Torresdale, if the way should be clear. That this committee reported progress April 25, 1875, and from time to time thereafter, until April 16, 1878, when the presbytery directed that, without delay, they should organize a mission church at Torresdale. That on May 6, 1878, the Macalester Memorial Church was duly constituted, consisting of fourteen members; to this number three others were subsequently added. That this action of the committee was accepted, and their report was adopted by the presbytery on the 8th of October, 1878, and the name of The Macalester Memorial Church placed on the roll of the presbytery.

That the organization was completed by the appointment of an elder *ad interim* and a moderator.

That the action of the presbytery was shortly thereafter communicated officially to defendants, and on the 27th of May, 1878, they, by letter addressed to the Chairman of the Committee of the Presbytery of Philadelphia North, accepted the action of the presbytery as binding on them, acknowledging "that it is made the duty of this company to set apart an acre of ground on Grant Avenue, in Torresdale, and to erect thereon a church building," and invited consultation with the committee as to plans, etc. That plans in accordance with this suggestion were prepared and submitted for the approval of the executors.

That on July 19, 1878, the executors wrote to the committee that they had, "after looking carefully at the matter, decided that they had not sufficient evidence to justify them in proceeding to build, and that they would prefer a bill in equity to be filed, a master appointed, and an order of Court obtained."

The bill then set forth that the executors refused to proceed in the matter, and prayed that they be ordered to proceed and execute their duties as executors under the said sixth clause of the will, set apart a lot of ground and erect a church edifice thereon, and convey the same to the Trustees of the General Assembly, in trust for the Macalester Memorial Church in Torresdale.

The answer averred that a sufficient number of persons to form a nucleus under the provisions of the will had not been found; that none of the complainants were property-holders or residents of Torresdale, nor were they in a position to assist in the support of the church, for which it was the intention of the testator to provide; that quite as many persons who lived at Torresdale, and were likely to attend a new church, could have been found during the testator's lifetime; but that the testator refrained from building because he considered that number too small; that, in fact, the number had actually decreased since his death. The respondents, therefore, averred that the conditions upon the fulfilment of which the lot of ground was to be set apart and

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the legacy paid did not exist, and they prayed that the bill be dismissed, and that the two sums of $5000, mentioned in the testator's will, be decreed to have fallen into and become part of the residuary estate of the testator.

Joseph DeF. Junkin and *George Junkin* for complainants.

The condition is that the nucleus of a congregation be found—not a congregation.

The fact that the testator provided a sum of $5000 for the maintenance of the church proves that he did not expect it to be self-supporting.

The will makes no provision as to the *character* of the persons to be found.

The decision of the question whether or not a nucleus has been found rests with the Presbytery alone; and they have decided the question in the affirmative.

The evidence shows that the executors are refusing to act in this matter from an unreasonable cause, and this is therefore a very proper case for the interference of the Court.

Hill on Trustees, *490.

William W. Porter (with whom was *William A. Porter*), for defendants.

This is a legacy upon a condition. The question whether the condition has been fulfilled, should be decided by the executors. When they decided that the nucleus had been found, the presbytery was to organize the church. The executors have investigated the matter, and have concluded that there is no such nucleus.

April 9, 1881. THE COURT (after stating the facts and pleadings). That part of the answer which takes exception to the "persons who have been organized into a church, as not fulfilling the requirements of the will, because they are not in position to assist in the support of the church, and are not permanent residents of Torresdale, is not supported by the testimony as to much the larger number of the members; all are able to contribute to a greater or less extent, and the large majority reside in Torresdale or in the neighborhood of it; nor is it material that they are not property holders; no such qualification was imposed by the testator. So is it also a manifest misreading of the will, to interpret it as restricting the residence of the membership, to what may properly be called Torresdale, within the bounds of which the church building was to be erected; by no word or sentence of the will, can be justified the conclusion, that it was to be restricted in its use to the people residing within the boundaries of Torresdale; the contrary of this appears in the first paragraph of the sixth clause, which reads, "the erection of a Presbyterian Church at Torresdale has been a favorite object with me, and would have been carried out before this time, but for the want of sufficient Presbyterian element *in the neighborhood*." It was to the neighborhood then, that the testator looked with the hope, that within its bounds might be found a sufficient number of Presbyterians to constitute a respectable number to form the nucleus of a church. With the knowledge which Mr. Macalester had of the persons who resided in what may be termed the village which he had founded, he could have had little expectation of finding the element necessary for the formation of such a church as he intended should be established; and therefore the implied hope, that others might find in the neighborhood that which he had not found. If this was not so, he probably would have described the persons to be found, as respectable, in the sense of being wealthy or well to do, which would have a meaning entirely different from the phrase inserted in the will, "a respectable number;" this respectable number in the judgment of the presbytery has been found, which establishes a *prima facie* case in favor of the complainants, because it is the action of a judicatory, which, at least in conjunction with the executors, is required to act, before the intention of the testator in this respect can be carried into effect. This declared intention was not simply to secure the finding of the nucleus of a congregation, made up of Presbyterians, that is, those of Presbyterian predilection or preferences, or who may have been members of other churches of that denomination, and who adhered to the doctrines of the church; but the purpose is clearly expressed that the structure or building was to be for the use and benefit as a place of worship, of a church and congregation, *duly organized* at Torresdale, and being in connection with the Presbyterian Church of the United States of America. The words, duly organized, have a special significance in their application to the organization of a Presbyterian Church when used by one who may fairly be presumed to have understood the full force and accurate meaning of the language employed, to express the thought as it lay in his mind; for, as we have found, he was a Presbyterian, an intelligent man, and one who for years stood forth as an ordained officer of the church with which he was connected. It is not, therefore, straining the language of the will, to hold, that the testator intended that the church for which he was making provision, was to be duly organized according to Presbyterian law and usage, and that law and usage makes it absolutely essential that such organization must be supervised and approved by presbytery, for they only can decide what constitutes the due organization of a Presbyterian Church. In all cases in which a nucleus of a congregation has been gathered, presbytery alone can decide

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whether it shall be duly organized or constituted with the rights and privileges which belong to a completed church organization, and from this it follows, that no authority could as well do the entire work as presbytery, commencing with a due investigation of Torresdale and its neighborhood, in looking for and searching out the Presbyterian element of that locality, in order to ascertain whether it was possible to carry out that which the testator designates as having been a favorite project of his own. In no other way and through no other channel, could this work be as well done as by presbytery, and of all this the testator may be supposed to have been well acquainted. And this raises a fair presumption that his intention was to give to presbytery exclusive control over the entire matter. Whether this is or is not a correct interpretation of the will, it does no violence to its letter or to its spirit, to hold, that that judicatory should at least co-operate with the executors in the effort to find a sufficient body of Presbyterians out of which it was to duly organize a church, before it was called upon to exercise its exclusive jurisdiction of organization, and of bringing the church into proper connection with the General Assembly. It is to be remembered, that the language of the will is not "if my executors can find, or, I direct my executors to try and find;" on the contrary, it reads, "if a respectable number of persons *can be* found." This clearly carries with it the idea that effort should be made to find, but no express direction is given as to who should make this effort, and ascertain if it was possible for the persons or body making search for a respectable number of persons, to find them. It is very certain that the executors did not understand that it was incumbent on them to make this effort in the first instance. This is placed beyond dispute by the testimony of Mr. Gest, who, when asked the question whether, from the time of sending the will to the date named, did the executors, or any one for them, make any investigation as to this church matter at Torresdale, he answered, "Having communicated to presbytery, as I have stated, I did not deem that any action on our part was necessary until we should hear from them. . . . I considered the establishment of the church was for them, while I think the executors and trustees under this will have a responsibility as to how the church was to be constituted, with reference to the number and character of its members." This concession admits that the true construction of the will is, that Mr. Macalester intended that presbytery should ascertain if the respectable number of persons could be found, and if this was committed to presbytery as a duty to be performed by them, if they were to exercise an exclusive judgment and discretion over the matter in the first instance, their action is conclusive and binding on the executors, unless they can show that presbytery has acted in bad faith, or that their action is unwise and has no proper basis to support it. And this in substance is what the defendants have undertaken to do. The opposition now made to this application raises just this issue, which places the burden of proof on those seeking to maintain it; their testimony must not only be sufficient to overcome the *prima facie* case which arises upon the presumption of honest and judicious action on the part of presbytery, but it must also be sufficient to disprove the case which the plaintiffs have made by their testimony. We do not see how the defendants could do otherwise than concede the right and the duty of presbytery to make the effort to find the element necessary to a due organization of a Presbyterian Church; to do less would be to convict themselves of a gross neglect of a duty imposed by the will. For four years after sending a copy of the will to presbytery, they rested content with doing nothing; from April, 1874, to May, 1878, not a word was spoken or an act done by them to carry out a clearly expressed purpose of the testator. It must be taken then, as admitted by the defendants, that, having given notice to presbytery, the executors rested satisfied, under the belief that they had performed their whole duty, until presbytery, who had five years within which to make the effort, ascertained whether the proper nucleus could be found. So entirely were defendants of this mind, that, when notified by presbytery that a church had been formed, they expressed entire acquiescence in what had been done, and communicated such acquiescence in the letter of the Vice-President of May 27, 1878.

There are one or two other matters which bear on this portion of the case now under consideration; the first is, that in the will is found not only the manifest intention that the church was to have a due organization, but it was to be so organized that it was to be brought, to use the language of the testator, in connection with the General Assembly, and this was impossible to be done, unless it was taken under the care and entered on the rolls of presbytery.

The other thought is, that against the view now asserted by the defendants, that it is their exclusive right to decide the question whether such a respectable number of persons had been found as satisfied the requirements of the will, that the testator, when defining the duties of the executors, which he intended should be performed exclusively by them, had no difficulty in finding language that indicates with precision what that intention was—I hereby *direct* my executors to set apart an acre of ground, erect a church building thereon, and then convey said

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property. And I further *direct* them to deposit the sum of $5000 in trust. There is no mistaking the mandatory character of this language, which is wholly wanting, when he says, if a respectable number of persons can be found, etc.

It is, of course, conceded that good faith and the securing of necessary results are essential in order to satisfy the requirements of the will. If all that the testator exacted as preliminary to imposing the duty of building a church at Torresdale on his executors has not been attained, then the complainants have failed to make out a case entitling them to the relief for which they pray. As already stated, it rests on the defendants to make good, by competent proof, either the want of good faith, or gross error of judgment in presbytery, to successfully maintain the stand which they have taken.

This brings us to the consideration of the most material, and, substantially, the only disputed question of fact which is raised by the testimony, whether the conditions imposed by the testator have been established by the proofs.

The witnesses examined on the part of the complainants may be divided into two classes; those who took part under appointment or sanction of presbytery, in the organization of the church, and residents of Torresdale, eleven in all. Those classified under the first head are clergymen, all of whom shared in the examination of the ground, or in the work of organization of the church, the majority of whom are pastors having charge of churches in the northern section of the city—Frankford, Holmesburg, Bensalem, Falls of Schuylkill, and Bristol, just outside of the city limits. Several of these witnesses were connected with this enterprise by appointment of presbytery for all of the period from 1874 until 1878; most of them are gentlemen of long association with the Presbyterian church, familiar with its laws and usages, and having experience in the work of organizing new churches. Their testimony shows that they felt themselves not only justified in organizing the Macalester Memorial Church, but that the prospects of the enterprise are that it will be successful; that fourteen communicant members, with an attendance on the preaching services of from twenty-five to thirty-five persons, are quite equal to and even greater in numbers than those with which other church enterprises have been begun and carried on successfully; to which, in this case, is to be added a house of worship clear of debt, and the income of $5000, applicable to the payment of the pastor's salary. Of the other witnesses, it is to be said that Mr. Thomas is a lumber merchant; Mr. Myers has a cottage or summer residence at Torresdale; Mr. Sweeney is a storekeeper in the neighborhood, and Mr. Campbell and Mrs. McLean are plain working people; the last two have resided at Torresdale, one twenty-six and the other seven years.

Mrs. McLean says she can do more than take a pew, and the other is willing to give $100 towards the support of the enterprise. All these witnesses express a favorable opinion of the success of the church, and of their purpose to contribute to it.

One of the witnesses says, from fifteen to thirty-five families of the neighborhood have expressed themselves favorable to the erection of the church building, and an intention to attend the services of the church, and that most of them are able to assist in its support, and are Presbyterian in their preferences.

On the part of the defendants, nine witnesses have been examined. The testimony of Effingham Perott and Josiah Bacon is wholly negative in its character, and may, without further remark, be passed by. Mr. Caldwell and Mr. Gest, the president and vice-president of the company defendant, have no personal knowledge on the subject. W. G. and Thomas K. Smith, though for years residing at Torresdale, have but little knowledge of the people who are associated in or connected with this church and congregation. When the son was interrogated on the subject, all whom he could say he knew were the families of Nicoll and McLean and Duncan Tait; he does not even know Fullerton, nor the Sweeney or Noble families, nor Susan Fisher, nor James Campbell.

The testimony of the father does not substantially differ from that of the son. Neither of them can be supposed to have a very strong desire to see a Presbyterian church established at Torresdale; they are of a different religious faith, and attend worship at the convent near by. Each expresses the opinion that the proposed outlay of the money would be an improvident expenditure.

Mrs. Laughton, who is a daughter of the testator, George Nicoll, who has been in the employ of the Macalester family for over twenty-five years as a gardener, and Edward M. Hopkins, who is a nephew of the deceased, are all the remaining witnesses. Mrs. Laughton resided at Torresdale for many summers, but her associates, except her own father, were doubtless of a wholly different class from those who desire to establish this church; she is now a member of the Episcopal Church, and is strongly opposed to carrying into effect the desire expressed by the testator, for the reason that she does not believe the church can be sustained. Mrs. Laughton admits that if this bequest of $10,000 lapses and becomes a part of the residuary estate of her father, she will be entitled to half the income for life, and that Nicoll was the only person, in any way or at any time connected with this church

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movement, to whom she applied for information in relation to it.

Nicoll's testimony is against the wisdom of the enterprise, unless some person of wealth will stand in the relation of patron to it. He was one of the original members, and ceased attending upon its services when this suit was brought, because, he says, he thought there was not a sufficient number of members, there was no one to look after its interests and grievances, and because Mrs. Laughton was opposed to it.

Mr. Hopkins's reasons for opposing the establishing of the charity are substantially the same as those given by the last four witnesses: he says, not one person, outside of a few servants, would attend this church. The weight which should be given to his testimony is manifest from his last two answers upon cross-examination: He says, "I do not know that this church has been organized, and I do not know that the Presbyterians for nearly a year have been holding regular meetings in Torresdale, attended by from twenty to thirty persons."

From what I regard as the decided weight of the testimony, I find the fact to be that the conditions contained in the will, upon which are made to depend the erection of a building for the use of a Presbyterian church, as contemplated by the testator, exist at Torresdale; that a respectable number of persons have been found sufficient to form the nucleus of a congregation, which has been duly organized into a church, which is now in connection with the General Assembly of the Presbyterian Church of the United States of America.

I reach this finding of fact, notwithstanding the conclusion which seems to be established by the testimony, that the Presbyterian element in Torresdale differs very little from what it was at the time of the death of Mr. Macalester; but it is equally clear that the evidence fails to show that he had any other knowledge upon the subject, except that which other persons might obtain from association with those of his own condition in life, and with whom he was in the habit of daily intercourse, who, with rare exceptions, were connected with or attendants upon the Episcopal Church. Mrs. Laughton is herself unable to say, of her personal knowledge, that her father ever made inquiry among the people residing in the neighborhood, as to the feasibility of organizing a church, or that he ever made an effort, like that which the committee of presbytery made, to call together, at his own house or elsewhere, those who were willing to join in or favor such an undertaking. If it had been done, Mrs. Laughton and Mr. Nicoll would be most likely, of all persons, to have known all about it. But how does it affect the question, whether Mr. Macalester knew of the Presbyterian element residing in the neighborhood of Torresdale, or whether he did not know; it is sufficient that, having committed to others the duty of seeking out that which he had not found, and the result of their effort being a chruch well constituted, in the opinion of experienced and competent judges, which was duly organized by Presbytery, possessing, in its start in life, elements of strength and hope, not belonging to many of the strong Presbyterian churches of to-day in the dawn of of their existence. The fact, after all that may be said to the contrary, stands forth that the nucleus has been found, a church has been duly organized, and all that it now asks, is that the purpose of the testator may be carried into effect by giving to it the shelter and support which he provided for it.

It is needless to say much of the power of the Court to require a trustee to do that which is imposed on him as a duty, when, without reasonable cause, or for want of proper effort, or a neglect to obtain information necessary to an intelligent action, he refuses to exercise the power with which he is vested, or to perform the duty which he is directed to perform; the law is too well settled to require more than a reference to it here. The principle is equally applicable to the case of a trustee who has a duty enjoined on him to be performed in conjunction with others. In this case, regarded in a light most favorable to the defendants, the duty was a joint duty with the presbytery; all that was required has been accomplished, which, being done, the testator then said, I direct my executors to do that which the complainants seek to obtain from them through the controlling power of the Court, because they have refused to go forward. And upon what ground do they justify the course which they have adopted? We think a careful reading of the testimony will show that a change of purpose on the part of defendants, and their refusal to erect a church building, was propably founded on the advice of Mr. Hopkins alone, which, from Mr. Gest's testimony, shows was volunteered, not solicited. It is true that Mr. Gest speaks of obtaining information from Mrs. Laughton and Mr. Nicoll, but the action of the Board of Directors of the company defendant, was based on the report which Mr. Caldwell says he made to them at a meeting in July, 1878, his information on the subject having been obtained from Mr. Gest, and Mr. Gest could not have conferred with Mrs. Laughton, who at the time was absent in Europe, and did not return home until October, 1878; Mr. Gest also says his interview with her was subsequent to the conversation he had with Mr. Hopkins.

Mrs. Laughton testifies that Mr. Nicoll was present when she had her interview with Mr. Gest, and that was after her return from Europe;

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and Mr. Gest, though testifying to his having conversed with and obtained information from Nicoll, yet he does not speak of having had more than one conversation with him; if they had but the one interview on the subject, then it must have been as late as October, 1878. It is admitted that other than this there was no investigation by the officers or agents of the executors: that no search was made by them, at Torresdale or in its neighborhood, and that the only information which they sought or in any way obtained, was from a source which was either hostile or indifferent to the success of the enterprise. Can this be regarded as fulfilling the full measure of the duty of defendants, or justify them in ignoring the action of presbytery, and in refusing to erect a church at Torresdale? We think that it cannot. In no aspect in which the case can be viewed are they justified in maintaining the stand which they have taken; they have shown no reasonable or sufficient cause which will excuse them from the performance of that which we regard as a manifest duty imposed on them by the testator.

The relief for which complainants pray is hereby granted, the costs of the proceeding to be paid by the defendants.

Opinion by ALLISON, P. J.

Common Pleas—Law.

C. P. of Delaware Co. April, 1881.

Craig v. Economy Building Association.

Sheriff's interpleader—Costs—Who liable for—Losing party—Claimant, having obtained a verdict for the goods, may, on entering judgment, issue fi. fa. for costs.

Rule to set aside fi. fa. for costs.

Feigned issue under the Sheriff's Interpleader Act. The plaintiff obtained a verdict for all the articles claimed by him. Judgment was entered upon this verdict, and fi. fa. issued for costs, whereupon the defendant took this rule.

E. Quinn, for the rule.

V. Gilpin Robinson, contra.

May 2, 1881. THE COURT. There appears to be some conflict in the authorities upon the question of costs in sheriffs' interpleaders. It must be remembered that the proceedings, though in a common law form, are purely equitable. The rules of chancery in interpleader cases govern our practice under the Act of Assembly giving to our common law courts jurisdiction to settle disputes of this kind.

To clearly understand the English cases upon the subject of costs between the parties to an interpleader to test the ownership of personal property levied on by the sheriff, and claimed by a stranger to the execution, we must distinguish the *plaintiff* in a *bill in chancery* from the *plaintiff* in a *suit* under our statute. The plaintiff in a bill in equity in such a case would be the holder of the fund or property in dispute. He would occupy the same position as the sheriff under our statutory proceeding. All those English cases, therefore, which decide that the *plaintiff* shall not be decreed to pay costs, where he has been guilty of no bad faith, no matter what the result of the suit, are only applicable here to the sheriff. Of course his costs, in any event, are payable out of the fund.

Where an English bill for an interpleader speaks of the defendants it would include under our statute both parties. The sheriff would be its plaintiff, and call on the plaintiff in the execution and the claimant of the goods, as defendants in his bill, to interplead.

We must, therefore, look only to those cases which regulate the costs as between *defendants* for light upon the subject. The rule will be found clearly stated in Dan. Ch. Pr. 1766. It is as follows: "In the adjustment of the controversy between the *defendants*, the party whose claim is adjudged groundless, will be compelled to pay the costs to the rightful claimants of the fund." (See Thomson *v.* Ebbets, 1 Hopk. 272; Badeau *v.* Rogers, 2 Paige, 209; Cowtan *v.* Williams, 9 Vesey, 107; Eden Injunc., 2 Am. ed. 405, and note.) This is the rule, though the parties do nothing but suffer the law to run its course. They are called upon by rule, before costs are incurred, to show cause why they shall not maintain or relinquish their respective claims. After this they proceed at their peril as far as costs are concerned. Any other rule would be unjust. Costs must be paid by somebody. If the losing party is not liable, who is to pay the necessary costs of the Court officers, which always await the final result of the suit?

Rule discharged.

Opinion by CLAYTON, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, AUG. 18, 1881.* [No. 18.

Supreme Court.

July, '80, 51. January 28, 1881.

Lungren v. Pennell.
Pennell's Appeal.
Harper's Appeal.

Corporations—Promoters of—When they occupy fiduciary relation towards stockholders—Fraud—Equity—Pleading—Misjoinder—Multifariousness—When objection for, properly taken.

Any man or number of men who are the owners of any kind of property may form an association with others, and sell that property to the association at any price that may be agreed on between them, no matter what it may originally have cost, provided there be no fraudulent representation made by the vendors to their associates. They are not bound to disclose the profits which they may realize by the transaction. There is no confidential relation between the parties, and they deal at arm's length with each other.

Densmore Oil Company *v.* Densmore (14 Smith, 43), and McElhenny's Appeal (11 Smith, 188), approved and followed.

Per GREEN, J. Where several complainants have each a separate cause of action against one or another of several defendants, on the ground of misrepresentations made by the several defendants to the several complainants, with reference to a common enterprise, and the circumstances of each several misrepresentation differ, and there is an ascertained legal measure of damages applicable to each, the proper remedy is an action at law by each person injured against each person who injured him. A bill in equity filed by all so injured against all who injured them, to enforce their rights, is multifarious and defective for misjoinder of parties. Objections to it on this ground, however, if not made until after final hearing, are probably too late.

Appeal from the Common Pleas No. 3, of Philadelphia County.

Bill in equity, between Charles H. Lungren and William A. Bell, trading as Lungren and Bell; William Milligan, William E. Rowan, Nathan Brooke and Edward H. Pugh, trading as Brooke and Pugh; Allen Tomlinson and Francis C. Hill, trading as Tomlinson and Hill; Thomas A. Lancaster and Clayton N. Wills, trading as Lancaster and Wills; J. Graham Tull, T. G. Wall, and Washington Garner, suing as well for themselves as for all other subscribers to the stock of the Treton Oil Company of Ohio (except the defendants), who should become parties to the suit, and contribute to the expenses thereof, complainants; and William H. Pennell, Abraham S. Jenks, Benjamin W. Harper, and The Treton Oil Company of Ohio, defendants.

The bill, filed March 15, 1867, and amended December 30, 1874, averred that the defendants, Pennell, Jenks, and Harper, having formed a fraudulent conspiracy to cheat and defraud the complainants, had in 1864 purchased certain lands in Ohio, supposed to be oil lands, for the sum of $28,136; that after said purchase they formed a company, known as the Treton Oil Company of Ohio, to work said lands; that by fraudulent representations to the complainants and others, to the effect that all subscribers to the stock of said company would be on the same footing as the defendants, and that the real value and purchase-money of the land paid was $105,000, they induced complainants and others to subscribe to the capital stock of said company, the complainants subscribing the following sums:—

Lungren & Bell,	1000	shares,	$2500
William Milligan,	500	"	1250
William E. Rowan,	500	"	1250
Brooke & Pugh,	500	"	1250
Tomlinson & Hill,	500	"	1250
Lancaster & Wills,	500	"	1250
I. G. Tull.	1000	"	2500
Washington Garner,	500	"	1250
T. G. Wall,	1000	"	2500

That a very large sum of money having thus been paid in, defendants conveyed to said company the lands purchased, and took from the treasury thereof in payment therefor the sum of $105,000, the difference between which sum and $28,136 they then divided among themselves. That the said company proved a failure, and that the stock thereof was worthless, and that defendants being officers thereof had charge of the books and papers, and refused access thereto to complainants; wherefore the bill prayed: (1) That defendants be decreed to repay to complainants their several subscriptions with interest; (2) or that the stock be decreed to be sold, and that the defendants be decreed to pay complainants their losses; (3) or that issues be awarded to determine complainants' several damages, and that the defendants be decreed to pay the same; (4) or that the said company be required, or the complainants be permitted, in its name to sue defendants, in order to force said defendants to pay into said company's treasury the amount of their unlawful profits.

On September 25, 1867, answers were filed by the Treton Oil Company, and by Harper, Jenks, and Pennell. The answer of the company averred that it was duly organized by its co-defendants and others, and that the lands purchased were conveyed to it, and were the basis

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of its organization. It further denied all deceit or fraud on its part.

The answer of Harper, Jenks, and Pennell averred that the defendant William H. Pennell had bought the lands in question in 1864; that subsequently he agreed to and did allow the following persons to take each a one-sixth interest in said purchase, viz., R. D. Pennell, Henry W. Childs, and O. C. Childs, and the defendants Harper and Jenks; that afterwards the six so interested agreed to divide the interest in said lands into eighty-sixths, and not to sell any one interest for less than $1250; that in pursuance of said agreement, the defendant Harper afterwards sold one undivided eighty-sixth interest to complainant Milligan for $1250, and that the defendant Pennell had in like manner sold one eighty-sixth interest to each of the other complainants for a like sum, except to complainants Lungren and Bell, Tull and Wall, and that to them he had sold two eighty-sixth interests each for the sum of $2500 each; that defendant Jenks sold no interest to any of the complainants; and further, that various other similar sales of interests were made to others than complainants; that such sales were all *bona fide*, and without any false representations made by defendants as to the value of the land or as to the complainants coming in on equal terms with defendants; that the Treton Oil Company was afterwards organized; that stock was awarded thereon to complainants and others at the rate of $2.50 a share, in proportion to the interest owned by each; that the lands purchased were then conveyed to the said company, and that not one cent was ever taken from the treasury thereof to pay for said lands. The answer finally denied that complainants had been denied access to the books of the said company, and asked that respondents be dismissed with costs.

A replication was filed and the case referred to Samuel Robb, Esq., as Examiner and Master. The following are substantially the facts of the case as found by him in his report, and as adopted by the Supreme Court in its opinion.

"In the latter part of November, 1864, one Henry W. Childs, visited Venango County, Pennsylvania, and by his invitation Wm. H. Pennell, one of the defendants, accompanied him. By Mr. Pennell's invitation, B. W. Harper, another defendant went with them. When they had accomplished the object of their visit, on the proposal of Mr. Childs, they went to West Virginia, to look at oil lands there, meeting on the way A. S. Jenks, another defendant, who was going out to look at some land he had agreed to buy. Mr. Jenks was not satisfied with this land, and the party accepted an invitation from a Mr. Hill, a member of the Hocking Valley Oil Company, to visit the lands of that company in Athens County, Ohio, which were represented as oil lands of great prospective value. On arriving at Athens, they inspected these lands, consisting of two farms in fee and two leased premises which were very highly spoken of, as good prospective oil properties. The Hocking Valley parties offered to sell these properties to Childs, Harper, and Jenks for $150,000, but the offer was declined. The next day two of the Hocking Valley Company came to Pennell and offered to sell him the properties at $45,000, he paying two-thirds of the price and they to pay one-third, and to have one-third of any profit that could be made out them. After some negotiation Pennell agreed that he would take the properties at the price which the original contracts with the owners would show them to have cost, if upon his return to Philadelphia he should think successful oil companies could be organized. Messrs. Childs, Pennell, Harper, and Jenks immediately returned to Philadelphia, arriving there on December 11, 1864, and on the next day, W. H. Pennell, after conference with his brother, R. D. Pennell, telegraphed to Mr. Martin, who represented the Hocking Valley Company, that he would take the properties as agreed. So far it is perfectly manifest that the purchase of the properties in question was made by W. H. Pennell individually, on his own responsibility, without any knowledge on his part, before he left Philadelphia, that he was to buy the properties at all. He did not even know of their existence, and of course he had no relations whatever, as to the purchase, with any of the plaintiffs or defendants. Those relations were established subsequently to the purchase and in the following manner. Some days after the agreement to purchase, but not all on the same day, Messrs. Childs, Harper, and Jenks called on W. H. Pennell, and either at his solicitation, or on theirs, he agreed to sell to each of them a one-sixth interest in the purchase at the cost rate, and the same interest to a Mr. C. O. Childs, and R. D. Pennell his brother. These six persons, thus being the owners of the whole, agreed among themselves to organize two companies, putting a fee and a lease in each company, to make each consist of forty-two parts, and that no interest should be sold for less than twelve hundred and fifty dollars. Up to this point, no one of the plaintiffs had acquired any interest in the enterprise, and no relation confidential or otherwise was established between any of the plaintiffs and any of the defendants. The six persons named were the only parties interested in the project. Shortly afterwards, some of the plaintiffs and others more or less acquainted with the Messrs. Pennell, and who

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had learned in one way or another of W. H. Pennell's visit to the oil regions, called upon them, to inquire about his visit, and were informed that he had purchased or had arranged to purchase certain properties in Ohio, and that he and his brother and certain friends intended to organize two oil companies; that each company would consist of forty-two interests, and that each interest would cost twelve hundred and fifty dollars. He was solicited by some of the parties thus calling to sell interests to them. To one of the applicants, he stated what the land had cost, though the price was not remembered by the witness; to others no prices were mentioned, no questions being asked; some, the majority, of the plaintiffs testified they inferred from what he stated, that the cost was the aggregate of the interests at $1250; and others inferred he was making a profit. It was understood by all that companies were to be organized, and sales of interests were made conditionally on every purchaser joining with him and his friends in the organization thereof. The Master further finds that it does not appear that the Pennells or Harper and Jenks made any representations as to the character of the lands which they did not believe to be true, relying upon the statements made by the parties in Ohio, and upon what had been seen, where they were confident that they and those uniting with them in the speculation would make large profits. While these negotiations were going on, the titles to the properties were being examined, and were finally pronounced good, after which, during January, 1865, the Messrs. Pennell sold or received pay for twenty-two interests at $1250 each. The Messrs. Childs sold their two-sixths interests to R. D. Pennell, at an advance. The conveyances for the properties were made during January, 1865, to W. H. Pennell in fee, and the actual consideration paid in each instance, but one, was recited in each instrument. An assignment of one lease did not recite the consideration, but the actual sum paid for it was $3136. These several conveyances were entered for record in Athens Co., Ohio, the deeds on January 26 and 30, and the assignment and lease on April 6, 1865. On February 7, the parties interested, including the purchasers of eighty-fourth interests held a meeting and resolved to form one company instead of two; that the deeds and assignments of leases offered by W. H. Pennell be received at the price offered—$105,000; that the capital stock should consist of 200,000 shares at the par value of $2.50 each, which should also be the subscription price, and that 20,000 shares of stock should be reserved as working capital, and sold at not less than $2.50 per share. On February 25th a charter was procured, and in March meetings were held, officers elected, and money was appropriated to prosecute the work of the company. On March 11th and April 5th, by proper instruments, the properties were conveyed to the company, for which no money was paid. It was testified by several witnesses that at the organization meeting on February 7th, Mr. Thomas T. Tasker, Sr., one of the purchasers of an interest, stated that these properties for other than oil purposes were worth very little; but as paying oil properties they would be cheap; that it made no difference to them whether they cost Mr. Pennell one dollar or one hundred dollars per acre, and that doubtless he was making a profit out of them. The plaintiffs testify they did not hear these remarks. There was also evidence that at this meeting Mr. Pennell offered to take back the interests of any purchasers who were dissatisfied. The Master further finds at the time of, and for months after, the organization, all the parties appeared to have estimated the property as very valuable, and to have confidently expected to realize large profits from the speculation. He finds also, and upon abundant testimony, that all the purchasers of interests except the plaintiffs presumed or were told and acted on the belief, that Mr. Pennell or the parties from whom they respectively bought were making a profit. Considerable sales of working capital were made at $2.50 per share, and the money was paid into the treasury and used for the purposes of the company. Soon after the organization a prospectus was prepared, setting forth the name of the company: Capital stock $500,000; 200,000 shares, par value $2.50; working capital 20,000 shares; names and addresses of the officers, and inviting subscriptions at the company's office. Two wells were sunk but without success; though wells in the neighborhood were worked with profit. After further unsuccessful efforts to work the property, and numerous meetings of the directors, it was resolved at a meeting of the stockholders in February, 1867, to suspend work, and rent the farm. About this time, some of the parties feeling themselves wronged in the matter of the price paid for the property, decided to commence proceedings to get their money back, and on March 15, 1867, the present bill was filed. A very large amount of testimony was taken, and many other facts in addition to those we have recounted were found by the Master, and some material facts which he was asked to find by the plaintiffs he refused to find, either because he did not credit the witnesses, or because by reason of opposing testimony and of other facts and circumstances combined, he considered the weight of the testimony to be against the theory of the plaintiff. In his report, which is very full and elaborate, he states

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his reasons for the conclusions of fact at which he arrived.

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"The most serious complaint made, by the plaintiffs was to the effect that they were deceived by the representations of the defendants, or some of them, as to the cost of the property, and that they were told, they were to be admitted as purchasers on the same terms as the defendants. The Master very fully and carefully considers the whole of this testimony on both sides.

"He shows that the sales of interests were individual transactions, each being independent of the other, that there was an absence of certainty in the testimony of the plaintiffs as to what was said, that there was positive contradiction by the defendants, as to all the positive statements of the plaintiffs on this subject, that there was very considerable testimony by purchasers, other than plaintiffs, that no such representations were made to them, and that they were satisfied or were directly told by defendants that a profit was being made; that although thirty-one interests were sold to twenty-two different persons only nine of the purchasers, representing twelve interests, joined in the bill. Five purchasers from Mr. Jenks do not complain or consider themselves aggrieved by him or by any defendant. Of sixteen interest holders, representing twenty-two interests purchased from the Pennells, only eight, representing eleven interests, are parties here; the remainder not thinking themselves misled or injured by the Pennells or by any defendant. The Master further shows that some of the plaintiffs were informed or admitted a knowledge that a profit was being made, and he argues that it is difficult to understand how the defendants, meditating such a fraud as is charged here, could have told or acted the truth to one set of purchasers, and told or acted an untruth to another set of purchasers, in respect of the same subject-matter, in an enterprise or speculation in which they were all about to become engaged. He further shows, that by the undisputed testimony, at the organization meeting, the deeds for the properties which recited the actual consideration paid were produced, and were open to the inspection of any one present, and that such action was entirely inconsistent with any theory of fraud as to the price. He refers also to the testimony of the witnesses, who state the declarations of Mr. T. T. Tasker at the same meeting as to the small value of the land except for oil purposes; and that it was a matter of indifference what had been paid for the properties; and also to the fact that the manifest purpose of all was to make a profit out of the land, not as agricultural, but as oil territory. Many other facts and circumstances bearing upon this branch of the case are presented by the Master, with great and convincing force, in favor of the correctness of his conclusions, but it is not necessary to repeat them all."

The Master was further of opinion that the facts showed no fiduciary relation to have existed between Pennell and complainants, and recommended therefore that the bill be dismissed with costs.

To this report exceptions were filed by the complainants on the ground, *inter alia*, that the Master erred in not finding that there was a fiduciary relation existing between Pennell and complainants, in not finding that complainants had been deceived and entrapped by the defendants into purchasing their interests by false representations as to the value of the lands purchased, and as to the footing upon which complainants were to stand as compared with that of defendants, and finally in reporting a decree dismissing the bill.

On December 13, 1874, the exceptions to the Master's report were argued, and the same day the bill was amended by permission. The amendments consisted of new allegations as to the misrepresentations made by defendants to complainants, but comprised nothing as to which the evidence had not been already passed upon by the Master.

The report of the Master was then by agreement referred back to him to enable him to review the case in the light of the bill as amended. He reported that he had been "unable to find in any of the amendments any just grounds for changing the conclusions of his report."

Exceptions were filed, and the case twice argued before the Court. The Court having intimated an opinion adverse to that of the Master, argument was then heard in February, 1879, as to the form of the decree. Defendants then moved for leave to answer the amended bill, which leave was refused them.

On April 21, 1880, the opinion of the Court was delivered by YERKES, J. The Court were satisfied from the evidence that defendants Harper and Pennell had occupied a fiduciary relation towards the complainants, that they had deceived them as to the real value of the land bought, and that they fraudulently represented to them that they were to come into the concern on the same footing as defendants themselves.

The following decree was accordingly entered: "And now, April 21, 1880, the above case having been argued, and after full consideration, it is ordered and decreed that the defendant, B. W. Harper, pay to the plaintiff, Wm. Milligan, the sum of $1778.03, and that the defendant, William H. Pennell, pay to each of the plaintiffs, Lungren & Bell, J. G. Tull and T. G. Wall, the

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sum of $3556.06, and to each of the plaintiffs, William E. Rowan, Brooke & Pugh, Tomlinson & Hill, Lancaster & Wills, and Washington Garner, the sum of $1778.03, and that the said defendants, Pennell and Harper, pay the costs, and that the bill be dismissed as to the defendant Jenks without costs."

The defendants, Pennell and Harper, thereupon took this appeal, assigning for error, *inter alia*, (1) The entering of a decree for complainants on the grounds and for the reasons assigned by the Court. (2) The entering of a decree whereby specific sums were ordered to be paid by specific defendants to specific complainants. (3) The action of the Court in not dismissing the complainant's bill for multifariousness and misjoinder of parties. (4) The refusal to allow the defendants to file answers to the amended bill.

C. Stuart Patterson and *William A. Porter* (with them *T. De Witt Cuyler*), for appellants.

The Court should have allowed defendants to file answers to the amended bill. Any amendment of a bill, however trifling, entitles defendants to an entirely new answer.

1 Daniell's Eq. Prac. 409.
Miller *v.* Whittaker, 33 Ill. 386.
Insurance Co. *v.* Jenkins, 8 Paige, 589.
Bowen *v.* Idley, 6 Id. 46.
Richardson *v.* Richardson, 5 Id. 58.
Bosanquet *v.* Marsham, 4 Simons, 573.

Such amendments fall within the spirit of the Act of May 4, 1864, § 2 (Purd. Dig. 601, pl. 71), which Act is liberally construed.

Dougherty's Appeal, 1 WEEKLY NOTES, 595.
Danzeisen's Appeal, 23 Smith, 65.
Wilhelm's Appeal, 29 Id. 120.

The case presents no evidence of fiduciary relations existing between complainants and respondents, nor does it show that any misrepresentations were made by the latter to the former.

The New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Ch. Div. 13.
Densmore Oil Co. *v.* Densmore, 14 Sm. 49.

The amended blll is bad for multifariousness. It presents two causes of action, viz.: 1. Misrepresentations to induce complainants to buy interests; and 2. Misrepresentations to induce them to buy shares of stock. There is a clear misjoinder of parties, the cause of action of each of complainants being separate and distinct. The relief afforded to complainants is at any rate improper. It should consist of rescission of the contract and restoration to the status *ante fraudem*, not of affirmance of the contract and a specific recovery in damages.

Bispham's Equity, 476.

J. Howard Gendell, for appellees.

The case is clearly one in which the promoters of a company have so conducted themselves as to violate the confidential relations existing between them and subscribers to the stock, or purchasers of interests.

Simons *v.* The Vulcan Oil and Mining Co., 11 Sm. 217.
McElhenny's Appeal, Ibid. 195.
Rice's Appeal, 29 Smith, 204.
Hichens *v.* Congreve, 1 Russ. & My. 150.

The eivdence is very strong that the defendants, especially the defendant Pennell, was acting as agent for others in purchasing the land. The principle of Densmore Oil Co. *v.* Densmore (14 Smith, 43), is inapplicable. There defendants had owned the land for a long time before selling to the company, and never purchased with any intent to form a company.

The evidence as to the misrepresentations by defendants to complainants as to the value of the land and their footing in the enterprise is clear.

Rice's Appeal, 29 Smith, 168.
Ahl's Appeal, Ibid. 204.
Short *v.* Stevenson, 13 Smith, 95.
New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Chan. 73; s. c. L. R. 3 App. Cas. 1218.

The form of the decree was proper. The Court had all parties before it, and its equity powers were sufficiently plastic to warrant a decree whereby justice would be done. The bill is not multifarious, but with a double aspect which is allowable under the authorities.

Story's Eq. Pl. § 97 *et seq.*
1 Daniell's Chan. Pl. & Pr. 232 *et seq.*

An objection for misjoinder or multifariousness can be made only by demurrer.

Story's Eq. Pl. §§ 237 and 544.
Persch *v.* Quiggle, 7 Smith, 247.

The amendments to the bill only set out the representations of the original bill at greater length. They gave no new rights or cause of action to complainants. This fact joined to the lapse of time and the steps taken in the cause between the time of amendment and the application by defendants to file new answers was enough to warrant the Court in refusing to allow such answers to be filed.

Wilhelm's Appeal, 29 Smith, 120.
Good Intent Co. *v.* Hartzell, 10 Harris, 277.
Blakeslee *v.* Scott, 37 Leg. Int. 474.
Brooke *v.* Phillips, 6 Phila. 392.
Pancoast *v.* Reeves, 7 Phila. 383.

February 28, 1881. THE COURT. The learned Master in the Court below, for reasons expressed at length in his report, recommended a decree in this case dismissing the bill. His conclusions were founded on an absence of merit in the case of the plaintiffs. The learned Court differing in opinion from the Master, as to his conclusions upon the facts of the case, and as to the application of equitable principles involved, held that there was liability established as to some of the defendants, in favor of the plaintiffs, and made decrees accordingly. The decrees actually made were that the defendant, B. W. Harper, pay to the plaintiff, William Milligan, $1778.03, and that the defendant, Wm. H. Pen-

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nell, pay to Lungren & Bell, J. G. Tull, and T. G. Wall, $3556.06; and to each of the plaintiffs, Wm. E. Rowan, Brooke & Pugh, Tomlinson & Hill, Lancaster and Wills, and Washington Garner, $1778.03. The bill is dismissed as to A. S. Jenks. It will be seen at once, that there was no common liability of both defendants either to all or to any one of the plaintiffs. On the contrary, there was a judgment for a specific sum of money in favor of one of the plaintiffs, against one of the defendants only, and different judgments, in favor of one set of plaintiffs against the other defendant for one joint sum, and in favor of another set of plaintiffs for several and not joint sums, payable to each. It is difficult to conceive of more discrepant and variant causes of action than are indicated by the decrees in question. If the plaintiff Milligan had a valid claim against the defendant Harper, but not against the other defendants, and the other plaintiffs had different claims against one of the other defendants, but none against Harper, it is not possible to understand what community of right there was, or could be, which would justify the joining of the rather numerous plaintiffs in one bill against the several defendants. The incongruity, so far as the fact is concerned, is explained when we discover by the testimony, and the reasons given by the learned Court below for the decrees, that there never was a common cause of action in the case. In the opinion of the Court it is said: "The plaintiff Milligan bought his stock of the defendant Harper, and false representation was made of the price of the land at the time of sale. We find that nearly all of the other plaintiffs bought of Wm. H. Pennell. As to the two about which there seems to be some doubt, they certainly bought of R. D. and W. H. Pennell. Lancaster and Wills seem to us to have bought of Wm. H. Pennell, whilst Tomlinson and Hill may have bought of the two. To all the defendants at the time of the negotiations for sale of interests, representations were made that no profit was being made from the sale." By this it appears that the causes of action as recognized and enforced by the Court were false representations, made by individual defendants to individual plaintiffs, in regard to the sale by the former to the latter of certain property interests. The Court state further in making up the decrees, "The plaintiffs bought eighty-fourth interests at $1250. This was based upon the amount of property being $105,000. The actual price paid by the defendants was $28,136. One eighty-fourth of this would be $346.85. The difference between this and $1250 would be $903.15, and with interest to date would be $1778.03, which should be paid to each holder." This calculation shows that there was a precise well defined measure of damages, by which the right of each plaintiff, entitled to recover, could be determined. We think it clearly established, that if there was any right of recovery at all, it was a several and individual right, depending upon the circumstances, including the false representations, of each case, with an ascertained legal measure of damages applicable to each, and that the appropriate remedy was by an action at law by each person injured against each person who injured him. It follows that the bill and amendment were multifarious, and defective for misjoinder of parties. We do not, however, decide the case upon these grounds. These objections were not made until after final hearing, when it was probably too late, under the decisions. (Persch *v.* Quiggle, 7 P. F. S. 258.)

The more important question in the case is, the right of the plaintiffs to recover on the merits. We have given a very careful attention, both to the able and exhaustive report of the Master, and to the opinion of the learned Court below, and find that we differ from the Court and concur with the Master in his conclusions upon the whole case. The leading facts as found by the Master are as follows: . . . (In this and the next following space marked with asterisks occur the passages already cited in setting forth the facts as found by the Master.)

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After a very patient and careful examination and consideration of the testimony, we are convinced that in all the important and controlling elements of the case, his findings and conclusions are fully sustained by the testimony.

* * * * * *

The credibility of witnesses and weight and force of their testimony were matters of which the Master was far more competent to judge than the Court below, or this Court, and we do not feel at liberty to deny the correctness of his conclusions as to conflicting testimony. As to the controlling facts there is very little conflict of testimony. When W. H. Pennell agreed to buy the property in question, he was neither the agent of the plaintiffs, nor did he stand in any confidential relation to them. He could not have required any of them to pay any part of the purchase-money. That liability rested entirely upon himself. How, then, can it be said that he purchased as agent for them, or as promoter of a common enterprise? He did not purchase for a company, because no company was in existence. There was no common project at any time between the Pennells and the plaintiffs. On the contrary, W. H. Pennell, having contracted on his sole responsibility, for the purchase of the land on December 12th, sold one-sixth interests in the purchase to various persons after that date, and it was these one-sixth owners who sold, as indi-

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viduals, portions of their interests to individual plaintiffs.

The principles which control such a case are not difficult of statement or application. Our own case of Densmore Oil Co. *v.* Densmore (14 P. F. S. 43) furnishes the test. We there held "that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may originally have cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were in no sense agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy."

In the case of McElhenney's Appeal (11 P. F. S. 188), McElhenney, who represented himself as the owner of the land, but in fact was not, agreed with Boyd and others that if they could sell it for $40,000 they should share the profits with him over the cost price, which he said was $12,000. This plan was carried out. Boyd and others formed a company to which the land was sold at $40,000. The profits were divided with McElhenny, and the company filed a bill against his administrators to recover the money paid to him out of the treasury as part of the $40,000 purchase-money. False representations as to the cost of the land were alleged and proved to have been made, and it was also shown that McElhenny never was the owner of the land, though it was ostensibly sold as his to the promoters, who in turn sold it to the company. This Court, THOMPSON, C. J., in speaking of the transaction, said "It nowhere appears that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co., and others, although he bought it to sell again, no doubt. He had a perfect right, therefore, to deal with them at arm's length, as it seems he did;" and again, "If the property was not purchased by McElhenny for the use, and as agent of the company, but for his own use (and this is the proof in the case), he might sell it at a profit most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profit at which he sold to them.

"They have not pretended that he was their agent in making the purchase, and I am unable to understand the ground of a right in the company to demand it. The difference between the sum he paid and that at which he sold he was as fairly entitled to as to the sum paid." These considerations are directly applicable to the undoubted facts of the present case. It is too plain for argument that W. H. Pennell did not contract to purchase the land as the agent of anybody. His sale of one-sixth interest to his co-defendants and others was made at the actual cost of the property. Then these one-sixth owners, instead of forming a company, as in McElhenny's case, sold eighty-fourth interests to the plaintiffs and others. Then it was that the whole party, as owners of the eighty-fourth interests, including all the plaintiffs and all the defendants, and several others, who are not parties, combined together to form a company with a capital of $500,000, on the basis of the property in question at a cost of $105,000. The owners of the eighty-fourth interests were the immediate promoters of the company, and the purpose of their combination was to sell to the public at $2.50 per share stock which cost them 59 cents per share. This, of course, they had a right to do. Had the property yielded oil in paying quantities, as was confidently expected by all, they would doubtless have been able to market the stock at par or upwards, and thus realize the anticipated profits of the common enterprise. It happened otherwise, and then a few of those who purchased their individual interests at a larger price than was paid by their vendors, seek to get back their money by the aid of salutary equitable principles, which are not applicable to the facts of their case. In our opinion the plaintiffs are not in a position to avail themselves of the benefit of the doctrine which imposes liability to refund upon persons who purchase as agents or promoters. We have examined with much care the evidence relied upon to establish these relations between the defendants and plaintiffs, and we find it to be affected with so much uncertainty and confusion in the testimony of the plaintiffs, so much direct contradiction in the testimony of the defendants, and so much inconsistency with the other facts and circumstances of the case, as to be incapable of use as the foundation of a judicial decree. It follows that the decree of the Court below must be reversed and the bill dismissed.

Decree reversed and bill dismissed, and it is further ordered, adjudged, and decreed, that the costs of the case, including the costs of these appeals, be paid by the appellees.

Opinion by GREEN, J.

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July, '79, 116; July, '80, 54. March 8, 1881.

Lycoming Insurance Co. v. Storrs.

Errors and appeals — What not subject of writ of error — Summons — Irregular service of writ — Writ of error to refusal of motion to quash — When it lies — What is equivalent to waiver of irregular service — Insurance — Whether assignor or assignee for the benefit of creditors should pay assessments on fire insurance policy — Policy not admissible without application when it is part thereof.

A writ of error taken before final judgment to the refusal of the Court to set aside a service of writ of summons as irregular, is premature, and will be quashed.

A defendant, upon an alleged irregular service, appeared *de bene esse*, and unsuccessfully moved to quash the writ. He then appeared before arbitrators, under a rule of reference, agreed to a continuance and to the change of an arbitrator, contested the cause before the arbitrators, and appealed from their award:

Held, That the appearance before the arbitrators and the appeal were equivalent to service, and that the agreement to continue and substitute was a waiver of protests previously filed.

In an action by S., the assignee for the benefit of creditors of M., the assured, against an insurance company, to recover for loss by fire, it was shown, in avoidance of the policy, that M. received notice of an assessment, and that he did not pay it, as required by the policy to effect the continuance of the company's liability:

Held, That S., having no interest in the policy, could not complain of want of notice to him, but that M. still had the beneficial interest in the policy, and should have paid the assessment upon notice.

Held further, That any agreement of the company's agent to indorse on the policy the fact of assignment, that any loss should be paid to S., and that notice of assessments should be given to him, although made with competent authority, was immaterial in view of the fact that S. had no interest, and M. was actually notified.

Held further, That any agreement between M. and the agent of the company that the latter should credit the premium on a debt he owed M. on a land contract, was incompetent to prove payment of premium.

If, by the terms of the policy, the application is made part of the policy, the latter is inadmissible without the application.

Error to the Common Pleas of Bradford County.

Assumpsit on a policy of fire insurance, by Wm. R. Storrs, assignee for the benefit of creditors of John F. Means, against the Lycoming Fire Insurance Company.

This writ of error, and one arising out of the same cause to July T. 1879, No. 116, were argued together. The error assigned in the latter constitutes the first assignment of error in the present writ (*infra*).

The summons was served on O. D. Bartlett, agent, and judgment was entered for want of an appearance. The judgment was stricken off, the summons set aside, and an alias summons was issued, which was served on Walter G. Tracy, agent, and on W. P. J. Painter, president. A rule to set aside this summons was discharged, and the writ of error hereinbefore alluded to was taken. Plaintiff then having taken a rule to arbitrate, defendant, by counsel appearing *de bene esse*, protested, and moved to stay proceedings on account of the pendency of the above writ of error. This motion was refused, and the defendant appeared before the arbitrators, agreed to the substitution of a new arbitrator for one withdrawn, and to a continuance. The arbitrators made an award in favor of the plaintiff, which the Court, upon defendant's motion, refused to set aside. Thereupon the defendant appealed, and, protesting against the illegality and insufficiency of the service, pleaded "non assumpsit, with leave," etc. Upon the swearing of the jury, counsel for defendant again filed a special protest for the reasons given.

Upon the trial, before MORROW, P. J., the following facts appeared. The suit was to recover loss occasioned by the burning of the "Means House." Prior to the fire, and in February, 1877, Means made an assignment for the benefit of creditors to Storrs. It was in evidence that shortly after the assignment, Means and Storrs had a conversation with Russell and Bartlett, from whose companies Means had taken several policies, Bartlett representing the company defendant; that in pursuance of the purpose of this meeting, Russell prepared a statement to the effect that Means, having assigned all his property to Storrs for the benefit of creditors, the loss, if any, on the property covered by the policies, would be paid to Storrs. Russell indorsed these agreements upon his policies, and testified that Bartlett agreed to do likewise, and also to give notice to Storrs of any assessments. Bartlett denied this agreement, and that he was to give Storrs notice. In the ensuing May, notice of assessment No. 35, payable under the policy within thirty days, was sent to Means, but not to Storrs, who never knew anything of it until after the fire. Means testified that upon the receipt of notice, he agreed with Bartlett that it should be paid by crediting the latter with the amount of the assessment on a land contract which he had with Bartlett. The admission of this testimony constitutes the 8th assignment of error.

The notice contained a clause avoiding the policy if the assessment be not paid within thirty days, and also denying the authority of the agent to waive any of its provisions, or receive other than actual payment. Evidence as to how previous assessments had been paid was offered under objection for the purpose of corroborating Means in relation to the alleged indebtedness

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between himself and Bartlett individually. (7th assignment of error.)

The policy provided that "for a more particular description of the property, reference must be had to the application of the assured, which forms a part of this policy." When the plaintiff offered the policy in evidence, the defendant objected to the admission thereof without the application, and tendered the application; but the Court admitted the policy without the application. (5th assignment of error).

The defendant offered in evidence a deed from Storrs to Means, dated May 29, 1879, recorded, etc., wherein Storrs reassigned to Means the property assigned to him in 1877; for the purpose of showing that Storrs had no standing in Court. Objected to; objection overruled. Exception. (9th assignment of error.)

The defendant presented the following points:

(2) That according to the evidence of John F. Means, the real plaintiff, he received notice of the assessment more than thirty days prior to the fire which destroyed the property mentioned and described in the policy, as per notice given in evidence, that he, the said John F. Means, did not pay said assessment No. 35, as required by the terms of the eighth condition of the policy, and of the notice to pay the same which was served upon him. *Answer.* The facts here stated are undisputed, and if they were the only facts in the case relating to notice and payment of assessment No. 35, the plaintiff could not recover. The case is, however, being tried in the name of Storrs, assignee of Means, against the defendant. *Refused.*

(3) That Wm. R. Storrs, the assignee of John F. Means, never having given his premium note to the company, and no assessment having been charged to him on any note of said Means in connection with the policy upon which suit is brought, did not become a member of the company and was not entitled to notice, and that the notice served on John F. Means was good and sufficient under the terms of the contract of insurance. This point the Court did not specifically answer.

(5) That under all the evidence in the case the plaintiff is not entitled to recover, and the verdict must be in favor of the company defendant. This point was not specifically answered. (2d, 3d, and 4th assignments of error.)

The Court charged the jury, *inter alia*: "Now if you find from all the evidence in the case that Bartlett was the agent of the company, with power to write policies; that immediately after the assignment to Storrs he agreed to write on this policy that Storrs was the assignee of Means for the benefit of creditors, and that in case of loss the insurance was to be paid to Storrs; and if you further find that he did not give him notice of assessment No. 35 we think the plaintiff is entitled to recover. Because we think that under his power to write policies he could write upon the face of this policy what Judge Russell testified he agreed to write upon it, and we think also that he had the power under his agency to agree to give this notice to Storrs." (6th assignment of error.)

Verdict for plaintiff for $3300, and judgment thereon, whereupon the defendant took this writ, assigning for error the refusal to set aside the writ of summons, the admission of the evidence objected to, the refusal to affirm its points, and the charge, *ut supra.*

Williams and *H. W. Watson* (with whom was *Angle*), for the plaintiff in error.

The service of the summons was clearly irregular.

The appearance, *de bene esse*, protects from an irregular service, and is not a waiver of the irregularity. The first writ of error was not premature.

Bolard *v.* Mason, 16 Sm. 138.
Coleman's Appeal, 25 Ib. 460
Winrow *v.* Raymond, 4 Barr, 501.

Means was a member of the company, and knew that Bartlett had not the power either to waive the provisions of the by-laws, or to agree to give notice of future assessments to Storrs.

Mitchell *v.* Ins. Co., 1 Sm. 411.
Mentz *v.* Ins. Co., 29 Id. 477.

Storrs was not entitled to notice, and the proposed payment by credit to Bartlett on an individual transaction shows that Storrs never was in fact recognized. But the payment could not be made thus.

Crawford Co. Ins. Co. *v.* Cochran, 7 N. 231.

The policy was inadmissible without the application.

Lycoming Ins. Co. *v.* Sailer, 17 Sm. 108.

The deed, showing that the plaintiff had no interest in the suit, should have been received.

Davies (*Carnochan* with him), for the defendant in error.

No writ of error lies before final judgment to the refusal of the Court to set aside a service.

Miller *v.* Spreecher, 2 Yeates, 162.
Kendrick *v.* Overstreet, 3 S. & R. 357.
Gardner *v.* Lefevre, 1 P. & W. 73.
Coleman's Appeal, 25 Sm. 460.

The continuance, agreement, substitution, and appeal by the defendant were a waiver of any irregular service.

Evans *v.* Duncan, 4 W. 24.
Christman *v.* Moran, 9 Barr, 487.
Bosler *v.* Poe, 13 S. & R. 231.
Stout *v.* Comth., 2 R. 341.

While Bartlett was a special agent, his powers were general, and he acted in this instance within the scope of his authority.

Wood on Ins., 847.
Wharton on Agency, § 202.
R. R. Co. *v.* Schuyler, 34 N. Y. 30.

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If Storrs was a stranger, he had no knowledge of Bartlett's powers, and had a right to rely on his promises.

The defendant had the application, and could have put it in evidence if regarded as part of the policy.

The deed of reassignment was subsequent to the fire and to suit, and consequently immaterial, for all rights had been fixed.

May 2, 1881. THE COURT. The defendant below has taken two writs of error in this case. The first was to the refusal of the Court to set aside the service of the writ. The second was to the final judgment. It is plain the first writ was premature (Coleman's Appeal, 25 P. F. S. 441). This writ must be quashed. As the same point is raised by the first assignment of error upon the second writ the defendant will have the full benefit of it for all it is worth.

We need not discuss the question whether the service of the summons upon W. G. Tracy, the local agent, bound the company defendant. The latter appeared *de bene esse*, and subsequently moved to set aside the service. This the Court refused to do. At this point, the defendant was not in Court unless the writ had been properly served. It had then but one of two courses to pursue; the one was to come in and defend the suit; the other was to stay out and take the risk of the service. It attempted to do both, and as might have been anticipated, did not succeed. The plaintiff took out a rule of reference. The defendant appeared before the arbitrators, agreed to a continuance, and also agreed to a substitution of another arbitrator in place of one first chosen; contested the cause before the arbitrators, and then appealed from their award. The defendant's appearance before the arbitrators and its subsequent appeal were equal to service (Evans *v.* Duncan, 4 Watts, 24), and its *agreement* to continue and to substitute an arbitrator, was a waiver of the protests previously filed. We see no error in the first assignment.

2. The second assignment is sustained. The defendant's second point should have been affirmed. The facts were not disputed that John F. Means, the assured, received notice of the assessment more than thirty days prior to the fire which destroyed the property insured, and that the said Means did not pay his assessment, No. 35, as required by his policy and the notice served upon him to do so. The learned Judge, while admitting the facts as above stated, declined the point for the reason that the case was being tried in the name of Storrs, assignee of Means, against the defendant. This was error. Storrs was a voluntary assignee for creditors. The company had nothing to do with him. He held no policy, nor had he any contract relation with the company. Means still had the beneficial interest in the policy; if paid, the proceeds would go to him or to the payment of his debts, which is the same thing. Hence it is entirely immaterial whether the agent Bartlett made the agreement referred to in the sixth assignment or not. Granted that it was made with competent authority, and that the company failed to give notice to the assignee of the assessment, what does it matter? Can the assignee complain? Certainly not; he was not insured and had no interest. Can Means complain? His mouth is closed because he had notice and did not pay the assessment. Nor does it help him that he supposed his assessment had been paid to the company by Bartlett the agent. He had not paid Bartlett, and any agreement between them that Bartlett should credit the premium on a debt he owed Means on a land contract, would not avail as against the company. Bartlett had no right to take the company's money to pay his private debt to Means, and this the latter knew or ought to have known. The 2d, 3d, 4th, 6th, 7th, and 8th assignments are substantially covered by the foregoing remarks and are sustained.

5. This assignment is ruled by the Lycoming Mutual Ins. Co. *v.* Sailer (17 P. F. S. 108), where it was held that it is error to admit the policy in evidence without the application, where the latter forms a part of it. In that case the defect was cured by the defendant putting in evidence the application. Such was not the case here. The defendant produced the application in Court and tendered it to the plaintiff who refused to offer it. The Court admitted the policy without the application, which was error.

9. The deed from Storrs, assignee, to Means, reconveying the assigned property was competent evidence to show that Means was the real party in interest. This already appeared; the evidence was cumulative and not very important. Yet I see no good reason why it should not have been received.

The first writ of error is quashed.

The judgment is reversed upon the second writ, and a venire facias de novo awarded.

Opinion by PAXSON, J. MERCUR, J., dissents.

[See next case.]

July, '80, 93. March 29, 1881.

Farmers and Mechanics' Mutual Ins. Co. v. Meckes to use, etc.

Insurance—When policy not admissible in evidence without the application—Insurable interest—Waiver of proof of loss—Admissibility of parol evidence to show answers of applicant.

Where by the express terms of a policy of insurance the application is made part thereof, the former is not ad-

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missible in evidence without the latter, unless it be shown that the latter is in possession of the other party, who refuses to produce it.

Lycoming Ins. Co. *v.* Sailer, 17 Sm. 108, and Lycoming Ins. Co. *v.* Storrs (supra) followed.

Where the evidence showed that the insured had entered into an agreement for the purchase of the premises in question and had paid one-fourth of the purchase-money, but had subsequently, after default in some of the later payments, assigned his interest under the agreement to his vendor, and retained possession under a parol agreement by the latter to convey to him upon payment of a stipulated sum:

Held, That he had an insurable interest.

Semble, That it is not necessary that the assured should have either a legal or equitable interest, or indeed any property interest in the subject matter insured. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves any loss to him.

An insured may show by parol that he made truthful statements to the agent of an insurance company, and is not concluded by the intentional or negligent answers of the agent.

Smith *v.* F. & M. Ins. Co., 8 N. 287; Eilenberger *v.* Protection Ins. Co., ibid. 464, followed.

Where an insurance company denies its liability under a policy on the ground that the insured had no interest in the property covered by the policy, a waiver of notice and proof of loss will be presumed.

Error to the Common Pleas of Carbon County.

Covenant, by Samuel L. Meckes to the use of Cornelius Snyder against the Farmers and Mechanics' Mutual Insurance Company.

On the trial, before DREHER, P. J., the plaintiff offered in evidence a policy in the defendant company on a saw-mill and adjoining property, assured to Meckes, the legal plaintiff, as owner in fee. The policy, which was afterward assigned to Snyder, contained the following stipulation:—

"And it is moreover agreed and declared that this policy is made and accepted in reference to the application, also the conditions hereto annexed, which are hereby made a part of this policy and to be used and resorted to in order to explain the rights and obligations of the parties thereto."

Its admission was objected to on the ground that the offer was not accompanied by the application. Objection overruled. Exception. (First and second assignments of error)

The testimony on the part of the defendant was that when Gilbert, the President of the company, and Tobias, the agent for Carbon County, went to the scene of the fire after a verbal notice, Mr. Gilbert asked Meckes, "Are you the owner of this property?" To which Meckes responded, "No, sir; it belongs to Mr. Snyder." Gilbert then said, "If that is so there is no use of proceeding any farther." Meckes then said, "I hadn't any title in the property, I owned it only under a parol contract." The testimony upon this branch of the case is sufficiently set out in the opinion of the Court, *infra*.

There was a dispute as to whether the plaintiff had truly stated the distance between two of the insured buildings, and the value of the property. The Court permitted him to testify as to what his statements were. It was shown that there was no written proof of loss sent to the company until long after the time specified in the policy.

The defendant's counsel requested the Court to charge, *inter alia:*

(4) There is no evidence that the proof of loss was made out and furnished to the defendants according to the by-laws of the company, and, therefore, there can be no recovery. *Refused.* (Seventh assignment.)

(6) If the jury believe that there were misrepresentations, either as to the value of the property, or as to the location of the same, and the distance the buildings were apart, or as to the ownership thereof, there can be no recovery in this suit because the contract of insurance is entire and not separable, and if void in one particular it is void altogether. *Answer.* A mere misrepresentation as to the value of the property, would not avoid the policy. To have the effect to annul the policy or contract of insurance, the over-valuation must have been made fraudulently, or be an intentional misrepresentation. Any material misrepresentation as to the location of the mill and its distance from other buildings, whereby the insurance company was induced to take the risk and issue the policy at a lower rate of premium than would have been demanded if a true and correct statement as to such location and distance had been given, or if the actual risk of the company was in point of fact materially greater than it would have been if the location and distance had been as represented, then such misrepresentation, whether fraudulently made or not, would annul the policy, and the verdict of the jury should be in in favor of the defendant corporation. (Eighth, ninth, and tenth assignments.)

In the general charge his Honor said:—

"The latter clause of the fourth condition of insurance indorsed upon the policy is as follows: 'If the interest in the property to be insured, be a leasehold or other interest not fee simple absolute, it must be so stated in the policy, otherwise the same shall be void.' In the policy itself Meckes is represented as the owner of the property. The evidence, uncontradicted, clearly shows that he was not the owner in fee simple; the evidence shows that the title to this property was in Cornelius Snyder, and therefore, under the fourth condition in insurance, the interest of Meckes ought to have been stated in the pol-

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icy, so that it would show precisely what his interest was, and if there were no other evidence upon this question, other than we have in the policy of insurance itself, and the fact that the title was in Cornelius Snyder, we would have to say to you, that this policy of insurance was null and void, and that there could be no recovery upon it by the plaintiff in this case. Meckes swears, however, that when he went to the agent of this company, Mr. Tobias, to effect this insurance, he stated to him that he held the property under a parol agreement with Mr. Snyder. If he did fully state to Tobias what his interest was, and Mr. Tobias, as the agent of the company, filled up the policy, setting forth that Meckes was the owner, knowing at the time that he was not the owner, but that the title was in Cornelius Snyder, then we say to you, that the fact that Meckes is described in the policy as the owner, would not avoid it, because it was the act and mistake of the agent of the company. The burden of proof rests upon the plaintiff to satisfy your minds fully from the evidence in the case that he did fully state to the agent, Tobias, that the title was in Cornelius Snyder, and that he only held it under a parol agreement for its purchase, and to further satisfy you that that was true—that he did hold it under a parol contract with Snyder. If the evidence so satisfy your minds, then we say to you, that the policy of insurance is good and the plaintiff may recover. (Substantially assignments third to sixth.)

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"Now, if the plaintiff did not comply with the conditions by giving the company notice of the fire, and if Mr. Gilbert, the President of the company, went upon the premises soon after to take a proof of the loss, and he refused to complete the account of the loss or the statement, and went away leaving the plaintiff under the impression that the company would not pay this claim, we say to you that you may infer from this evidence a waiver on the part of the company of a strict compliance by the plaintiff with either the by-law or the condition marked in these conditions indorsed upon the policy of insurance. And if they did so waive it, then if the plaintiff within a reasonable time thereafter (and of that you are to judge) did send a statement and proof of loss to the Secretary of this company, it would be a sufficient compliance on his part with the requirements of the condition.

Verdict and judgment for the plaintiff. Defendant took this writ, assigning for error, *inter alia*, the admission of testimony, the answers to points, and the portion of the general charge above quoted.

Wm. G. Freyman and *Edward Harvey*, for plaintiff in error.

By the express terms of the policy, the application was made part thereof; it was, therefore, error in the Court to admit the one in evidence without the other.

Sheldon *v.* Ins. Co., 22 Conn. 235.
LeRoy *v.* Id., 39 N. Y. 90.
Egan *v.* Id., 5 Denio, 326.
Wood on Insurance, 273.
Lycoming Ins. Co. *v.* Sailor, 17 Sm. 108.
Kensington Bank *v.* Ins. Co., 5 N. 227.

The testimony of Meckes's ownership, conceding its admissibility, fell far short of requisite evidence of title.

Moore *v.* Small, 7 H. 467.
Myers *v.* Byerly, 9 Wr. 368.

The evidence of a waiver of proof of loss was insufficient.

Trask *v.* Ins. Co., 5 Cas. 198.
Edwards *v.* Id., 25 Sm. 378.
Beatty *v.* Id., 16 Ibid. 9.

Craig and *Loose*, for defendants in error.

Inasmuch as the matter contained in the application was not pleaded the decision of Lycoming Ins. *v.* Sailer (17 Sm. 112) has no application, and the policy was admissible.

Although it was contended that the insurance of the property in Meckes's name as absolute owner in fee was evidence that he so stated his title to the company, yet testimony to show the contrary was clearly competent.

Smith *v.* Ins. Co., 8 N. 287.
Eilenberger *v.* Id., Ibid. 464.
Wood on Ins., § 407.

It is not necessary that the assured should have either a legal or equitable interest, or indeed any property interest in the subject matter insured. It is enough if he holds such a relation to the property, that its destruction by the peril insured against, involves pecuniary loss to him, or those for whom he acts. It need not be an existing *jus in re* nor *jus ad rem*.

Wood on Ins., Sec. 266, p. 493.

The question whether the company had not waived their right to a proof of loss was for the jury, and was fairly submitted to them.

Drake *v.* Ins. Co., 3 Gr. 325.

June 20, 1881. THE COURT. By the express terms of the policy in suit, the application is made a part of it, and is "to be used and resorted to in order to explain the rights and obligations of the parties thereto." When the policy was offered in evidence, it was objected to, because it was not accompanied by the application, but the objection was overruled and the policy was admitted. In the subsequent course of the trial, the application was not offered or given in evidence by either party. It was proved to be in existence and in the possession of the defendant at the place and time of trial. The plaintiff gave no notice to the defendant to produce it, nor was its production called for at the trial. The question presented, therefore, under

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the first assignment of error is, whether, when a contract is evidenced by two independent written papers, each one of which is a necessary part of the whole, the plaintiff who sues on the entire contract may give one of the papers in evidence without giving or offering the other? Had the plaintiff called upon the defendant to produce the other paper, after showing it was in their possession, and had the defendant thereupon refused to produce it, a different question would have been presented, but nothing of that kind occurred. It is simply following the familiar rules of evidence applicable in such cases, to hold that the policy offered by itself in this case was inadmissible. It was incomplete proof of the contract of the parties, and this appeared upon a mere inspection of the paper. No question of pleading arose in such circumstances. It was a mere question of evidence. We intimated quite plainly in Lycoming Mutual Insurance Co. *v.* Sailer (17 P. F. S., 108) that the policy was not admissible without the application; but, as the latter was subsequently given in evidence by the defendant, the defect was cured. We have, however, at the present term, in the case of Lycoming Ins. Co. *v.* Storrs, not yet reported [preceding case], expressly ruled that in the circumstances disclosed by the present case, the policy could not be given in evidence without the application, and this case must therefore be reversed on the first and second assignments of error.

The remaining assignments present questions of more difficulty. The policy was issued in the name of Samuel L. Meckes. Unquestionably, it constituted a contract of insurance upon property of which he was, or should be, the owner. It was his interest that was insured; and, in the absence of the designation of any special interest in the property, that interest would, by force of one of the conditions of the policy, be inferentially a fee-simple estate. Now it is entirely undisputed that at the time the policy was issued, Samuel L. Meckes was not the legal owner of the property. He had never held a conveyance of the title to himself. In ordinary circumstances, such a state of facts would have vitiated the policy. We think it equally clear that the policy cannot be sustained as a contract with Cornelius Snyder, to whom the loss was to be paid, for the simple reason that no such contract has been declared upon. But it is alleged that, although Meckes was not the owner of the legal title, he did have an equitable interest in the property insured, and has, therefore, an insurable interest sufficient to warrant a recovery. Even this would not authorize a verdict, if there were no more facts in the case than those which indicate his interest. The policy expressly requires that if the interest of the insured is any other than an absolute fee-simple, it must be so stated, otherwise, the policy is void. But the allegations of the plaintiff, Meckes, go further. He testified on the trial that he did have an equitable interest in the property insured, and that he expressly informed the agent of the company, at the time the policy was effected, of the exact facts in relation to his title, and was assured by the latter that it was all right and that a policy could be issued to him in his own name in such circumstances, which would bind the company. Upon the questions of fact, raised by these allegations, the case was carefully and fairly left to the jury, with proper instructions by the learned Judge of the Court below, as to the character of the testimony required. The jury found these facts against the company, and so far as that finding is concerned, we are bound by it and cannot review it. We are, however, obliged to determine the sufficiency of the facts found, in the light of the testimony, to warrant a recovery by the plaintiff. The first inquiry that arises is, did Meckes have an insurable interest in the property insured? It must be confessed that the evidence upon this subject is not of a very satisfactory character. We have, however, reached the conclusion that it is sufficient to sustain the verdict. In substance it appears from the testimony that Cornelius Snyder was the former owner of the property, which consisted of a large tract of land, a saw-mill and several dwelling houses; that by a written agreement, dated May 2, 1870, he contracted to sell the property to Meckes; and that by an assignment in writing, dated October 22, 1873, Meckes re-conveyed to Snyder his interest under the original agreement. Neither of these papers is printed, and we do not know their contents. Snyder testifies that he thinks the property was valued in the agreement at $6000, and that Meckes paid him about $1500. Though the witness does not state expressly that the property was to be sold for $6000, it is, perhaps, fair to infer from the testimony that such was the fact, and also that Meckes had paid $1500 on account of the purchase-money. But however that may be, it appears to be conceded that whatever interest Meckes had acquired under the original agreement, had been re-assigned to Snyder. When that was done, it would seem that Meckes had no interest, legal or equitable, in the property. But, both Snyder and Meckes testify that at the time of the application for insurance, there was a parol agreement in force between them in relation to a re-sale of the property. The terms of this agreement are certainly vague. Meckes testifies at one place as follows: "We had a parol contract, me and Snyder, when I insured it, by word of mouth; he said, at that time, if I could pay him $1500 for it, he would make me a deed." Whether he agreed to pay that price, or at what time, he does not say. At another

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place, he says, in reply to the questions: "Q. You agreed to pay Snyder how much? A. Well, he said if I could pay him $1500, he would give me a deed for the property. Q. The legal title was in Cornelius Snyder, and you had this agreement by word of mouth? A. Yes, sir." While this is far from being either precise or positive, it would justify an inference that Meckes did agree to pay the $1500. At another place he said he had no title except "by word of mouth," and that he had told Snyder he could not pay him; that he should take the property back, and that he did sell it back to him, and "signed the agreement back to him." This evidently referred to the first sale under the written agreement. At another place in his testimony, he says, in reply to a question as to a declaration to Tobias, "I told him that if the papers were all paid which I had given to Snyder, there would not be much more to pay than about six hundred dollars, if he could collect all the papers I gave to him." It may be that this was said in relation to the final parol agreement of purchase, though the witness does not say so in direct terms. Tobias, the agent of the company says, that Meckes told him he had bought the property for $12,000, and had it all paid but about $600; but this testimony appears to have been stricken out by the Court. The testimony of Snyder, also, is extremely indefinite. He states very positively that he claimed the title at the time of the loss, and that the insurance was effected for his benefit, but he does not give the particulars of the alleged parol agreement. He was asked, "How long did you own this property?" and replied, "I owned it partly all the time; Meckes told me he couldn't pay for it, and he would give me an agreement back and would hold it and see if he could pay for it and keep it. Q. He did transfer the agreement to you? A. Yes, sir. Q. You didn't make the agreement with him at last, but with his wife? A. Yes, sir. Q. And she owns it? A. She did own it." Being asked what he had said to the adjusters about the title, he said, "I think I stated the circumstances as it stood; that I had the title, and Meckes had an interest by parol, and when there would be any loss I would not be satisfied, and he assigned it to me, so things would be all right." Of course, from such testimony as all this, it is impossible to gather any definite and precise terms, so as to adjudge the exact state of accounts between Snyder and Meckes in regard to the purchase-money to be paid or actually paid at the time of the application. Haesler, a witness called by the company, testifying to declarations by Meckes, said, in reply to questions: "Q. Snyder claimed to have the legal title? A. Yes, sir. Q. And Meckes claimed to have the title by parol? A. No; he merely said that upon his paying a certain amount of money he could have it. Q. Which was by word of mouth; nothing written to that effect? A. No, sir; he hadn't paid it yet either." While the testimony, taken as a whole, is weak and unsatisfactory, it does establish, if believed, that there was a parol agreement for the sale of the property by Snyder to Meckes, and that the latter was holding the property at the time of the insurance and of the loss under that agreement, and that a part, perhaps the whole, of the purchase-money was due to Snyder, and that he was to get the amount of the insurance money in payment of what was coming to him. While it may be conceded that this evidence would not be sufficient to reform an instrument or raise a trust, it does not therefore follow, that it is not sufficient to create an interest which may be the basis of an insurance. Both the vendor and vendee agree in asserting the parol contract, and there is no reason to infer that either would refuse to abide by it, if it were set up in a legal or equitable proceeding. In any event we would be bound both by the verdict and the testimony to regard the case as one of parol contract for the sale of land, each party alleging it, the vendee in possession apparently, part of the purchase-money paid, and both parties asking to have it carried out. We think, in such circumstances, an insurable interest exists in the parol vendee. The doctrine, as to what constitutes an insurable interest, is thus stated in Wood on Insurance (§ 257, pp. 482–3): "The fact that the legal title of property is in another, does not deprive a person having an equitable interest therein from insuring it. Such equitable interest is recognized as a valid insurable interest. . . . A vendee of real estate in possession under a contract to purchase has an insurable interest in the property to the extent of his interest, and generally any person who has any interest in the property, legal or equitable, or who stands in such a relation thereto, that its destruction would entail pecuniary loss upon him, has an insurable interest to the extent of his interest therein, or of the loss to which he is subjected by the casualty." In the case of Smith *v.* The Bowditch Mut. Fire Ins. Co. (6 Cush. 448) the insured had formerly been the owner of the property, but had mortgaged it and it had been sold on foreclosure, and, at the time of insurance, he held only a bond for re-conveyance on certain conditions. It was held that this created an insurable interest, though the case was decided in favor of the company on other grounds.

In the case of Ætna Fire Ins. Co. *v.* Tyler (16 Wend. 385) it was held that one who held a contract, for the purchase of the premises insured, for $2000, payable $700 in money and $1300 in an article for land, and had paid no-

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thing on the purchase-money at the time of the insurance, though he had then assigned the article, and had only paid $161 in cash at the time of the loss, had an insurable interest and could recover the whole amount of the policy, although the vendor had also insured the premises in his own name prior to the contract, and that plaintiff knew of the policy at the time his own policy was effected. It is true the contract was in writing, but the decision was not put upon that ground, but rather upon the ground that the vendee had an equitable interest under his executory contract and was in possession.

In the Trader's Ins. Co. *v.* Robert (9 Wend. 406) it was held that both the mortgagor and mortgagee could insure the same building, and that their particular interest in the subject need not be described, but might be described generally as the property of the insured.

In Givney *v.* Phœnix Fire Ins. Co. (1 Wend. 85) the plaintiff had been in possession of the premises for several years, and then, while in possession, made a written contract for the purchase of the property for $5000, payable in yearly instalments with interest. At the date of the policy he had paid nothing, either of principal or interest, and at the time of the fire, he had paid one year's interest only, but had made valuable improvements. It was held, he could recover upon his equitable interest the full amount of the policy.

In Locke *v.* North American Ins. Co. (13 Mass. 67) the Supreme Court of Massachusetts said: "We are satisfied, as the law stands, that a *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured."

Wood on Ins. (§ 274, p. 503): "The fact, however, that the title of the insured to the property is defective or invalid even, will not deprive him of his insurable interest therein, if he is in the possession and use thereof under a *bona fide* claim of title, legal or equitable." To the same effect, see The Farmers, etc., Trust Co. *v.* The Harmony, etc., Ins. Co. (51 Barb. 33); Redfield *v.* Holland Purchase Ins. Co. (56 N. Y. 354).

Wood on Insurance (§ 266, p. 493): "It is not necessary that the assured should have, either a legal or equitable interest, or indeed any property interest in the subject matter insured. It is enough, if he holds such a relation to the property, that its destruction by the peril insured against involves pecuniary loss to him or those for whom he acts. It need not be an existing *jus in re* nor *jus ad rem*."

Col. Ins. Co. *v.* Lawrence (2 Pet. 25): A mere equitable or any qualified property in the thing insured may be protected by insurance. In this case, Chief Justice MARSHALL, in the course of an elaborate and exhaustive opinion, thus states the interest of the insured and the determination of the Court as to its insurable character. "It cannot be doubted, we think, that the assured had an interest in the property insured. Lawrence had an unquestionable title to a moiety of one-third, subject to the rent reserved in the original lease, and to a moiety of the remaining two-thirds as mortgagee. He had such title to the other moiety as could be acquired by an agreement for a purchase, the terms of which had not been complied with. The title is thus stated, because those words which declare the contract to be void, if Lawrence should fail to comply with it, do not, we think, render it absolutely void but only voidable. No time for performance is fixed; and if Howard is content with what has been done by Lawrence, and does not choose to annul the contract, the underwriters of this policy cannot treat it as a nullity. Lawrence, having this title under an executory contract, sells to Poindexter one undivided moiety of the property. These two persons, being both in possession, partly under legal conveyances, and partly under executory contracts, require an insurance on it against loss by fire. Had they an insurable interest? That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law is his. If the purchase-money be paid, it is his in fact. If he owes the purchase-money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property, but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss."

In the case of Redfield *v.* The Holland Purchase Ins. Co. (56 N. Y. Rep. 354) it was held that where land was conveyed by a husband to his wife, upon the consideration and under a parol agreement that the wife should, upon acquiring the legal title, grant and convey back, by a proper instrument to the husband, a life estate in the land, and the husband remained in possession, receiving the proceeds from the land, he had an insurable interest in the buildings erected on the land, although no lease or conveyance of the life estate had been executed to him by the wife. On page 357, the Court say: "The agreement in this case contemplated a

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conveyance by the wife of the life estate to the husband. His rights were not to be left in parol, and the arrangement was not subject to the objection which applies to an attempt to create a parol and secret trust in favor of a grantor. We are of opinion that the plaintiff had an insurable interest in the barn."

In Columbia Ins. Co. *v.* Cooper (14 Wright, on p. 341) it was held that the landlord of a factory, who had a right to seize fixed machinery on the premises for his rent, had an insurable interest therein, as it could not be detached without injury to the freehold.

In Harris *v.* York Mutual Ins. Co. (14 Wright, on p. 348), where a married woman had purchased from her father's executors the property insured, but had not received a deed therefor at the date of the policy, the husband effected a policy in his own name, he and his wife being in possession, and the wife subsequently received a deed for the premises, we held, that the husband's courtesy in his wife's equitable title, under the contract of purchase, was a sufficient insurable interest to sustain the policy.

In Coursin *v.* The Penna. Ins. Co. (10 Wright, 323) the plaintiff had no legal title to the premises insured, until at the end of a suit in equity, which was not commenced until after the loss had occurred. His equitable title consisted in the fact, that he had advanced to the persons, who were themselves but equitable owners, the money required to build the property insured, taking their notes secured by a trust deed. Being unable to pay, a verbal sale was made by the equitable owners to the plaintiff, to whom possession was given and the muniments of title were delivered to the plaintiff who surrendered the notes held by him. In this condition of the facts, it was held, there was a sufficient equitable title to sustain the policy.

Without deciding how far the facts in the present case would have sufficed to enable Meckes to resist an action of ejectment by Snyder to recover possession of the premises, or to have a trust declared for his benefit, or to reform the policy into a contract with Snyder, instead of Meckes, we are of opinion that they do establish an insurable interest in Meckes sufficient to sustain the policy. This branch of the case was not made a subject of distinct charge by the Court, or of finding by the jury; and we have therefore been obliged to expend more effort upon it than would have otherwise been necessary. Having determined it, however, in favor of the policy, the remaining questions are of more easy solution.

If Meckes had no insurable interest, it was a matter of no consequence what he said to the agent of the company in regard to the title, as the policy would then be void. But the policy required that the true character of the interest should be disclosed, if it was other than a fee simple estate, and avoided the instrument if this was not done. The learned Judge of the Court below correctly stated this to the jury in his charge, and said they could not find for the plaintiff unless they found that Meckes did inform the agent when the insurance was effected of the true state of his title, and that he only held under a parol agreement with Snyder. The jury has found by the verdict that Meckes did give this information. There is other evidence than his to support this allegation, as Snyder testifies to the same effect, and there is some corroboration in the fact that the agent did, a few days after the date of the policy, in consequence of what Meckes then told him, indorse upon the policy the words, "Loss payable to Cornelius Snyder, as his interest may appear."

But we are concluded by the finding of the jury, and the only question we can consider, is whether the information given as testified by Meckes was a sufficient compliance with the fourth condition of the policy, which required the true interest to be stated in the policy. The answers to questions were given verbally by Meckes and reduced to writing in the application by Tobias, the agent of the company. But the application is not before us, as it was not given in evidence. Its absence, however, is not material under the charge and verdict. The jury has found that the answers were truthfully made, and if any mistake occurred, it was the mistake of the agent.

In Smith *v.* Farmers and Mechanics' Mut. Ins. Co. (8 Norris, 287) it was held that the assured may show by parol, that he made truthful statements to the agent of an insurance company, and that he is not concluded by the intentional or negligent answers of the agent.

In Eilenberger *v.* Protective Mut. Fire Ins. Co. (8 Norris, 464) we held that the fraud or mistake of the agent, within the scope of his powers, will not enable the company to avoid the policy to the injury of the insured, who innocently became a party to the contract.

The same doctrine was applied to a state of facts very similar to those in the present case, in American Cent. Ins. Co. *v.* McLanathan (11 Kan. 533); and Franklin *v.* Atlantic Fire Ins. Co. (42 Mo. 457).

In Rowley *v.* Empire Ins. Co. (36 N. Y. 550) it was ruled that an agent authorized to take applications for insurance should be deemed to be acting within the scope of his authority where he fills up the blank application of insurance; and if through his fault or negligence it contains a material misstatement, not authorized by the

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instructions of the party who signs it, the wrong should be imputed to the company, and not to the assured.

We see no error, therefore, in the third, fourth, fifth, and sixth assignments.

As to the seventh assignment, it is only necessary to say that we have held in several cases that a waiver of notice and proof of loss within a specified time designated in the policy, may be inferred from a denial of their obligation by the insurers, exclusively on other grounds than the omission to give such notice. (Inland Ins. Co. *v.* Stauffer, 9 Casey, 397; State Ins. Co. of Missouri *v.* Todd, 2 Norris, 272; Farmers' Mutual Life Ins. Co. of Schuylkill Co. *v.* Moyer, 10 W. N. C. 129).

It was in evidence and not contradicted that Meckes gave verbal notice of the loss to Tobias, the agent, on the day after the fire, and that within a week thereafter, Gilbert, the President, and Tobias, the agent of the defendant, visited the premises to take proof of and adjust the loss, and when they learned from Meckes that the title was in Snyder and not in him, Mr. Gilbert declined to proceed any further with the proof, or take any further steps in the matter.

Subsequently, in December following, the fire having occurred in August, the plaintiff did make out and send to the defendant a regular written proof of loss; the latter replied, stating that the company declined to take any action on the claim, holding there was no just claim against them. No objection was made for want of proof of loss. In these circumstances, we think the Court below was clearly right in leaving the question of parol waiver to the jury in the manner they did.

Eighth, ninth, and tenth assignments. We see no error in what the Court said as to the over-valuation of the premises. Certainly, an over-valuation, in order to avoid the policy, must be intentional or fraudulent. A mere mistake of judgment will not suffice; and yet this was all the Court said upon that subject. The jury has found, under the charge, that there was no intentional over-valuation, and we cannot review the evidence on that subject. None of the assignments are sustained except the first and second, and on those—

The judgment is reversed and new *venire* awarded.

Opinion by GREEN, J.

Jan. '81, 82. February 22, 1881.

Appeal of the Children's Hospital. Dunn's Estate.

Charity—Will, construction of—Power of executors—Testamentary trustees—Discretionary power to designate charity—Does not survive to an administrator d. b. n. c. t. a.—Act of April 26, 1855, not retrospective.

When a discretion as to the application of a fund for charitable purposes is vested in executors, and the executors die during the pendency of the prior life estate, and before the occasion for the exercise of the discretion arises, the power is dead.

Although there be a clause in the will authorizing the executors to fill vacancies occurring among them, and conferring upon such successors "all the power and authority conferred by the nominations made by myself," yet, in the absence of successors so nominated, an administrator d. b. n. c. t. a. cannot exercise the discretion, nor claim the confidence reposed in the executors as testamentary trustees.

The testator having died prior to 1855, the Act of April 26, 1855 (Purd. Dig. 207, pl. 18), is inoperative to enable the Court to appoint a trustee to exercise the discretion.

Certiorari to the Orphans' Court of Philadelphia County.

Appeal of the Children's Hospital of Philadelphia from the decree dismissing its exceptions to the adjudication of the auditor, upon the account of Frederick Brown, Jr., administrator d. b. n. c. t. a. of the will of Nathan Dunn, deceased, awarding a certain fund to the heirs at law of the said Nathan Dunn.

In addition to the facts stated hereinafter in the opinion of the Court below, the will contained the following clause:—

"I desire and direct that all the property and estate real and personal which I may own or be in any way entitled to at the time of my decease shall be considered as fully disposed of by this will whether it be hereafter acquired or now owned by me."

Mr. Brown, the accountant, appointed the Children's Hospital to receive the sum of $10,761.29, but the auditor, Joseph A. Clay, Esq., holding the power incapable of execution by the accountant, awarded that sum to the heirs at law. On exceptions filed, the Court sustained the auditor, HANNA, P. J. delivering the following opinion:—

"The question presented by the exceptions of the accountant, arises under the clause of the will whereby a portion of the trust estate, after the death of the cestui que trust without leaving children, is bequeathed to the 'executors in trust to convert the same into money and to pay and apply the same in such amounts and proportions, and to such charitable and literary institutions as they (my executors) may select and

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prefer.' Testator died September 19, 1844, having appointed executors and authorized them upon the occurrence of any vacancy by death or otherwise, to appoint a successor to fill the place so vacant, giving the person or persons so to be appointed, 'all the power and authority conferred by the nominations made by myself.' The last surviving executor died February 27, 1864, without having appointed a successor. The cestui que trust was still living. On July 30, 1864, the accountant was appointed by the Orphans' Court trustee in the place of the deceased executor. On May 19, 1880, the cestui que trust died childless, whereby the corpus of the trust fell into and became a part of the general estate of testator. The accountant was subsequently granted letters of administration, d. b. n. c. t. a., upon the estate, and then filed his account as trustee.

"Before the auditor the balance of the residuary estate was claimed by the heirs at law of testator upon the ground that the trust had failed by reason of the death of the executor without appointing a successor in pursuance of the authority given him by the will, and there being no one in existence at the death of the cestui que trust to exercise the discretion vested in the executors and dispose of the balance of the estate to charitable uses. But on the contrary, the accountant as administrator d. b. n., etc., asserted the right to designate the charitable institution to which the fund should be paid and awarded. The auditor, however, sustained the claim of the heirs at law. After a careful examination of the subject we think this conclusion correct, as it seems to be settled, 'that when a discretion as to the application of the fund to charitable purposes had been vested in executors and those executors died during the pendency of a prior life estate, the Court would not exercise the discretion, and the gift would fail.' (Bispham's Equity, 139; Fontain *v.* Ravenel, 17 Howard, 369; Zeissweiss *v.* James, 13 P. F. Smith, 465.) Nor is the trust preserved by the Act of April 26, 1855 (Purdon, 207, pl. 18), which provides that 'no disposition of property hereafter made for any religious, charitable, literary, or scientific use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or ceasing, or depending upon the discretion of a last trustee, or being given in perpetuity, or in excess of the annual value hereinbefore limited, but it shall be the duty of any Orphans' Court, or Court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity;' etc. Testator's will took effect prior to the passage of the Act, which has been held to be prospective only (Taylor *v.* Mitchell, 7 P. F. Smith, 209), and consequently inapplicable to the present case. As said by SHARSWOOD, Chief Justice, in Mann *v.* Mullin (3 Norris, 301), arising under the Act of 1855: 'The will of Mr. Mann was ambulatory until his death. No rights in his estate under it or against it vested until that period. If at that time the Court of Common Pleas could not as a judicial function have exercised the discretion intrusted to it by the will, there would have been no competent trustee, and the trusts would have failed. We agree that no subsequent Act of Legislature, general or special, could have imparted to it new life.' But as the Court of Common Pleas, by the Act of 1855, prior to the death of the testator in 1873, had been rendered competent to carry into effect discretionary trusts, the charitable bequest contained in his will was preserved and the claims of the heirs at law defeated. But this is not an analogous case. Nathan Dunn died prior to the Act of 1855; but if subsequent, the case would be far different, and the omission of the 'last trustee' could have been supplied. As it is, the trustee appointed was but the trustee for the life of the cestui que trust, and upon her death the fund became payable to the administrator d. b. n. Nor had the latter any authority to execute the trust declared. The Act of 1834 (Purdon, 419, pl. 74), it is true, confers upon such administrators all 'the powers, duties, and liabilities of executors,' yet it has been construed to mean only such duties and powers as are incident to, and connected with, the *administration* of the estate. They may collect the assets, pay debts, sell lands, and distribute under the order of the Court, but they cannot exercise the discretion nor claim the confidence reposed in the executor as a testamentary trustee. (Elbert's Appeal, 9 Watts, 300; Ross *v.* Barclay, 6 Harris, 183; Waters *v.* Margerum, 10 P. F. Smith, 44; Nixon's Est., 7 Phila. Rep. 505; Hepburn's Est., 8 Id. 206; Lantz *v.* Boyer, 2 WEEKLY NOTES, 654; Maus *v.* Maus, Id. 656; Jackman *v.* Delafield, 4 Norris, 381.) For the reasons stated, the exceptions of the accountant are dismissed."

The accountant took this appeal, assigning for error the refusal of the Court to award the sum designated to the Children's Hospital.

John G. Johnson, for the appellant.

The power was not merely a personal one, but vested, without statutory authority, in the successors *virtute officio*. The direction in the will that all the property should be considered as fully disposed of, negatives the idea of a wish to give only through the medium of certain persons specially confided in, and discloses an intention to prevent an intestacy. But the Court has

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decided that there is an intestacy as to this fund and has given it to the next of kin.

Here the power is accompanied by an estate, and the estate having been bequeathed away the power aids the general object of the bequest.

Gibbs *v.* Rumsey, 2 Ves. & Beams, 294.
Attorney-General *v* Glegg, 1 Atk. 356.
Loring *v.* Marsh, 6 Wallace, 337.
Perry on Trusts, §§ 271, 731.

But the power survives to the administrator by statutory enactment.

Act of 22 March, 1825, § 2, Purd. Dig. 1420.
Act of 14 April, 1828, 10 Smith, 222.
Act of 14 June, 1836, § 25, P. L. 633.

William C. Hannis (with whom was *Edward Hopper*), for the appellees.

The power of the administrator was not derived from the testator, but from the Register of Wills, and under our statutes, therefore, he cannot execute the powers of a testamentary trustee.

Ross *v.* Barclay, 6 H. 183.
Waters *v.* Margerum, 10 Sm. 39.

The power confided was founded on personal confidence, and the Court cannot delegate it to another.

Fontain *v.* Ravenel, 17 Howard, 369.
Zeissweiss *v.* James, 13 Sm. 465.
Mann *v.* Mullin, 3 N. 297.
Bispham's Equity, 139.

The rule is the same in England.

Morice *v.* The Bishop of Durham, 9 Ves. Jr. 399, and s. c. 10 Ves. 521.
Williams *v.* Kershaw, 5 Clark & Finelly's Appeal Cases, 111.
James *v.* Allen, 3 Merivale's Reports, 17.
Vezey *v.* Jamson, 1 Simons & Stuart, 69.
Down *v.* Worrall, 1 Mylne & Keene's Rep. 561.
Ommanney *v.* Butcher, Turner & Russell's Rep. 260.
Cole *v.* Wade, 16 Ves. R. 27.

March 7, 1881. THE COURT. We affirm this decree upon the opinion of the learned President of the Court below.

Decree affirmed, and appeal dismissed at the costs of the appellants.

PER CURIAM. MERCUR, J., absent.

May, '81, 115. May 5, 1881.

Eby, Executor, v. Hoopes.

Debtor and creditor—Assignment of securities—Whether in payment or as collateral security—Presumption of law—Transaction between husband and wife.

Whether the assignment of securities by a debtor to a creditor is in payment or as collateral security is a question of intention. In the absence of evidence of intention, it is a presumption of law that the assignment was only as collateral. The duty of establishing the contrary is affirmative and it rests upon the debtor.

The fact that the transaction was between husband and wife, and that the assignment of a security was absolute in form, affords no ground to rebut the presumption.

Error to the Common Pleas of Lancaster County.

Assumpsit, by Simon P. Eby, executor of Elizabeth K. Hoopes, deceased, against William B. Hoopes. The narr. was in the common counts. Pleas, non assumpsit, payment, payment with leave.

On the trial, before PATTERSON, J., the evidence showed the following facts: The plaintiff's testatrix, Elizabeth K. Hoopes, was the wife of the defendant. In April, 1868, she received in cash, as part of her share of her father's estate, about $5500, of which amount she loaned to her husband, the defendant, $3000, and took from him a judgment bond for that sum with interest, which was never entered up. She also loaned to one Griffiths $2500 on a judgment bond. This latter amount was paid off in April, 1874, by a check to her order. She indorsed this check and her husband took it to the bank in which he kept his account, and deposited it to his own credit.

The defendant, under his plea of payment, gave in evidence a bond and mortgage executed to him May 12, 1873, by David H. Lewis and wife for $1850; assignments indorsed by the defendant to Samuel H. Hoopes, and by him to Elizabeth K. Hoopes, both assignments being without date and not acknowledged until August 23, 1878, a short time after Mrs. Hoopes's death. The defendant also proved that on March 31, 1874, he took a judgment bond against Mordecai Markwood for $1800, payable in six annual instalments of $300 each with interest, which judgment was entered of record April 29, 1874, for the use of Elizabeth K. Hoopes. Also the assignment to Mrs. Hoopes in her lifetime of nineteen shares of bank stock, the market value of which was $1016.00.

After Mrs. Hoopes's death her executor issued execution on the Markwood judgment of $1800, and realized as the net proceeds of the sheriff's sale of the defendant's property, $1163.55. He also sued out the Lewis mortgage, and realized from the property $952.73. The total receipts from the above securities amounted to $3132.28, and this suit was brought to recover the difference between that sum and the sum of $5500, the defendant's indebtedness to his wife's estate, with interest. The plaintiff contended that the Markwood judgment and the Lewis mortgage were transferred to Mrs. Hoopes as collateral security, that such was the legal presumption, and that they were only credits for the amount realized from them. The defendant contended that they were assigned as payment to the extent of their full face value, and denied

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that there was any legal presumption that they were taken as collateral.

The defendant presented, *inter alia*, the following points:—

(3) That when an absolute assignment is made by a husband to a wife of a judgment or a mortgage, there is no presumption of law that it is assigned as collateral security. *Answer.* The Court answer, that the rule of law is, that a higher security between different parties, and for a different sum, will be presumed, in the first instance, to have been accepted only as collateral security. If one who is indebted on simple contract gives a bond or has a judgment entered against him for it, the simple contract is merged in the higher security, and any one may agree to accept of a different security in satisfaction of his or her debt. When an absolute assignment is made by a husband to a wife of a judgment or mortgage, there is no presumption of law that it or they are assigned as collateral security, independent of proof that they were so accepted.

(4) That there was no evidence that either the Lewis mortgage or the Markwood judgment was assigned as collateral. *Answer.* The Court answer, that they have no knowledge of such evidence, but that the evidence in the case is for the jury, and whether there is such evidence is for the jury to determine.

The jury found a verdict for the plaintiff for $200, and judgment was entered thereon. The plaintiff took this writ, assigning for error the answers to the defendant's points as above quoted.

H. M. North, for the plaintiff in error.

The defendant, without giving proof of any intention on the part of Mrs. Hoopes to receive the assignments of the Markwood judgment and the Lewis mortgage as absolute payment to the extent of their face value, relied on the alleged presumption of law that they were made in payment and not as collateral security, and the Court sustained the defendant in that proposition. This is clearly error.

Leas *v.* James, 10 S. & R. 315.
Perit *v.* Pittfield, 5 Rawle, 171.
Stone *v.* Miller, 4 Harris, 456.
Jones *v.* Johnson, 3 W. & S. 278.
Covely *v.* Fox, 1 Jones, 174.

If the transaction had been between strangers, it would have been by legal presumption one of collateral security—much more should this be so as between husband and wife.

William M. Hayes and *M. Brosius* for the defendant.

The jury found, as stated in our third point, that the assignment of the Markwood judgment was an *absolute* assignment, and the Court properly charged that in such case there is no presumption of law that it was as collateral security. This was limited and explained in the earlier portion of the answer to our third point, and the question of the intention of the parties was fairly submitted to the jury in the general charge.

We did not seek credit for the Lewis mortgage, which, as the evidence showed, was assigned for a different purpose, and we don't thank the jury for giving us credit for it. The verdict for $200 was a surprise to both sides. No such sum was claimed by the plaintiff, and it was not the result of giving credit for the Lewis mortgage. Our theory is, that the jury confused some irrelevant evidence about a carriage which was in our possession, and thus gave the plaintiff $200 more than he was entitled to. But we submitted rather than have a new trial.

June 6, 1881. THE COURT. The learned Judge of the Court below in his general charge correctly stated the law relative to the assignment of securities by a debtor to a creditor. Whether such assignment is in payment or as collateral security, is certainly a question of intention depending upon the testimony in the particular case. In the absence of evidence tending to show an intention to pay and receive the securities assigned as satisfaction of the debt, in whole or in part, the law presumes that they were assigned only as collateral. The duty of establishing the contrary is affirmative, and it rests upon the debtor. If he fails to perform this duty the law makes a positive inference that the assignment is only as collateral security, and that inference is substantial evidence upon which the creditor may rely. The circumstance that the assignment of the security is absolute in form, is of no consequence on the question of intention, because the assignment simply operates to transfer the title. Nor is the legal effect of the assignment dependent upon the relations which may subsist between the parties. Whether they be husband and wife, or parent and child, or strangers in blood, can make no difference when the one relation of debtor and creditor is under consideration, and there are no special circumstances affecting the case. In Leas *v.* James (10 S. & R. 315), this Court said, TILGHMAN, C. J., "When the defendants set up the assignment of the bonds as a payment, it is incumbent on them to prove it was so intended. The writing itself shows no such thing, and in cases where a chose in action is assigned by the debtor to the creditor, I think the presumption is, that it was not intended as an absolute payment unless it is so expressed. The reason of this presumption is that such assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another." We said in the case of Perit *v.* Pittfield (5 Rawle, 171), "The

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general principle is that property placed by the debtor in the hands of the creditor, is not to be construed as received in full discharge of the debt unless that plainly appears to have been the intention of the parties." In Jones *v.* Johnson (3 W. & S. 278), GIBSON, C. J., said, "There are presumptions which operate even in cases of intention as *prima facie* evidence on the one side or the other; for instance that a bond given by a stranger after the debt incurred was accepted as collateral security."

The learned Judge of the Court below in his answer to the defendant's third point said, "When an absolute assignment is made by a husband to a wife of a judgment or mortgage there is no presumption of law that it or they are assigned as collateral security independent of proof that they were so accepted." As an abstract proposition independent of any relation of debtor and creditor existing between the husband and wife, this is true, but it is said in an action at law where that relation does exist, and the husband who is the debtor is seeking to have an inference of payment affixed to a mere transfer of a security by himself to his wife because it was absolute in form. When said in such a connection and between parties so circumstanced it tended to mislead the jury and was therefore erroneous.

This is still more apparent when we consider the answer to the defendant's fourth point, which was, "that there is no evidence that either the Lewis mortgage or the Markwood judgment was assigned as collateral," to which the Court answer, "that they have no knowledge of such evidence, but that the evidence in the case is for the jury, and whether there is such evidence is for the jury to determine." This answer entirely ignores the force of the legal presumption, which is in itself evidence, that the securities in question were assigned as collateral. This evidence then was in the case and the Court should have so said to the jury instead of leaving it to them to say whether there was any such evidence. Upon these two answers the jury were at liberty to infer that unless there was affirmative evidence on the part of the plaintiff showing that the mortgage and bond were taken as collateral only, they were really taken as payment. This would shift the burden of proof from the debtor to the creditor who required no proof, having already a legal presumption, which in itself was evidence that the assignment was as collateral and not as payment. For these reasons the judgment must be reversed.

Judgment reversed, and venire de novo awarded.

Opinion by GREEN, J. MERCUR and GORDON, JJ., dissent.

Jan. '81, 45. February 17, 1881.

Scott v. The City of Philadelphia.

Road jury—Confirmation of award made by—Cannot be attacked in a collateral proceeding—Act of May 6, 1872 (P. L. 1163)—Practice.

The confirmation of an award of a road jury by the Quarter Sessions cannot be attacked in a scire facias on a municipal claim in the Common Pleas to recover the amount of the award; a party injured by the award has his remedy by certiorari.

Error to the Common Pleas No. 1, of Philadelphia County.

Scire facias sur claim by the city of Philadelphia, against Freeman Scott, to recover $7100, the amount awarded by a road jury as benefits accruing to a lot owned by defendant and situate at the N. E. corner of Fifteenth Street and Montgomery Avenue, by the opening of certain streets through Monument Cemetery.

An affidavit of defence was filed, setting up the following facts: The Monument Cemetery Company owned a certain tract of land in the city of Philadelphia, situate between Broad and Seventeenth streets and north of Montgomery Avenue. By the Act of May 6, 1872, it was provided that Fifteenth, Sixteenth, and Norris streets should be laid out through the above lot of ground, and further, that on "assessing damages for said opening the cost of a suitable inclosure of said cemetery ground on said streets should be allowed." The jury appointed to assess the damages occasioned by the opening of said streets, in pursuance of this Act reported that no damage would be sustained by the Monument Cemetery Company by reason thereof, but were of opinion that the cost of a suitable inclosure for said cemetery upon the line of the newly opened streets would be $34,600, which sum they accordingly awarded to the cemetery company. They further reported that certain lots of ground, *inter alia*, that of defendant, were benefited by said opening and accordingly assessed upon defendant the sum of $7100 as the amount of benefit accruing to his property. Exceptions were filed to this report, and it was thereupon recommitted to the jury with instructions that "whatever sum the jury award, must be awarded as damages for the opening of the said streets." (See 10 Phila. 214.) The jury then, without notice to the various apportionees, filed a supplemental report stating, *inter alia*, as follows: "The jury find, determine, and award to the said . . . . cemetery company as the full damages sustained by them by reason of the opening of Fifteenth, Sixteenth, and Norris streets through the ground of its cemetery, the sum of $34,600, and do assess and

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apportion the same among the respective properties in the vicinity benefited by the opening of said streets, as shown by the former report, reference being had thereunto will more fully and at large appear." This report was afterwards confirmed, and the claim in suit filed against defendant's property.

The affidavit of defence concluded by averring that affiant was advised and believed that the Act of May 6, 1872, and the award of the jury were unconstitutional in that defendant's property was taken without compensation and given to the cemetery company, not for damages done it, but to improve its property by the erection of costly and ornamental walls and railings.

A rule for judgment for want of a sufficient affidavit of defence was obtained and afterwards made absolute, whereupon defendant took this writ, assigning for error the entry of judgment as above.

Wm. Rotch Wister (with him *Chas. Meyers*), for plaintiff in error.

The Act of May 6, 1872, is unconstitutional in providing that in assessing damages, the cost of a suitable inclosure to the cemetery shall be allowed; we have been able to find no similar Act in this State. Private property cannot be taken for private use. This new element in damages is clearly wrong; the only test is the market value of the estate before and after the property is taken. Such is the law in this and in all other States. The jury expressly found in their original report that no damages would be done the cemetery company, by reason of opening the streets in question, and this still stands as a part of their finding. The instructions of the Court, in pursuance of which a supplemental report was filed, were erroneous; the unconstitutionality of the Act was not at the time called to the attention of the Court, or it would have held it unconstitutional.

C. E. Morgan, Jr., Assistant City Solicitor, and *Wm. Nelson West*, City Solicitor, for defendant in error.

The confirmation of a road jury's award cannot be impeached collaterally. Any irregularity or error in the proceedings of the Quarter Sessions must be corrected in that Court or in the Court of last resort by certiorari.

Pittsburg *v.* Cluley, 24 Sm. 264.

Western Penna. R. R. Co. *v.* City, 2 WEEKLY NOTES, 229.

The decree of the Quarter Sessions in the proceedings under the Act of May 6, 1872, have been affirmed by this Court.

Sharp's Appeal, 5 WEEKLY NOTES, 239.

February 28, 1881. THE COURT. The confirmation of an award of a road jury, cannot be impeached collaterally. The plaintiff in error, could have removed the proceedings to the Supreme Court by certiorari, when his present contention might have been presented and fully heard. Even admitting the unconstitutionality of the Act of May 6, 1872 (Pamph. L. 1163), for the sake of the argument, it is only according to the plaintiff by reason of the allowance for inclosure, but that did not affect the jurisdiction of the Quarter Sessions. Their order in the case, even on this assumption, was not void, but voidable. It would make sad havoc with orders and decrees, if whenever a constitutional question is shown to have been involved, they are to be treated as null and void if wrongly decided.

Judgment affirmed.

PER CURIAM.

Common Pleas—Law.

C. P. No. 2. Dec. 21, 1880.

Bank v. Kurtz.

Warranty of chattels—Fraudulent certificates of stock—Liability of vendor or pledgor.

Case stated, in which the facts set forth were substantially as follows: In the month of April, 1875, the Peoples' Bank, the plaintiff, bought of William W. Kurtz, a note broker, trading as W. W. Kurtz & Co., three promissory notes, with collateral, made by the Emaus Iron Co. to the order of S. Gross Fry, signed "Emaus Iron Co. per S. GROSS FRY, President," and indorsed "S. GROSS FRY." Each note contained an authority to the holder to sell the collateral upon default in the payment thereof without any notice or demand of payment. The collateral given with these notes consisted of three certificates of the capital stock of the Phila. & Darby R. R. Co., standing in the name of W. W. Kurtz & Co., and accompanied by a blank power of attorney, properly executed by them to transfer the same. The certificates were signed by S. Gross Fry, President, and by the Treasurer.

The three notes were not paid when due, and were protested. Before the notes fell due, however, on May 15, 1875, a fraudulent over-issue of the Phila. & Darby R. R. Co.'s stock was discovered, and the stock fell from a value of $8 per share to less than $3. The shares pledged by the defendant with the plaintiff were part of this fraudulent over-issue, although entirely regular on the face of the certificates, which were duly signed and sealed by the proper officers of the corporation.

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In August, 1875, immediately when the notes fell due, the plaintiff tendered them with the collateral to the defendant, and demanded repayment of the money paid for them. This demand was refused by the defendant, and was again refused December 4, 1875, on a similar tender of the notes, protests, and collateral.

The plaintiff, when it purchased the notes of the defendant, dealt with him as a principal and did not know that the defendant was simply acting as the agent of S. Gross Fry, the President of the Emaus Iron Co., and of the Phila. & Darby R. R. Co., although that was the fact.

Various small amounts, insufficient in the total to pay the claim of the plaintiff, had been collected by suit and otherwise from the Phila. & Darby R. R. Co., from the assigned estate of the Emaus Iron Co., and from the assigned estate of S. Gross Fry.

The question submitted to the Court upon these facts was whether the plaintiff was entitled to tender back the notes or not; if the answer were affirmative, then judgment for the plaintiff for the amount remaining unpaid.

Charles Gilpin, for the plaintiff.

The defendant, Kurtz, when he presented these certificates of stock as collateral, thereby warranted their genuineness to the bank. The bill of sale which Kurtz gave, sells to the bank 2600 shares of the capital stock of the Phila. & Darby R. R. Co.

Flynn *v.* Allen, 7 Sm. 482.

The plaintiff's suit in equity against the Phila. & Darby R. R. Co. can work no estoppel; for without bringing that suit it was impossible to ascertain whether the certificates warranted by Kurtz were genuine or not.

R. C. McMurtrie, contra.

The doctrine of *ultra vires*, which it is alleged renders these certificates of stock entirely void, because issued for shares in excess of the amount allowed by the charter of the corporation, ought logically to be extended a step further. If by this doctrine the certificates are void, they can furnish no basis for a contract, and the only remedy is against the corporation for a tort in issuing them.

[HARE, P. J. The obligation which the plaintiff here is seeking to enforce arises not out of these void certificates, but out of the acts done by the parties in execution of what originally may have been a void contract. Out of these acts new considerations may arise.]

The doctrine of *ultra vires*, however, was never intended to enable a corporation to take advantage of its own wrong, to seduce a man into dealing with it and then to deny the validity of its own acts. The doctrine does not vitiate the acts of corporations as regards outsiders dealing with the corporations.

Insurance Bank *v.* U. S. Bank, 4 Clark's Pa. Law Jour. 125.

O'Hare *v.* Bank, 27 P. F. S. 102.

Bank *v.* Savings Society, 3 Grant, 135.

There is no warranty, and there is no question of specific performance; for this was only a contract for collateral; the bank did not care nor contract for these particular shares. There can be no rescission, for the bank has sued upon the certificates and thereby waived its right to rescind.

Benjamin on Sales, § 452.

C. A. V.

THE COURT. Judgment for defendant on the case stated.

C. P. No. 3. June 25, 1881.

Brooks v. Prentzel.

Practice—Discontinuance—Not allowable if done to vex defendant in a criminal action.

Rule to strike off discontinuance.

The transcript of the magistrate's docket and the depositions taken, showed that on June 14th, 1881, defendant was arrested on a charge of perjury in making the affidavit of defence in this case. After the filing of the affidavit the case was discontinued. Upon the hearing before the magistrate, this fact was shown, and thereupon defendant was bound over to appear at the Quarter Sessions. This rule was then taken.

A. M. Burton, for the rule.

The object and effect of the discontinuance of this suit is to vex and harass the defendant in a criminal action. This should not be allowed.

Payne *v.* Grant, 7 WEEKLY NOTES, 406.

John Dolman, contra.

THE COURT. Rule absolute.

Orphans' Court.

May 23, 1881.

Condy's Estate.

Decedent's estate—Insurance stock—Increase of capital—Sale of option to subscribe to new stock by executor—Proceeds belong to principal of estate and are not part of the income.

Sur exceptions to adjudication.

The following are the facts as they appeared before the Auditing Judge (HANNA, P. J.):—

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Mary Condy, the testatrix, died June 29, 1880, bequeathing the residue of her estate in trust "to collect and receive the income and interest of the residue, and after deducting commissions and expenses, to pay the same to my aforesaid cousin, Elizabeth Borden Biddle, of the city of Philadelphia, State of Pennsylvania, during her natural life, and at her death to be thus disposed of." She then gives "one-half of said residue of my estate" to the Protestant Episcopal Hospital, and the "remaining half of said residue" to Christ Church Hospital. Among the assets of the estate were certain shares of the "Insurance Company of North America."

On November 15th, 1880, at a special meeting of the stockholders of the Insurance Company of North America, a resolution was adopted as follows: "That the capital stock of the company be increased one million dollars, by the issue of one hundred thousand shares at par to the stockholders, in proportion of one share for each two shares held by them on the day they shall respectively subscribe for the same—they subscribing an agreement to pay ten dollars per share for the stock, and also ten dollars per share for the privilege of subscribing, the proceeds of which privilege shall be added to the surplus fund of the company." The right to subscribe to expire on February 1, 1881. All shares not subscribed for before February 1, 1881, and those the price of which is not fully paid by December 15, 1881, are to be sold at public auction for the benefit of the company, but at not less than $20 per share.

The accountant held, when this resolution was adopted, 108 shares. Being entitled, under the resolution, to subscribe for 54 new shares, he sold his 54 privileges to subscribe at $10 each, realizing $533.25, which sum he carried to principal account, asking the Court to distribute the same between the life-tenant and remainder-man.

At the audit it appeared from the testimony of Mr. Platt, the president of the company, and from the annual statement of its business, that the intrinsic or actual value of each share of stock before the transaction was $22.25, and after $21.50. These results were obtained by an addition of the capital and surplus fund of the company, and a division of their sum by the number of shares. There was no serious diminution in the actual, nor in the market, value of the stock, caused by the new issue; the diminution in the actual value being only 75 cents a share.

At the audit, the legatee for life claimed as income a portion ($452.25) of the fund realized as above, by the sale of the privileges to subscribe.

The Auditing Judge found as follows: "From these facts counsel for the exceptant contended, as there was a loss on the book value of only 75 cents on each share of stock, that, therefore, the life tenant was entitled to take as income belonging to her the sum of $452.25 out of the proceeds of the right to subscribe for fifty-four new shares at $20 each, or upon payment of $10.80. But this the Auditing Judge is unable to comprehend. There was no dividend declared either in stock or a share of the surplus fund of the insurance company, but the stockholders agreed among themselves simply to increase the capital stock of the company, and also the surplus fund, each to the extent of $1,000,000. Each stockholder was to pay $20 for each new share. This was all he received, and no portion of the surplus fund.

"That these new shares which the decedent's estate would be entitled to would be a part of the principal estate seems clear, and if accountant had elected to subscribe for the stock he could only take principal to pay for them, and not income, for the latter belonged to the legatee for life.

"If this be so, then it follows that the money realized by the sale of the option to subscribe belongs to the principal of the estate, and we think that Moss's Appeal (2 Norris, 264), determines the question in favor of the residuary legatees."

To this finding exceptions were filed in behalf of the legatee for life.

Edward Hopkinson, for exceptant.

The issue of the new stock caused a diminution in the actual value of the old stock of only 75 cents a share, or a total loss to the corpus of the trust estate of $81; this loss only should be made good to the corpus out of the sale of the options. The balance is profit to the trust estate, and must be awarded as income to life tenant.

The test is—has the issuing of the new stock impaired the capital of the trust estate by diminishing the actual or intrinsic value of the old shares composing the capital of the trust estate, if so, then so much of the fund realized by the sale of the subscription right (or if, instead of selling the right, the subscription be made, so many of the new shares at their actual or intrinsic value) shall be awarded to the capital of the trust as will make up the loss, and the surplus, if any, to the income.

Wiltbank's Ap., 14 P. F. S. 256.
Moss's Ap., 2 Norris, 264.

Jos. B. Townsend and *Geo. C. Morris*, contra.

May 28, 1881. THE COURT dismissed the exceptions, and confirmed the adjudication.

[No opinion filed.]

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, AUG. 25, 1881.* [NO. 19.

Supreme Court.

May, '79, 91. June 10, 1880.

Northumberland Coal Co. v. Clement.

Ejectment—Junior warrants—Admission in evidence of their location as tending to show the location of senior warrants made by the same deputy-surveyor—Surveys made and returned in a block—Practical surveyors—What they may testify to—Opinion of surveyors as to the interpretation of marks upon the ground.

In a controversy as to the location of the division line between two adjoining tracts of land included within two separate adjoining blocks of surveys, the senior block lying north of the junior block, and the official returns of the junior block calling to adjoin the senior block upon the north, marks were discovered upon the ground that clearly define the exterior opposing lines of the respective blocks, but no marks, counting to the dates of the original surveys, were found to establish the common, or division, line of the blocks:

Held, where surveys have been made and returned as a block, the location of each tract therein may be proved by proving the location of the block. The inquiry is not where a tract should, or might, have been located, but where it actually was located. Every mark on the ground tending to show the location of any tract in the block is some evidence of the location of the whole block, and, therefore of every tract therein.

Held further, the testimony of practical surveyors of large experience in tracing original lines, and especially the testimony of those acquainted with the marks made by the surveyor who located the warrants, was properly admitted. A surveyor must not be permitted to testify as to the legal interpretation to be given to a survey, yet a practical surveyor may testify whether, in his opinion, certain marks on trees, piles of stones, or other marks on the ground, were intended as monuments of boundaries.

Held further, the location of a junior warrant may throw light upon the location of a senior warrant which it calls to adjoin, where the division line between the two was returned as of the same length in each return and where both warrants, having been in the surveyor's hands at the same time, were located by the same surveyor.

Error to the Common Pleas of Northumberland County.

Ejectment, brought by Ira T. Clement against the Northumberland Coal Company, to recover a tract of land situate in Mount Carmel Township, Northumberland County, containing about ninety-six acres.

The trial was had 19th April, 1878, before ROCKEFELLER, P. J. It appeared in evidence that the plaintiff, Clement, is the owner of one undivided half part of a tract of land surveyed under a warrant dated 11 June, 1793, granted by the Commonwealth in the name of Thomas Billington. Also that the Billington was one of eleven warrants owned by Dr. Thomas Ruston, all dated 11th June, 1793, granted in the name of Daniel Reese, Charlotte Ruston, Mary Meyers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, junior, John Young, Joshua Bean, and Samuel Lobdill. These lands are now generally known as the BRUSH VALLEY lands. The Daniel Reese, situate at the western end of the series, is the leading warrant, and calls for the Charlotte Ruston on the east; while the Charlotte Ruston calls for the Daniel Reese on the west. Each of these warrants, from the Reese to the Lobdill, calls alternatively for the adjoining warrant, proceeding from west to east in the order given above. Surveys were made under the first four of these warrants on the 2d October, 1793; the return of the Billington survey does not show upon what day it was made, though the Mary Ruston, which adjoins it on the east, was surveyed on the same day, the 2d October, and the last five tracts upon the following day, the 3d October, 1793. A certified copy of the returns of surveys showed that these eleven surveys had all been returned into the land office by William Gray, deputy-surveyor, on the 3d March, 1794; at which time the Thomas Billington tract was said to contain 411 acres. The plaintiff contended that these surveys were made and returned as a block. The evidence showed that the Thomas Billington tract was patented the 18th October, 1794, and that one equal undivided half part of the said tract became vested, by sundry mesne conveyances, in Ira T. Clement, the plaintiff. There was no dispute as to the plaintiff's title to so much of the tract.

The evidence further showed the defendant, the Northumberland Coal Company, to be the owner of a tract of land, containing 371¼ acres, surveyed in the warrantee name of Lewis Walker, lying directly south of the Thomas Billington tract, and also showed that the Lewis Walker warrant was one of four, granted by the Commonwealth to Ebenezer Branham, Nathaniel Brown, Lewis Walker, and William Elliott, all of which are dated the 26th November, 1793, under which surveys were made on the 21st and the 22d October, 1794, and returned into the land office, by William Gray, deputy-surveyor, 23d February, 1795. These four tracts, now generally known as the LEFEVRE lands, extend along the BRUSH VALLEY lands, on the south, throughout their entire length, and the official returns of these surveys call for the Brush Valley lands upon the north. There was no dispute as to the defendant's title to the Lewis Walker tract.

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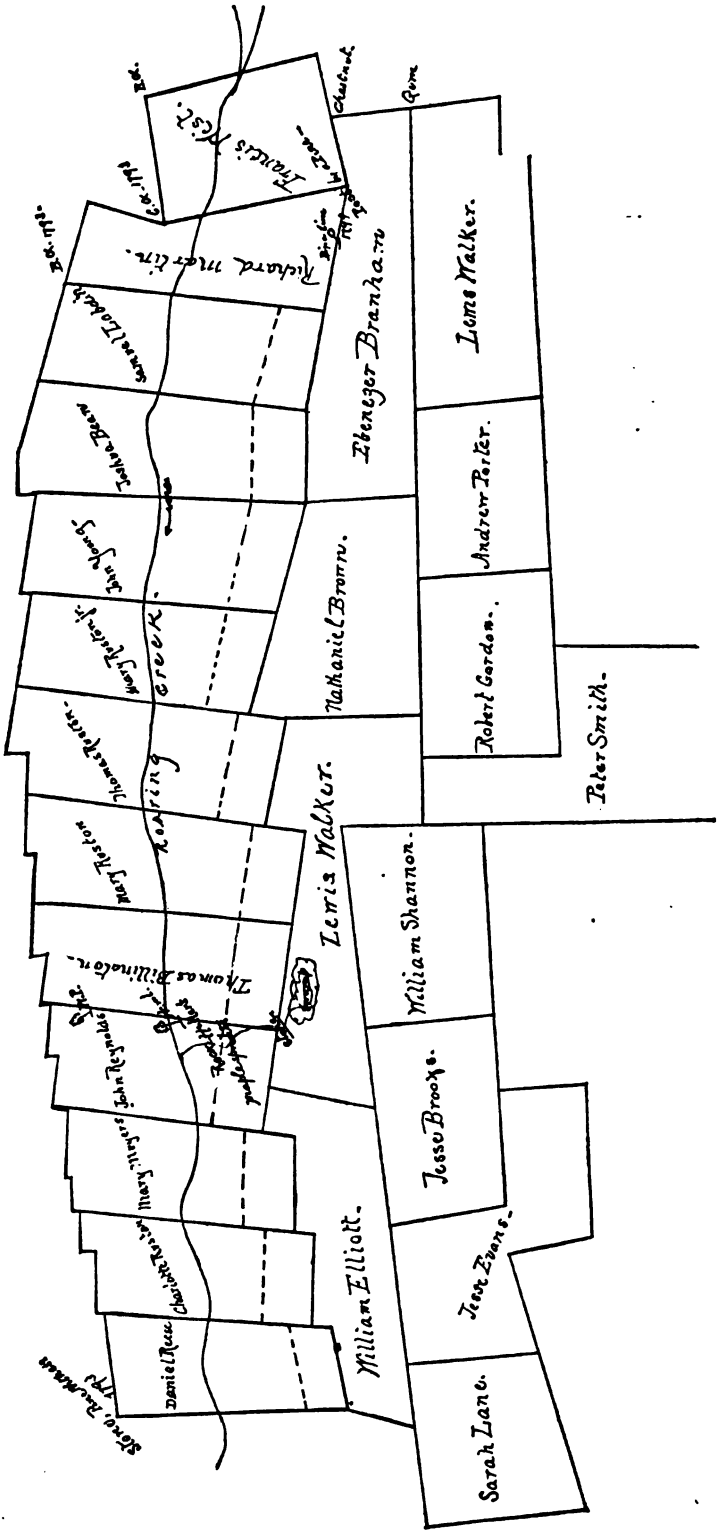

Draft showing the Relative Locations of the Brush Valley Lands and the Lefevre Lands.

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The controversy arose as to the location of the line that divides the Billington tract from the Walker tract, and defines the southern limit of the former and the northern limit of the latter; the plaintiff contending that his survey, *as marked upon the ground*, includes the land described in this writ of ejectment, while the defendant asserted his right to extend his claim as far north as the southern line described in the official return of the Thomas Billington tract, which the Walker survey calls to adjoin on the north, thus confining the plaintiff, by courses and distances, to the official return of his survey and disregarding the marks said to have been found upon the ground.

Many surveyors were called, by either side, who testified that the northern lines and corners of the eleven tracts composing the Brush Valley lands are well defined by marks still existing upon the ground, made at the time of the original survey in 1793; they all agreed as to the northern line and the northern corners of the Thomas Billington tract. Along their southern boundary line, these eleven surveys call for post corners in every case excepting one corner, which forms the southern limit of the division line between the Thomas Billington tract and the John Reynolds tract; these tracts call for a small maple tree as a common corner, it being the southeast corner of the Reynolds tract and the southwest corner of the Billington tract. There was a conflict of evidence as to whether the position of this maple had been established by the surveyors, and the question of its true position was submitted by the learned Court to the jury. No original marks were found by the surveyors in running either the southern line of the Brush Valley lands, unless it be this maple corner; nor were there any original marks upon either of the division lines between the eleven tracts except upon the line between the Reynolds tract and the Billington tract. Upon this line the surveyors found a white pine tree and a hemlock tree each marked at the date of the original survey. In regard to the maple tree, called for as a common corner by the Reynolds and the Billington tracts, the defendant introduced the testimony of David Rockefeller, a surveyor, who had run this division line in the year 1847. He testified that he found the line well marked upon the ground, corresponding with the dates of the original surveys, and that, in running from the northern corner, and making allowance for the rugged character of the land, he found at the end of the official courses and distances a small maple stump, with maple sprouts growing about it, and a maple tree lying upon the ground. The defendant asserted that this is the true location of the maple tree called for as the common corner, though the tree found by Rockefeller lying upon the ground was too much burned, and otherwise disfigured, to show whether it had ever been marked by surveyors or not. But the plaintiff's surveyors testified, in rebuttal to this, that the maple sprouts found by Rockefeller were situated not only about eight rods short of the official distance of the division line between these two tracts, but were also about seven rods out of the official course, and that similar clumps of maple sprouts are frequently to be met with upon the mountain in that vicinity.

It appeared, from the evidence, that the land in controversy would not be included in the Thomas Billington tract, but would lie beyond it, and would extend seventy-two rods further south, if the lines of that tract were run according to the official courses and distances as they were returned by the deputy-surveyor. And it also appeared that if the southern line of the Billington tract were run as the defendant asserted it should be run, so as to make a corner at the point where Rockefeller found the maple sprouts spoken of by him, the land in dispute would be excluded.

The plaintiff introduced the testimony of John Fisher, who had run the division line between the Reynolds and the Billington tracts in the year 1814, in company with Henry Donnel, the county surveyor at that time of Northumberland County. He testified that, at the southern end of this line, the southwest corner of the Billington tract, they found a stone corner and a post, situate near a swamp, at a distance of sixty or seventy rods south of the point now known as Rockefeller's maple sprouts. Henry Donnel had been an assistant to William Gray, the deputy-surveyor, at the time the surveys of the Brush Valley lands were made, and he was employed by Gray in making various surveys in that part of Northumberland County. The plaintiff offered to prove by the witness, John Fisher, that Henry Donnel told him, while they were surveying the western line of the Thomas Billington tract, in 1814, that the stone corner they found at the southwest of the Billington tract was where he had located that corner some twenty years before; this for the purpose of showing where the original corner was, and to establish the southern line of the tract as originally located. This offer, having been objected to by the defendant, was rejected by the Court upon the ground that, as there was no evidence to show that Henry Donnel made the original surveys, his declarations twenty-one years after the surveys were made are not admissible. The Court sealed a bill of exceptions for the plaintiff.

But, in order to prove that the southern line of the eleven tracts composing the Brush Valley lands, and consequently also the southern

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line of the Billington tract, was run at the time of the original survey and marked upon the ground, far enough south of the courses and distances given in the official return to include the land now in dispute, the plaintiff had recourse to the location of other surveys in the block of eleven as well as to other prior and subsequent surveys made by the same deputy-surveyor, William Gray, almost at the same time; he contended that what the surveyor did in locating these other surveys must be taken as some evidence to be submitted to the jury and to be considered by them in determining whether the southern lines of the eleven tracts were actually located upon the ground or not.

One of these surveys was made by William Gray and returned the 10th September, 1793, in the warrantee name of Francis West, a few days before the Brush Valley tracts were surveyed, as their returns show. The Francis West tract lies east and south of the Samuel Lobdill, the easternmost of the Brush Valley tracts, and it appeared in evidence that its lines and corners were marked upon the ground. Another survey was made on the 23d February, 1794, under a warrant granted in the name of Richard Martin and dated 22d January, 1794; it appeared that its northern, eastern, and southern lines were marked upon the ground. The Martin survey calls for the Samuel Lobdill survey on the west. The plaintiff contended that the Lobdill survey was one of a block of surveys, that its southern line was actually run upon the ground a number of rods south of its official courses and distances, and that if he proved this, by means of these other surveys, he should have a starting point that must control the location of the whole block. There is a post by a pine tree at the southwest corner of the Francis West survey called for in the official return, and this same post by a pine is called for also as the southeast corner of the Richard Martin survey. From this corner the official course of the Martin survey is north 89¾ degrees west, 309 perches, and the surveyors all testified that they found upon this line a pitch pine tree counting to 1794, that was marked as a line tree and establishes the southern line of the Martin survey. The plaintiff extended this line, in its official course, the official distance, to the point where it would intersect the western line drawn from the northwest corner of the Richard Martin survey, and he asserted that this point must establish the southwest corner of the Martin survey; and, as the Richard Martin calls for the Samuel Lobdill survey on the west, the plaintiff contended that this is some evidence that the Samuel Lobdill survey was located at that place by the surveyor in 1793. It appeared that the eastern line of the Richard Martin survey, as marked upon the ground, is longer than its official distance, and consequently its western line must also be lengthened if drawn to intersect the southern line running west from the post by a pine corner. And it appeared also that, if the southern line of the eleven Brush Valley tracts were run upon the ground, starting from the point thus obtained as the southeast corner of the Samuel Lobdill survey and following its courses and distances, as the plaintiff contended this line was run in 1793, the land in dispute would be included in the Thomas Billington survey. There is still another survey, lying south of the Francis West, the Richard Martin and the Samuel Lobdill surveys, which was made on the 21st October, 1794, under a warrant granted in the name of Ebenezer Branham, dated the 26th November, 1793, referred to above as one of the Lefevre tracts; it calls for a post by a pine in its northern line, and this the plaintiff alleges to be the same corner that is called for by the Francis West and the Richard Martin surveys as their common corner, and that the surveyor adopted that post by a pine corner in locating the Ebenezer Branham survey, and also that he adopted the line of the Richard Martin survey as marked upon the ground a few months before. The Ebenezer Branham survey calls for the Richard Martin on the north and it calls also for the Samuel Lobdill. The plaintiff contended, therefore, that if the Branham survey were established either by marks made by the surveyors upon the ground, or by the monuments called for by it, its call for the Samuel Lobdill would be some evidence that that survey was located upon the ground. The defendant asserted that the southern line of the Brush Valley tracts was never run and marked upon the ground by the deputy-surveyor in making the original surveys, and all the surveyors called for the defence testified that there are no original marks upon it corresponding to the dates of the surveys, although they ran for a distance of seven miles through timber old enough to have been marked at the time for line trees and corners.

The plaintiff introduced, in this connection, the testimony of Abraham Shipman, who upon being asked, under objection and exception, where, in his opinion as a surveyor, the southern line of the eleven surveys of October, 1793, was located by the deputy surveyor, testified that the best authority he could find for its location was to begin at the post at the southeast corner of the Martin survey and run westward, following the courses and distances, to the pine line-tree at the south of the Martin, that being exactly in the official course; also that he could not locate the southern line of the eleven tracts, according to their official courses and distances, without ignoring this pine tree, and that if the southern line of the eleven tracts were run by the official

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courses and distances from the post by a pine corner and by the pine line-tree at the south of the Martin survey, the distance of the south line from the north line of the eleven tracts would be greater than that given in the official return of these surveys. This witness also testified, on behalf of the plaintiff, under objection and exception, that he found that the lines in William Gray's surveys generally overrun the official distances, where they are lines of mountain surveys and run from one mountain to another, as in this case they do. This was offered as some evidence of the original location of the line between the Brush Valley lands and the Lefevre lands.

The Court submitted to the jury the questions whether the eleven tracts composing the Brush Valley lands were surveyed in a block; also, whether the place where the maple stump and maple sprouts were found is the original location of the common corner between the John Reynolds survey and the Thomas Billington survey, and whether the southern line of the Thomas Billington survey was run upon the ground or not, and where it was run, if run at all. In regard to locating the southern line of the Brush Valley lands by means of the Martin and the West surveys, the Court charged the jury, *inter alia:* "But what the surveyor did in locating these two surveys, the Richard Martin and the Francis West, is submitted to you to be considered by you, with all the other evidence in the case, in determining the question whether the southern lines of the eleven tracts were actually run upon the ground or not; and, if so, where they were run, and I will repeat, that nothing that was done by him in the location of these two surveys, the Martin and the West, is to have, or can have, the effect of extending the Lobdill survey, but is only submitted to you as some evidence of what he did upon the ground in 1793 in locating the other eleven tracts."

Verdict for the plaintiff and judgment thereon.

The defendant then took this writ, and filed nine assignments of error, among which were the charge of the Court as stated above, and the following: The Court below erred, *First.* In receiving the evidence offered by the plaintiff below, as follows: "Plaintiff's counsel propose to ask the witness, Judge Shipman, where, in his opinion as a surveyor, the southern line of the eleven surveys of October, 1793, was located by the deputy-surveyor." *Secondly.* In receiving the evidence offered, as follows: "Plaintiff proposes to show by the witness, Abraham Shipman, what the excess in lines in William Gray's surveys, in the neighborhood of these blocks, has been found to be."

Joshua W. Comly and *William H. M. Oram,* for plaintiff in error.

As to the first assignment of error. The witness was asked his opinion, as a surveyor, where the southern line of the eleven surveys was *located* by the deputy-surveyor. This was simply asking him how a line which the deputy-surveyor did not run and mark upon the ground ought now to be located. It is a purely legal question which the witness was not competent to answer. The Court permitted him to decide it, and he decided that the line ought not to be run where the official returns of the surveys call for it, but that it should be controlled by the location of the junior adjoining survey of Richard Martin. This was not good law.

Clement *v.* The Northumberland Coal Co., 6 WEEKLY NOTES, 46.

Carbon Run Improvement Co. *v.* Rockafeller, 1 Casey, 49.

Manhattan Coal Co. *v.* Green, 23 P. F. Sm. 310.

Bellas *v.* Cleaver, 4 Wright, 260.

Nor was the opinion of the witness competent evidence.

Ormsby *v.* Ihmsen, 10 Casey, 462.

As to the second assignment of error. Where lines are found run upon the ground, which may or may not have been run for the survey, and objection is made to their being established as lines of the survey, on account of the excess of land that the survey would then contain, evidence of similar excess in surveys made by the same surveyor has been received to meet such objection; but such evidence is not generally admitted as competent in questions of location, nor is it ever admitted except under peculiar circumstances that do not exist in this case.

All the surveyors testified that, in their opinion, the south lines of the eleven surveys had not been run by the deputy-surveyor upon the ground. The fact that these surveys call for posts at sixteen corners along their southern lines, running through a well-wooded country, is, of itself, strong evidence that those corners were imaginary.

Woods *v* Ingersoll, 1 Binney, 150.

The survey of the Thomas Billington tract became valid twenty-one years after it was returned into the land office for all the land contained in that survey, according to the courses and distances so returned.

Fritz *v.* Brandon, 28 P. F. Sm. 342–355.

The post corner by a pine was made for the southwest corner of the Francis West survey some twenty-two days before the surveys of the eleven tracts were commenced, and after they were finished there was a mile of vacant land lying between the Francis West and the Samuel Lobdill, the nearest of the eleven tracts. When the latter surveys were made, there was no connection between them and the Francis West by location, by contiguity, by call, or by common ownership, and it was only when the surveyor occupied the vacant land between the Samuel

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Lobdill and the Francis West, by the location of the junior survey of Richard Martin, that the post by a pine corner could possibly have any connection with the south lines of the eleven tracts. But, if they were run upon the ground at all, it was done previously to this connection, and the marking of this post corner by a pine could have no share in locating the lines, or power to prove that they were run upon the ground.

The south line of the Richard Martin passes through a rugged country for 318 perches, but the surveyor never ran more than 64.6 perches of this land, and marked at that place a pine as a line-tree. He finished it by protraction, and called for a post at the southeast corner of the Samuel Lobdill, thus making the east line of the Lobdill and the west line of the Martin identical, and, in the return of the Richard Martin, he describes the western line as 320 perches in length; that is, he calls for a post as the common corner of the Martin and the Lobdill surveys at precisely the same point where he placed the southeast corner of the Samuel Lobdill, in the return of that survey. He supposed that his south line, that he continued by protraction from the pine witness, would intersect the line coming down from the northeast corner of the Samuel Lobdill tract at the distance of 320 perches from that northeast corner. But he was mistaken in this; for he had made a mistake in running the west line of the Francis West tract, and had described that line in his return as 250 perches long, though it is found by the surveyors to be really 280 perches upon the ground to the post by a pine corner. When he adopted this line as the lower east line of the Richard Martin survey, he adopted the error in length also, and returned this line of the Richard Martin survey as 250 perches long. It is conceded that the south line of the Richard Martin is marked upon the ground, running from the post corner by a pine, its official course, until it intersects the western line from its northwest corner. But this corner formed by this intersection cannot affect the southeast corner of the Samuel Lobdill survey, or determine the south line of the Thomas Billington tract, for this would clearly be extending older surveys in consequence of the acts and mistakes of a deputy-surveyor committed in locating a younger survey.

Clement *v.* The Northumberland Coal Co., *supra.*
Carbon Run Improvement Co. *v.* Rockefeller, *supra.*
Manhattan Coal Co. *v.* Green, *supra.*

But even if the eleven surveys be considered as having been made in a block, and if the mistake in measuring the lower east line of the Richard Martin survey could lengthen the Samuel Lobdill tract by about 30 perches, it would be unreasonable to continue this error in measurement in such a manner as to extend the Thomas Billington tract 72 perches further south than its official return, and to carry the error of the Martin survey through a whole tier of surveys that were made before the warrant for the Richard Martin had been granted by the Commonwealth.

T. H. Purdy and *S. P. Wolverton*, for defendant in error.

As to the first assignment of error. The question answered by the witness, Abraham Shipman, was the following: "Look at the map and state, from the examinations you have made, where, in your opinion, the southern line of this block of eleven tracts called the Brush Valley tracts, was located." This involved no legal proposition, but only required him to state from his experience as an expert surveyor, where the survey originally located the southern line of these tracts. Nor is this an unusual question.

Davis *v.* Mason, 4 Pickering, 156.
Peterborough *v.* Jaffrey, 6 New Hamp. 464.

"Mere abstract opinion is not evidence, but a surveyor, or any other person conversant in the subject, may state facts, and his opinion on those facts, to enable the jury to form a correct judgment of the matter in dispute."

Lessee of Forbes *v.* Caruthers, 3 Yeates, 557.

"A surveyor may state where he would locate a warrant similar to that under which the party holds."

Farr *v.* Swan, 2 Barr, 245.

As to the second assignment of error. The Brush Valley surveys would contain much less land than was returned by the surveyor, if they were located, as the defendant below contended they should be, by taking the maple sprouts as a monument upon the southern line of the block. All the surveyors testified that this corner is eight rods short of the official distance. Counsel for the plaintiff below contended that this corner should be placed forty rods further south, near a swamp, and assigned as a reason for doing so, that the defendant's alleged location would not only lessen the official quantity of land in the Brush Valley block, but would very greatly increase the quantity contained in the Lefevre block. As bearing upon this question, the plaintiff showed, by the testimony of surveyors, that all the lines run in this block and upon adjoining surveys, where monuments are found, exceed the official lengths given in the returns of surveys. Whether it be the theory of the defendant's counsel that the southern line should be established by running east and west by these maple sprouts, or by the exact official distance of the survey, this testimony was not only relevant, but also very important. It is well known that an excess was thrown into surveys made about the time these lands were located, and that all the lines upon the ground are found to overrun the

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official distances. "The practice of including a quantity of land, exceeding ten per cent. more than the warrant called for, was sanctioned by the Proprietaries' land officers, and has been recognized by repeated Acts of Assembly."

Layton *v.* Paull, 5 Watts, 465.

The plaintiff owns the Thomas Billington survey, which is one of a block, *i. e.*, the Brush Valley block; and the defendant below owns the Lewis Walker survey, also one of a block called the Lefevre block. The question is: Which survey covers the land in dispute? The southern line of the Lefevre block is well marked upon the ground, as also the north line of the Brush Valley block. In the exact course of the Richard Martin and the Ebenezer Branham surveys, there is a well-marked pine line-tree, counting to 1793. This undoubtedly fixes the line between the Martin and the Branham, and not only that, but it establishes the whole northern line of the Lefevre block in which the Branham and the Walker surveys are included. By continuing this line westward from the pine line-tree, its official courses and distances, the land in dispute is excluded from the Walker survey. Any other location of this line would distort the figures of the surveys. The result of the location asserted by the defendant below would be, to produce an offset of about thirty perches at the line between the Martin and the Lobdill tracts, where Gray returned a straight line, and also to increase the width of the Walker tract about sixty perches, thus increasing its quantity of land by about eighty per cent.

The pine line-tree between the Branham and the Martin surveys was marked in two places, and may have been marked, according to the testimony of the surveyors, either when the eleven tracts were surveyed, or, possibly, both when the Martin survey was made and again in the same year, when the Lefevre block was located. In either case, it is without question a common line-tree between the Richard Martin tract and the Lefevre block. It is well settled that where surveys were originally made and returned into the land office, as a block, they must be located upon the ground as a block.

Hagerty *v.* Mathers, 7 Casey, 355.
Darrah *v.* Bryant, 6 P. F. Sm. 69.
Mathers and Boynton *v.* Hagarty, 1 Wright, 64.
Fitz *v.* Brandon, 28 P. F. Sm. 351.
Mock *v.* Astley, 13 S. & R. 382.
Hole *v.* Rittenhouse, 1 Casey, 491.
Malone *v.* Sallada, 12 Wr. 425.

The pine line-tree of the Martin survey was clearly adopted for the Lefevre block. Lines marked upon the ground constitute the actual survey and control the return; the defendant is therefore bound by this fixed line marked upon the ground.

Hall *v.* Tanner, 4 Barr, 244.
Walker *v.* Smith, 2 Id. 43.
McGinnis *v.* Porter, 8 Harris, 80.

In locating a junior warrant the deputy-surveyor may adopt the marks of an older survey instead of confusing evidence by making new ones; and when such marks have been adopted, the line of the junior survey is as effectually located as if it had been actually marked upon the ground.

Dreer *v.* Carskadden, 12 Wr. 38.
Caul *v.* Spring, 2 Watts, 390.
Martz *v.* Hartley, 4 Id. 261.
Schnable *v.* Doughty, 3 Barr, 392.
McBarron *v.* Gilbert, 6 Wr. 279.
Bellas *v.* Cleaver, 4 Id. 267.

Oct. 4, 1880. THE COURT. When original surveys have been made and returned, as a block, into the land office, the location of each tract therein may be proved by proving the location of the block. In ascertaining the location of a tract the inquiry is not where it should, or might, have been located, but where it actually was located. Every mark on the ground tending to show the location of any tract in the block is some evidence of the location of the whole block, and therefore of each tract therein. (Hagerty *v.* Mathers et al., 7 Casey, 348; Malone *v.* Sallada, 12 Wright, 425; Darrah *v.* Bryant, 6 P. F. Smith, 69; Fritz *v.* Brandon, 28 Id. 351.)

This contention is as to the location of a tract surveyed in the name of Thomas Billington. It is one in a block of eleven tracts for which warrants issued on the 11th of May [June], 1793. They were all owned by one person. The surveys made by virtue thereof were all returned to the office of the Surveyor-General on the 3d of March, 1794. The block begins with the Daniel Reese on the west and ends with the Samuel Lobdill on the east. The official returns show the surveys of the first four, and of the sixth in order, to have been made on the 2d of October, 1793. The return of the Thomas Billington, which tract is the fifth in the block, omits to state the precise date of its survey further than it was in 1793. It is, however, fair to presume it was made on the same day as the John Reynolds on the west and the Mary Ruston on the east. The remaining five tracts were surveyed on the day next thereafter. The Richard Martin, which lies east of and adjoining the Samuel Lobdill, was surveyed on the 23d of February, 1794, on warrant dated the 22d of the month preceding. The Lewis Walker, under which the plaintiff in error claims, lies south of and adjoining the Thomas Billington, and was surveyed on the 22d of October, 1794, and return thereof made on the 23d of February following.

Nearly ninety years have passed since the Billington warrant was located. Time has effaced many marks of the survey. Those which were distinctly visible have to a considerable extent

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become obliterated or destroyed. The location of the northern lines of the Billington tract and of the block of which it forms a part, is unquestioned. They are found distinctly marked on the ground. The main question is where was the south line of the Billington tract located.

The testimony of practical surveyors of large experience in tracing original lines, and especially the testimony of those acquainted with the marks made by the surveyor who located the warrants, was properly admitted. It is true, a surveyor must not be permitted to testify as to the legal interpretation to be given to a survey, yet a practical surveyor may testify whether, in his opinion, certain marks on trees, piles of stones, or other marks on the ground were intended as monuments of boundaries. (Wharton on Evidence, Sec. 444; Davis *v.* Mason, 4 Pick. 156; Lessee of Forbes *v.* Caruthers, 3 Yates, 527; Ormsby et al. *v.* Ihmsen, 10 Casey, 462.)

The practical knowledge and experience of the surveyor whose opinion was asked are unquestioned. The facts proved were amply sufficient to enable him to form an opinion as to the actual location of the warrant. We will refer to some of them.

The official survey of the Thomas Billington calls for a small maple as its southwest corner. Maple sprouts are found at the place claimed by the defendant in error to be the southwest corner of the tract. The original surveys of all these tracts were made by Henry Donnel, acting as a deputy-surveyor. It is shown that the same Donnel in 1814, in running the northern line of the Lewis Walker tract, fixed the line between it and the Thomas Billington to be where it is now claimed by the defendant in error. The official survey of the Richard Martin calls for a white pine tree in its south line. That tree is standing and identified.

That warrant was located by the same surveyor, and the return of survey was made three days before the survey of the Billington tract was returned. It calls for the Samuel Lobdill on the west, and the line between the tracts is of the same length in each survey. He had the warrants in his hands at the same time. The location of the latter throws light on the former. The location claimed by the defendant in error for the Billington is not only in harmony with the block of surveys of which it forms a part, but also with the location of the Richard Martin, made by the same surveyor soon thereafter.

Without referring to the evidence more in detail, we think it was sufficient to submit to the jury to find the true location of the tract, and that it was properly submitted by the learned Judge. We discover no error in the record.

Judgment affirmed.

Opinion by MERCUR, J.

Jan. '81, 252. March 23, 1881.

The Coatesville Gas Co. v. The County of Chester.

Taxation — Exemption from — Corporations — Gas companies — Constitution of Pennsylvania, Art. IX. §§ 1 and 2 — Act of May 14, 1874 (P. L. 158).

Land belonging to a chartered gas company upon which its furnaces, retorts, etc., were erected, which was used only for the purposes of manufacturing and supplying gas, and which was necessary and indispensable therefor, was sought to be made liable to a county tax on real estate. The land with improvements was a part of the capital stock of the corporation, and wholly included within the same, and as such paid the usual State tax to the Commonwealth. The stock of the company was owned by individuals who paid taxes thereon to the State and the county:

Held (reversing the judgment of the Court below), that the land was not liable to the tax sought to be imposed.

Per MERCUR, J. "The principle which appears to be recognized is that the public works of a corporation used as such, with their necessary appurtenances, shall be exempt from taxation as land, but subject to it in another form, and a gas company so far partakes of the nature of a corporation for public purposes as to be subject to the same rule."

The provisions of Art. IX. §§ 1 and 2, Constitution of Pennsylvania, do not execute themselves so as to repeal any existing laws providing for the assessment and collection of taxes. They merely imposed restrictions on future legislation when it should thereafter be enacted.

The object of the Act of May 14, 1874 (P. L. 158), was not to provide a mode of taxing, but to declare what property should not be exempt from taxation.

Chadwick *v.* Magines, 8 WEEKLY NOTES, 451, distinguished.

Error to the Common Pleas of Chester County.

The following facts were agreed upon as a case stated for the opinion of the Court, with like effect as if found by the special verdict of a jury.

The defendant is a corporation chartered by special Act of Assembly in 1868, "with the right and authority to supply the borough of Coatesville and its vicinity with gaslight." By its charter, which is agreed to be a part of this case stated, it is declared to be managed, subject, and entitled under the general Act of Assembly of 1857, relating to gas companies and its supplements.

Among other property, the defendant owns a lot of land in the borough of Coatesville, on which are erected a brick building containing its furnaces, retorts, and machinery for manufacturing gas, and its reservoir for retaining and distributing the gas through pipes along the streets through the borough of Coatesville. It is agreed that this lot and improvements are

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used only for the manufacturing and supplying of gas according to the defendant's corporate powers, and that they are necessary and indispensable therefor.

It is further agreed that the defendant is a stock company, whose revenues exceed its expenses, declaring dividends to its stockholders, and that the lot aforesaid with the improvements thereon are a part of the capital stock of the corporation defendant, and are wholly included in the same, and as such pay the usual State tax to the Commonwealth. The stock of the corporation defendant is owned by a considerable number of individuals who are liable to and pay tax thereon to the State and to the county plaintiff.

It is also agreed that the private statute of April 8, 1859 (P. L. 426) in regard to the West Chester Gas Co. be considered as a part of this case stated.

The lot of ground with the improvements thereon have been assessed as the real estate of the defendant, and a county tax of $19.20 levied on the same, which the defendant refuses to pay.

If the Court shall be of opinion that the property so assessed is legally subject to such tax, then judgment to be entered for the plaintiff with full costs in either case, and reserving the right to either party to have review of said judgment in the Supreme Court.

The Court (FUTHEY, P. J.) entered judgment for the plaintiff on the case stated, for $19.20 with costs.

The defendant thereupon took this writ assigning for error the entry of judgment for the plaintiff.

R. Jones Monaghan, for plaintiff in error.

(1) The plaintiff in error is a corporation chartered by statute for the benefit of the public. The lot of land held liable to taxation by the Court below is used for no other purpose than for manufacturing and supplying gas, and is necessary and indispensable therefor. We do not claim this property to be exempt from taxation. Our position is not that it is *exempt* but that it is not *liable* to the tax claimed by the county of Chester. Without express authority of law, no tax either for State, county, township, or other purposes can be levied.

Zanesville *v.* Muskingum Co., 5 Ohio St. (Critchfield), 592.

Unless some law has positively declared our property subject to the tax here claimed, it cannot be levied. No statute has ever by apt words declared such property liable to a county tax.

(2) It has many times been held in this Court, that property such as ours, under statutes in stronger terms than the one involved here was not liable to such taxation as is here claimed.

Schuylkill Bridge *v.* Frailey, 13 S. & R. 422.
Lehigh C. & N. Co. *v.* Northampton Co., 8 W. & S. 335.
County of Erie *v.* Erie, etc., Transportation Co., 6 Norris, 435.
Ridge Turnpike Co. *v.* Stoever, 6 W. & S. 379.
Berks Co. *v.* R. R. Co., 6 Barr, 71.
Schuylkill Nav. Co. *v.* Berks Co., 1 Jones, 205.
Wayne Co. *v.* D. & H. Canal Co., 3 Harris, 352.
West Chester Gas Co. *v.* Chester Co , 6 Casey, 233.
Carbon Iron Co. *v.* Carbon Co., 3 Wr. 255.
Lackawanna Iron Co. *v.* Luzerne Co., 6 Wr. 429.
Northampton Co. *v.* Lehigh C. & N. Co., 25 P. F. S. 463.

(3) Chartered gas companies stand in the same position as a railway or canal company. This Court decided that they were not liable to taxation under the Act of 1834.

West Chester Gas Co. *v.* Chester Co., 6 Casey, 233.

This decision was affirmed and it was held by this Court that the Act of 1873 no more applied to incorporated gas companies than it did to railroad companies.

Northampton Co. *v.* Easton Gas Co., 1 Ches. Co. Rep. 157; s. c. 6 Leg. Gaz. 207.

(4) The new Constitution defines what property shall be *exempt;* it does not *impose* taxes. This property never has been declared subject to taxation. The Constitution, sec. 2 of Schedule, expressly provides that all laws in force shall continue as if the Constitution had not been adopted; and by section 31 of Schedule that the Legislature shall pass laws to carry it into force and effect. The New Constitution did not change the law as then interpreted on this subject; it was not immediately operative and did not *per se* repeal existing legislation.

Lehigh Iron Co. *v.* Lower Macungie Twp., 31 P. F. S. 482.
3 Constitutional Debates, 367–8, 129.

(5) Did the Act of May 14, 1874 (P. L. 158), make the property in question liable to the tax here claimed? That statute is entitled "An Act to *exempt from taxation*" certain specified classes of property. The *proviso* only says that "all property, other than that which is in actual use and occupation for the purposes" therein specified "shall be subject to taxation." There is no intention evident on the part of the Legislature, by this language to lay a tax. The proviso was intended to exclude property proposed hereafter to be used for exempt purposes, or property heretofore used for such objects and which had been turned into other uses. At most it was intended to lay down a rule of strict construction. A proviso to an exempting Act simply limits and qualifies the exemptions declared by the Act itself.

Bouvier's Law Dictionary, tit. Proviso.

A proviso is considered as limiting the enacting clause, and its effect is to be restrained to that.

Sedgwick on Construction of Laws, 49.
Dwarris on Statutes, *659.

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Coode on Legislative Expression, 2 Br. Purd. Dig. 1506.
Voorhees *v.* Bank of U. S., 10 Peters, 449.
Wayman *v.* Southard, 10 Wheat. 1.

The Act of 1873, which was an Act *limiting* exemptions, is expounded in—

Northampton Co. *v.* Lehigh C. & N. Co., 25 P. F. S. 463.

See also—

Venango Co. *v.* Jamestown R. R. Co., 2 Leg. Chron. Rep. 326.
Luzerne Co. *v.* Lehigh C. & N. Co., 5 Luz. Leg. Rep. 5.

(6) A tax such as claimed here would be unconstitutional.

Constitution of 1874, Art. 9, sec. 1.

The requirement that on the same class taxes should be uniform would seem equally clear to prevent double taxation. The defendant here pays a State tax on its stock or assets, and the individual owners of the same stock or capital pay a State and county tax on it. The property sought to be held liable here is a part of the capital stock of the corporation, and is wholly included in the same, as is expressly agreed in the case stated. It has therefore once paid its county tax through the individuals owning the stock, and if it must pay it again on its real estate, it is doubly taxed.

See Lackawanna Co. *v.* Scranton Bank, 9 WEEKLY NOTES, 549.

H. T. Fairlamb, for defendant in error.

The provisions of the first and second sections of Art. IX. Constitution, makes the property in question subject to taxation.

Township of Londonderry *v.* Berger, 2 Pearson, 230.

If they do not, certainly the Act of May 14, 1874, with its clear proviso, does make it subject to county and other local burdens. Precisely the point in this case was decided by the Supreme Court, not one year ago, in—

Chadwick *v.* Magines, 8 WEEKLY NOTES, 452.

True, in that case there was no State tax paid, and the objection of double taxation could not be urged, but the case was decided, not on that ground, but on the force and effect of the Act of May 14, 1874. The plaintiff in error falls within the very terms of the proviso of the Act of 1874. The construction given to former Acts relating to taxation cannot be relied on to give relief here, for prior to 1874 there was no Act specifically declaring that *all property should be subject to taxation*, except certain particular classes distinctly mentioned.

The provision in the Constitution that "all taxes shall be uniform upon the same classes of subjects" does not prevent what is objected to as double taxation. The Legislature has as much power to tax twice as to tax once.

County of Dauphin *v.* Union Canal, 2 Pearson 39; 3 Brews. 124.
City of Pittsburg *v.* Kitty Roup, 1 WEEKLY NOTES, 255.
In re Washington Ave., 19 P. F. S. 352.
6 Const. Debates, 103ff.
Wallace *v.* Shelton, 14 Lous. Am. 498.
Levee Comm. *v.* Selby, 14 Id. 434.
Yeatman *v.* Crandall, 11 Id. 220.
Kittanning Coal Co. *v.* Commonwealth, 29 P. F. S. 100.
Lehigh Iron Co. *v.* Lower Macungie Twp., 31 P. F. S. 482.
Germania Life Ins. Co. *v.* Commonwealth, 4 Norris, 513.

A chartered gas company does not stand in the same position as a railway or canal company. Canal and railways, and that which forms constitutent parts of each have been declared free from taxation as real estate, for one reason because the canals and railroads passed through several counties, and it was unjust that they should be taxed in each county for county purposes. In no case has immunity from local burdens been allowed on account of double taxation, or because the real estate formed part of the stock or the capital on which a tax was paid to the State.

Lehigh C. & N. Co. *v.* Northampton Co., 8 W. & S. 334.
Railroad Co. *v.* Berks Co., 6 Barr, 75.
Navigation Co. *v.* Berks Co., 1 Jones, 202.
Carbon Iron Co. *v.* Carbon Co., 3 Wr. 251.
Lackawanna Iron Co. *v.* Luzerne Co., 6 Wr. 424.
West Chester Gas Co. *v.* County of Chester, 6 Casey, 233.

May 2, 1881. THE COURT. The plaintiff in error is a corporation chartered by special Act of Assembly in 1868, with the right and authority to supply the borough of Coatesville and its vicinity with gaslight, but to be subject to and managed under the general Act of 1857 relating to gas companies. The corporation owns a lot of ground situate in the borough of Coatesville, on which are erected a brick building containing its furnaces, retorts, and machinery for manufacturing gas, and its reservoir for retaining and distributing the gas through pipes along the streets of said borough. This lot and the improvements are used only for the manufacturing and supplying of gas according to the corporate powers of the company, and they are necessary and indispensable therefor. The corporation is a stock company, and its revenues exceed its expenses, so that dividends are declared to its stockholders. The lot described, with the improvements thereon, are a part of the capital stock of the corporation, and are wholly included within the same, and as such pay the usual State tax to the Commonwealth. The stock is owned by individuals who are liable to pay and do pay taxes thereon to the State and to the county of Chester.

The claim now is to also impose a county tax on the lot as real estate of the corporation. It is conceded that prior to the Constitution of

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1874 the lot was not so chargeable, under authority of West Chester Gas Co. *v.* The County of Chester (6 Casey, 232). It is, however, contended that it is taxable as real estate under Art. IX. sections 1 and 2 of the present Constitution and the Act of May 14, 1874, passed to give effect thereto. It was held in Lehigh Iron Co. *v.* Lower Macungie Township (31 P. F. Smith, 482), and in Indiana County *v.* Agricultural Society (4 Norris, 357), that these provisions of the Constitution did not execute themselves so as to repeal any existing laws providing for the assessment and collection of taxes. Those sections, like many others, merely imposed restrictions on future legislation, when it should thereafter be enacted. (Perkins *v.* Slack 5 Norris, 270; Commonwealth *ex rel.* Chase *v.* Harding, 6 Id. 343).

Conceding that this property of the corporation is liable to taxation under the Act of May 14, 1874, the question is, in what manner. Is the object of that Act to provide a mode of taxing, or to declare it shall not be exempt from taxation? We think the latter was its purpose. As we have already shown this lot constitutes a part of the stock of the corporation, which already paid a tax thereon to the Commonwealth, and the owners of the stock paid taxes thereon to the county. We fail to discover anything in the Act indicating an intention to impose double taxation on this lot. It is indispensably necessary to enable the corporation to execute the object or fulfil the purpose for which it was chartered. It was held in Lehigh Coal and Navigation Co. *v.* Northampton County (8 W. & S. 334) that the bed, berm-bank, and tow-path of an incorporated canal were not taxable as land under the Act of 15 April, 1834. Nor were the water-stations nor depots of a railroad corporation. (Railroad *v.* Berks County, 6 Barr, 70.) Nor the toll-house of a canal company, so built as to be also occupied as the family residence of the collector, nor the reservoirs of the canal and the machinery for raising cars (Wayne County *v.* Delaware and Hudson Canal Company, 3 Harris, 351); nor the works of an incorporated gas company. (West Chester Gas Co. *v.* County of Chester, *supra.*) Yet the Act of 1834 expressly made "all houses, lands, lots of ground, mills, and manufactories of all descriptions," etc., liable to taxation.

The principle which appears to be recognized is, that the public works of a corporation, used as such with their necessary appurtenances, shall be exempt from taxation as land, but be subject to it in another form, and that a gas company so far partakes of the nature of a corporation for public purposes as to be subject to the same rule. (Northampton Co. *v.* Lehigh Coal and Nav. Co., 25 P. F. Smith, 461; Same *v.* Easton Gas Company, not reported.)

It was urged that this lot is taxable as real estate of the company for county purposes under authority of Chadwick *v.* Magines (8 WEEKLY NOTES, 451). The facts in that case were very different from those in this case. There the corporation was not a stock company, and paid no taxes in any form to the State under the general corporation tax laws of the Commonwealth. It was then an attempt to escape all taxation. As the specific property was not of the class which the Constitution or the statute exempted from all taxation, it was properly held liable. It is true, some remarks of the Judge who delivered the opinion would indicate additional reasons for the judgment, yet the fact of exemption from all other taxes is made prominent. It is there said, "surely it was never intended that such a corporation should be exempt from all taxation, while others are compelled to bear their share of the public burden."

In the present case, the corporation does bear such a share of the public burdens as the Legislature has imposed on the class of corporations to which it belongs. We think the learned Judge erred in entering judgment in favor of the defendant in error.

Judgment reversed, and judgment in favor of the plaintiff in error with full costs according to the case stated.

Opinion by MERCUR, J.

Jan. '79, 220. Feb. 28, 1881.

Frame v. William Penn Coal Co.

Principal and agent—Undisclosed principal—Set off—Evidence—Admissions in writing—Isolated letters and postal cards.

Where a person deals *bona fide* with an agent, as owner, without knowledge of his agency, he may set off any claim he may have against the agent in answer to the demand of the principal.

Where in his direct examination the defendant was asked "to state what knowledge he had that the firm with whom he was dealing, were dealing in their sales of coal as principals or agents," the answer was excluded on the ground that he could not state his knowledge of the agency but must show facts from which the jury were to infer the fact of such knowledge:

Held (reversing the judgment of the Court below), that the ruling of the Court below was erroneous, and that the direct question should have been allowed. If the defendant had no knowledge of the agency, the absence of such knowledge was of itself a fact, which it was competent for him to state.

Isolated letters, and postal cards containing admissions by a party may be admissible in evidence against him, although they are in reply to others which are not produced in evidence.

Error to the Common Pleas of Berks County.

Assumpsit, by William Pollock and John Med-

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lar, trading as Pollock & Medlar, to the use of the William Penn Coal Company, against Conrad Frame to recover $120.30 for eight car loads of coal shipped to the defendant. Plea, non assumpsit, with leave, etc. Before trial the record was amended so that the William Penn Coal Co. stood as sole plaintiff.

On the trial, before SASSAMAN, A. L. J., on the part of the plaintiff, the superintendent and manager of the William Penn Coal Co. testified that the company, who were miners and shippers of coal, on September 3, 1873, sold to Frame eight car loads of coal of the value of $120.30, the bill for which was put in evidence, that in addition to the bill of lading a printed ticket was sent with the coal showing whose coal it was; that the bill for coal was sent by Pollock & Medlar, who were their agents for the sale of coal but to whom they did not sell; that they made out bills to Pollock & Medlar, and charged them with the coal; that they always entered the coal to the party to whom it was sent, and then charged it to the account of the agents; that they sent the bills to the agents, which were sometimes made out against the agents and sometimes against the parties; that the bills were sometimes paid to the agents and sometimes the money was sent direct to the colliery; that the agents were held liable for collections, but if they could not collect them, then the company undertook to collect; that they had a running account with Pollock & Medlar, charging them with bills and crediting them with payments, and that the coal for which this suit was brought was not settled for by Pollock & Medlar. On cross-examination the witness was asked the following question: "If the bills sold by the agents are afterwards not collectible by the company, are the agents liable to the company for the amount?" Objection. Objection sustained. Exception. (First assignment of error.)

At the close of the plaintiff's testimony, Conrad Frame, one of the defendants, testified that he had bought considerable coal during 1873 from Medlar, who came to his office pretty regularly once a month to sell coal. Question. "State what knowledge you had that Pollock & Medlar were dealing in their sales of coal as principals or agents." Objection. Objection sustained on the ground that facts and circumstances should be proven to show the manner in which Pollock & Medlar dealt, and it should be for the jury to conclude whether the facts and ostensible circumstances of the manner and dealing would induce knowledge of principalship or agency in the mind of a man of average intelligence. This form of putting the question is rejected. Exception. (Second assignment of error.)

Frame further testified that Medlar never said anything as to the capacity in which he sold the coal, but offered it in the name of Pollock & Medlar; that he came to the office about August 1, 1873, saying that he had three boat loads of coal to sell for which he asked $2.12, but afterwards offered it at $2.08; that he offered Medlar $2.00, which he said he would not take, but said that if he, the witness, made up his mind in a day or two he could write, and that he accordingly did write in a day or two afterwards. The defendant then offered in evidence the following letter:—

POTTSVILLE, Aug. 9, 1873.

CONRAD FRAME, Esq.

Dear Sir: We will send you the first cargo of Peach Mt. Coal this week. Yours truly,

POLLOCK & MEDLAR.

Objected to on the ground that the former letter to which the letter offered is in reply, must be first given in evidence. Objection sustained. (Third assignment of error.)

The defendant then offered in evidence the following postal card and letter—

(Postal Card.)

POTTSVILLE, Aug. 14, 1873.

CONRAD FRAME, Esq., Reading, Pa.

The storm will postpone the loading of your cargo of coal until next week.

POLLOCK & MEDLAR.

(Letter.)

POTTSVILLE, Aug. 25, 1873.

CONRAD FRAME, Esq.

Dear Sir:—On account of the bad luck we have had at the Peach Mountain Colliery this month, we find that we will not be able to send you any coal from that colliery. In the first place the heavy rains filled the slope with water and we lost nearly two weeks, and yesterday there was a man killed which will throw us idle for the balance of the month. We are very sorry we can't ship you the coal, but hope next month to make arrangements with you so as to give you the coal.

POLLOCK & MEDLAR.

Objected to as not relevant. Objection sustained. Exception. (Fourth assignment of error.)

In consequence of the failure to deliver the coal and its rise in price, the defendant alleged that he had sustained damages to the amount of $140, which he claimed as a set-off against the plaintiff's demand.

Verdict for the plaintiff and judgment thereon.

The defendant took this writ assigning for error the rejection of his offers of evidence, and the entry of judgment for the plaintiff.

A. G. Green, for the plaintiff in error.

If agency is a question for the jury, then everything is proper cross-examination that goes to the investigation of agency, and therefore it was error to rule out the question in the first assignment of error.

The ruling of the Court in rejecting the testimony of the very witness whose want of knowledge of agency it was important to establish, is so erroneous as not to need argument.

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The letters and postal should have been admitted, for the letters were the written admissions of the adverse party, which are always evidence. The letters were the admission of a contract. Letters of a party are evidence of themselves to prove a promise to pay without producing those to which such letters are answers.

Barrymore *v.* Taylor, 1 Esp. 327.
De Medina *v.* Owen, 3 Car. & Kir. 72.

A letter containing an admission by a party is evidence against him, although the letter is in reply to another which the party is not called on to produce.

Wiggin *v.* R. R., 120 Mass. 201.

Samuel L. Young, for defendant in error.

The fact of agency was clearly proved, the defendant merely alleged that he had no knowledge of it.

Whether the agents were liable if the debt was not collectible is irrelevant matter, for it was not proper cross-examination, and could not in any way affect the right of the plaintiff to recover from the defendant, whether he knew of the agency or not. To entitle the plaintiffs to recover it was not necessary to prove in the first place that the defendant had knowledge of the agency.

Story on Agency, § 420.

But there was evidence that the defendant had such knowledge, for a ticket and bill of lading were sent with the coal, and the jury were bound to find from the evidence that he did receive them. The inference deducible from the ticket was for the jury. The inference of the defendant would be his opinion and not a statement of facts.

1 Phillips on Evidence, 778.
Given *v.* Albert, 5 W. & S. 333.

It is submitted that there was no evidence of a contract between the plaintiff and defendant. At the time of the conversation, evidently no contract was made.* The letter sent by the defendant afterwards was not in evidence, and its contents are not known. If there was a contract it must have been in writing. To prove a contract there must be evidence of a proposition and an acceptance.

When it is proposed to prove a contract by the declarations of the parties, whether verbal or in writing, the whole must be given in evidence.

1 Greenleaf's Evidence, § 201.

Where a person seeks to prove the terms of a contract by a series of letters, he must take the whole of each letter, and cannot pick out part and reject the rest.

1 Wharton's Evidence, § 617.

The whole correspondence must be given in evidence.

2 Parsons on Contracts, 95.

Without knowing the contents of the letter the terms of the contract could not be known.

Nesbam *v.* Selby, 13 L. R. Eq. Cases, 191.

It is not the province of a jury to guess at the terms and stipulations of a contract the evidence of which is not before them, and without which there can be no assessment of damages.

March 21, 1881. THE COURT. This action as it stood in the Court below at the time of the trial, was a suit by the William Penn Coal Company, to recover the price of eight car-loads of coal shipped to the defendant by Pollock & Medlar, plaintiff's agents. The receipt of the coal was not denied by the defendant, but he alleged and offered to prove that he dealt with Pollock & Medlar as principals, and had no knowledge that they were plaintiff's agents, or that the coal in question belonged to plaintiff; that he made a contract with Mr. Medlar, one of the firm, about August 1, 1873, for two boat-loads of Peach Mountain Chestnut coal at $2.08, that Pollock & Medlar delayed sending said coal from time to time; that after repeatedly failing to do so, they finally, on the 25th of August, notified the defendant that they could not do so; that coal of the quality contracted for had risen in price at least forty cents, and that in consequence of said failure and rise, the defendant sustained damages to the amount of at least $140, which he claims to set off against the plaintiff's demand.

It is familiar law, that if one deal *bona fide* with an agent, as owner, without knowledge of his agency, he may set off any claim he may have against the agent in answer to the demand of the principal. (Story on Agency, §§ 420, 421; 2 Kent's Comm. 632, where numerous authorities are collected.) While the Court below appears to have recognized this principle, the defendant was nevertheless deprived of all practical benefit of it, by the ruling out of his evidence for other reasons. Thus in the second specification, the question was rejected because of its form. The defendant being on the stand was asked by his counsel, "State what knowledge you had that Pollock & Medlar were dealing in their sales of coal as principals or agents." The Court excluded the answer to this question upon the ground that defendant could not state his knowledge of the agency, but must show facts and circumstances from which the jury may infer the fact of such knowledge. The error of this ruling is manifest. If the defendants had no knowledge of the agency, the absence of such knowledge was of itself a fact which it was competent for him to state. The direct question might well have been asked. Its modification tended merely to draw out his sources of information, which was at most an anticipation of cross-examination. The fact that the defendant had no knowledge of the agency, was an essential preliminary of his defence. Conceding such knowledge it would

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have availed him nothing to have established the remainder of his offer.

It was also error to exclude the letters referred to in the third and fourth specifications. Assuming as we must, for the purposes of this case, that the defendant had no knowledge of the agency, they were links in the chain of the defence. The objection that the letters had not been given in evidence, to which those offered were replies, is not tenable. The rule is correctly stated by Mr. Wharton, in his work on Evidence at § 1127: "Nor is it an objection that the letters are insulated; a letter containing a particular admission may come in by itself; nor is it necessary in such case that the whole pertinent correspondence should be put in." The letters in question were offered to show delays in the shipment of coal, and they were some evidence of such delay.

We do not regard the evidence referred to in the first specification as material, and its rejection was not error.

Judgment reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

Oct. & Nov. '80, 41. Oct. 18, 1880.

Watterson v. Reynolds.

Landlord and tenant—Mining lease—How far gives right to quarry for other things besides ore—Consideration.

A lease of land providing that the lessee "shall hold the same and enjoy and use all the rights and privileges of real ownership as in fee simple," as long as he shall carry on a certain iron furnace, the lessee to pay the taxes and also a certain royalty to the lessor for every ton of iron ore quarried, confers also on the lessee the right to quarry limestone on said premises, for use in connection with the manufacture of iron.

Error to the Common Pleas of Clarion County.

Assumpsit, by James Watterson against Alexander Reynolds and John Moorehead, to recover the value of certain limestone alleged to have been quarried by defendants from a tract of land leased to them by plaintiff, for the purpose of aiding in the manufacture of pig iron on the said land.

On the trial, before JENKS, P. J., plaintiff gave in evidence a lease of the tract in question by himself to one McCullough containing, *inter alia*, the following clauses:—

"I, James Watterson . . . for and in consideration of one dollar . . . and for other valuable considerations hereafter mentioned, do hereby agree and engage . . . to lease to . . . McCullough a certain tract of land (described) . . . said McCulloch to take possession of the above described tract of land as soon as he commences to build a furnace at the mouth of Redbank Creek, and hold the same, and enjoy and use all the rights and privileges of real ownership as in fee simple so long as said McCulloch, his heirs, or assigns may carry on a furnace at the mouth of Redbank Creek, in said township of Madison; except that said McCulloch is to pay the taxes on said tract of land, and to pay me twenty cents per ton for each ton of twenty-two hundred and forty pounds of ore he may dig and haul away from said tract of land."

Also an assignment of said lease by McCullough to defendants. He then offered to show that defendants had dug limestone from the premises to the amount of 50,000 tons and to show the value of the same. Objected to by defendant as irrelevant and incompetent. Objection sustained and evidence excluded.

Plaintiff requested the Court to charge as follows: (1) The words in the lease . . . do not convey an interest in the soil, either by express grant or by implication, and the right to use and enjoy, refers only to the lease and the possession. *Answer.* We think the lease gives the defendants the right to use every part of the realty necessary and convenient for the profitable and efficient use of the furnace. We therefore decline to answer this point as requested.

(3) There is no grant in said instrument to take or carry away any of the soil but the ore; and not being conveyed away, the right of soil (other than the ore) remains in the lessor, and McCulloch and those claiming under him, cannot take limestone; and the plaintiff has the right to recover for all the limestone taken off the premises. *Answer.* We decline to answer this point as requested. We think the defendants had a right to use the limestone if it was necessary for the profitable and efficient use of the furnace.

Verdict for defendants and judgment thereon, whereupon plaintiff took this writ, assigning for error, *inter alia*, the refusal of his offer of evidence and the answers of the Court to his second and third points above cited.

Knox and *Maffet* (*James Campbell* with them) for plaintiff in error.

W. L. Corbett (with him *B. J. Reid & Son*) for defendants in error.

Nov. 8, 1880. THE COURT. We are of opinion that the Court below gave a correct construction to the lease between Watterson and McCulloch, and the judgment must therefore be affirmed. The lease is somewhat peculiar, both in its character and its phraseology, but we do not think it difficult of interpretation. In terms it is a grant of a tract of land, by description, containing forty-six acres more or less, the grantee to take possession "as soon as he commences to build a furnace at the mouth of Redbank Creek, and hold the same, and enjoy and

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use all the rights and privileges of real ownership as in fee simple, so long as said McCulloch, his heirs or assigns, may carry on a furnace at the mouth of Redbank Creek in said township of Madison; except that said McCulloch is to pay the taxes on said tract of land, and to pay me twenty cents per ton for each ton of twenty-two hundred and forty pounds of ore he may dig and haul away from said tract of land." No right to dig or take away either limestone or iron-ore is given in express words. The right to take ore is assumed to exist in the remainder of the instrument, but the only language previously used, which can suffice to confer that right is equally efficacious to confer also the right to take limestone. The land was manifestly leased for the very purpose of being used for the erection and maintenance of a furnace. The lessee can only take possession when he commences to build a furnace; he can hold it so long as he continues to carry on a furnace, and the same privilege is extended to his heirs and assigns indefinitely, and it is to be terminated when the property is formally abandoned as a furnace property. The consideration for the term to be paid by the lessee, for whatever rights and privileges are conferred by the lease is the erection and continued maintenance of a furnace on the premises, the payment of the taxes on the land, and the payment of a royalty of twenty cents per ton on every ton of twenty-two hundred and forty pounds of ore dug and hauled away from the tract. These constitute the full equivalent for every right conferred by the lease. There is no obligation to pay for any limestone that may be taken. Does the right to take limestone exist? If there are proper words giving the right, it is no reply to argue against its existence, that there is no provision to pay for it, since it may be paid for in the other considerations to move from the lessee. Now the words are that the lessee is "to hold the same (that is the tract of land) and enjoy and use all the rights and privileges of real ownership as in fee simple," so long as he may carry on a furnace on the premises. These words are in the lease for some purpose. We have no right to overlook or reject them, or to refuse them their plain natural meaning. It is certainly one of the "rights and privileges of real ownership as in fee simple," to take limestone from land whenever it is found. Moreover, limestone is a necessary article to be used in the manufacture of pig iron, and it may well be intended that the parties who were contracting for the erection and maintenance of a furnace on the demised premises, had it in contemplation that limestone as well as iron-ore should be taken and used in carrying on the furnace. We are of opinion that the words of the lease include the right to take limestone from the premise for use in the furnace, and as there was no obligation to pay for it, other than in the manner already indicated, there could be no recovery for its value in the manner proposed in this action. The Court below were right in excluding the testimony offered, and in their answers to the plaintiff's first and third points.

Judgment affirmed.

Opinion by GREEN, J. GORDON, J., dissents.

Jan. '81, 54. January 11, 1881.

Dorff's Appeal.
Hunt's Estate.

Executors and administrators—Trust duties vested in executors virtute officii—Power of sale—When surviving to administrator d. b. n. c. t. a.

A devise to executors in trust for the testator's wife for life as to certain real estate; to demise other real estate, to pay taxes, an annuity, and to divide the residue of the income; to farm the estate for a certain period, then to sell at discretion, and to divide the proceeds among the children living and the issue of deceased children, the daughters' shares to be invested for their sole and separate use during their lives—is a power of sale to make distribution, vested in the executors *virtute officii.*

The fact that the portion of the daughters was to be set aside and held in trust for them does not change the character of the power.

Such a power survives to the administrator *d. b. n. c. t. a.*

Appeal from the Orphans' Court of Philadelphia County.

Appeal of John Dorff from the decree dismissing his petition praying for an inquest in partition of the estate of James Hunt, dec'd.

James Hunt died in 1850, devising by a will, dated in 1846, his estate to his executors and the survivor, their heirs and assigns, in trust to suffer his wife, during her life, to occupy certain premises, to demise his real estate, to pay taxes, an annuity to his wife, and the residue of the income among his children. The will further contained the following clause:—

"I desire that my said executors shall so continue to farm and apply the proceeds of my said estate for and during the period of ten (10) years from the date of this my will, after which as they shall deem it expedient or for the advantage of my said estate to sell the whole or such parts thereof as they shall deem meet, reserving however the said house allotted to my said wife for her life and the net amount of the proceeds thence arising to divide into as many shares as I shall have children living and children deceased leaving issue and after securing to my said widow the annuity aforesaid to give and pay to Samuel Hunt, James Hunt, Charles Hunt, William Hunt, Catharine Hunt, and the issue of my deceased daughter Sophia, one share each of the said net proceeds thereof, or in case any thereof shall have died leaving issue alive, it is my

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will that such issue shall take as upon an intestacy the share of their deceased parent, and in case either thereof shall die without leaving issue alive at the time of their death then the same to be paid to and amongst the brothers and sisters of the deceased, and as to the other shares for my daughters Mary, Elizabeth and Susan and my son John's I direct my said executors to invest the same in their own names and the income thereof as to John's share to pay and apply for his support and the residue thereof or the income thereof to pay to my said daughters Eliza, Susan and Mary, each one share thereof to and for the sole and separate use of each of my said daughters for their natural lives respectively and upon the respective deaths of my said John and my daughters Mary, Eliza, and Susan to divide the share so allotted to them respectively among their respective issue or next of kin in case no issue alive at the time of any of their decease, in such shares and portions as they would receive if the parent so dying had died intestate possessed thereof."

The widow of the testator, and both of the executors died, and the Fidelity Insurance, Trust, and Safe Deposit Co. were granted letters of administration *d. b. n. c. t. a.*

To the petition of Dorff, a grandson of the testator, praying for a partition, the administrator and heirs made answers averring that Dorff had in 1868 sold his "right, title, interest, property, claim, and demand or interest in the said real estate" to William Hunt, dec'd. Upon replication the matter was referred to an examiner to take testimony. While before him, the petition of Joseph Hazazer for an inquest of partition in the same estate was presented, and, upon answer, dismissed. The examiner's report having been filed, the Court, without argument (and, it seems, upon the ground that the point had already been decided in Hazazer's petition), dismissed the petition and entered the following decree:—

"The Court dismiss the petition of John Dorff, praying for an inquest in partition, without prejudice to the question of whether or not the petitioner is a party interested in the estate of James Hunt, deceased, and, as such, entitled to a distributive share of the estate of said decedent."

The petitioner took this appeal, assigning for error the dismissal of his petition. The evidence taken before the examiner was not brought up.

John H. Campbell, for the appellant.

The interest of the petitioner was not passed upon by the Court below; it must be assumed as existing here.

Where the executors are testamentary trustees, and the trust extends beyond the sale and distribution, *virtute officii*, to an investment or for a collateral purpose, the power does not survive to the administrator *d. b. n. c. t. a.*

Evans *v.* Chew, 21 Sm. 51.
Ross *v.* Barclay, 18 Pa. St. 179.
Waters *v.* Margerum, 10 Sm. 44.
Jackman *v.* Delafield, 85 Pa. 383.

Thorn (with whom was *Junkin* and *Belsterling*), for the appellees.

The petitioner claims adversely, and if he has title, he should be remitted to his action of ejectment.

The power to sell may be executed by the administrator for the purpose of bringing in the estate for distribution, although trustees will have to be appointed for the living daughter's share.

Evans *v.* Chew, 21 Sm. 51.
Jackman *v.* Delafield, 85 Pa. 383.
Lantz *v.* Boyer, 31 Sm. 325.

That the power of sale given to the executor was discretionary and not absolute, does not prevent its surviving to the administrator *d. b. n.*

January 24, 1881. THE COURT. It might be enough to say, that we have not been furnished with a copy of the evidence in this case, and certainly cannot reverse without it. However we are clearly of the opinion that the power in the will of James Hunt was vested in his executors *virtute officii*. It was to make distribution, and the fact that the portion of the daughters was to be set aside and held in trust for them, did not change the character of the power. After the sale, had each share separately been directed to be invested in trust, it would still have been a power for distribution and exercised by the executors *virtutue officii*. Of course under the law, as well settled, it survived to the administrator *cum testamento annexo*. There are other objections to the award of an inquest of partition which it is unnecessary to consider.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM. GREEN, J., absent.

[*Cf.* Appeal of Children's Hospital, *ante*, 313.]

Common Pleas—Law.

C. P. No. 2. June 25, 1881.

Mintzer v. Mintzer.

Divorce—Order for alimony—Writ of sequestration to enforce obedience.

Petition for writ of sequestration.

Libel for divorce by wife against the husband. The Court having granted a rule for alimony *pendente lite*, the respondent answered admitting that he was in receipt of a considerable income

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under his father's will. The Court ordered alimony *pendente lite*, and the case proceeded to trial before a jury, who rendered a verdict for libellant, upon which a decree of divorce *a mensa et thoro* was entered, with allowance of permanent alimony. Default having been made both as to the alimony *pendente lite* and the permanent alimony, the Court ordered the respondent to pay the arrears and enter security, under the Act of April 15, 1845 (Purd. Dig. 513, pl. 25), for future payment, and issued an attachment to enforce this order. Respondent having absconded and remaining out of the jurisdiction to avoid the attachment, libellant filed this petition.

A. B. Guilbert (with him *Dougherty*), for the petition.

It appears that respondent has an estate which is in trust but that is not at present material. The trustee can be made a party after the granting of the writ, and the question whether the Court can reach the fund may then be considered.

It would seem that this application is *primæ impressionis;* the Courts in Pennsylvania have, however, issued the writ of ne exeat to compel obedience to an order of alimony.

Miller *v.* Miller, Penna. Registrar's Book, cited in Rawle's Eq. p. 43.
Dransfield *v.* Dransfield, 23 Leg. Int. 229.

Sequestration is the process issued upon a contempt to enforce obedience and afford protection to the parties.

Daniel Ch. Pr., p. 1225.
Adam Eq., p. 651.
Bishop on Divorce, § 500.

It has frequently been awarded to enforce a decree for the payment of alimony.

Bishop on Divorce, §§ 494, 504.
Browning on Divorce, 244.
Sidney *v.* Sidney, 17 L. T. Rep. N. S. p. 9.
Wilson *v.* Metcalfe, 1 Beav. 263.
Kirby *v.* Kirby, 1 Paige, 261.
Questel *v.* Questel, Wright (Ohio), 492.
Sheafe *v.* Sheafe, 40 N. H. 517.
Anon., 1 Haywood, 397.
Carey *v.* Carey, 2 Daly, 424.

C. A. V.

July 2, 1881. THE COURT. Writ of sequestration allowed.

C. P. No. 2. July 2, 1881.

Sickel v. Dillon.

Promissory note—Agreement to give time—Affidavit of defence.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note given by Dillon to the United Fireman's Insurance Co. for sundry interests and premium moneys and drawn payable to William V. Sickel, Secretary. The affidavit of defence set out that before maturity the time of payment was extended by an agreement between Sickel and the defendant, that two months after this agreement Sickel purchased the note from the company, and that the said note is now held by Horatio Sickel, the father of William V. Sickel.

Joseph L. Caven, for rule.

THE COURT. Even if the authority of Sickel to extend the note were sufficiently averred, the affidavit is bad in not setting forth any time to which the note was extended.

Rule absolute.

C. P. No. 2. July 2, 1881.

Weil et al. v. Michael.

Affidavit of defence—Insufficiency.

Rule for judgment for want of a sufficient affidavit of defence.

This was an action of assumpsit on a book account consisting of various entries from June 19, 1880, to January 15, 1881, and aggregating $196.40; the affidavit of defence set forth that "a portion of the goods charged against deponent were subsequently returned to plaintiffs and received by them, for which plaintiffs here fail to give deponent credit. That deponent does not owe the amount claimed by plaintiffs, and this he expects to be able to prove on the trial of the cause."

Kinley J. Tener, for the rule.

THE COURT. The affidavit should state the value of the goods returned, so as to permit plaintiff to take judgment for the balance admitted.

Rule absolute.

C. P. No. 2. July 2, 1881.

Janeway et al. v. Moss.

Affidavit of defence — Note signed by agent — Knowledge of agency by holder of note.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note signed "James A. Moss, Agent." The affidavit set forth that the note was made by defendant as agent, but the suit is brought against him individually; also that the note was not given by the defendant in his individual capacity but as agent for one Maria Moss, a widow, for whom he had been transacting the business of paper hanging, and for whom he ordered certain goods of the plaintiff, giving in payment thereof the note in suit;

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that the plaintiff knew these facts and so accepted the note.

W. B. Lane, for the rule.

The defendant avers no authority from Maria Moss to make a promissory note.

Story on Agency, § 277–8.
White *v.* Skinner, 13 Johnson, 307.
Kerns *v.* Piper, 4 Watts, 222.

The facts set forth in the affidavit give plaintiff no right of action against Maria Moss; her credit does not appear to have been pledged.

Roberts *v.* Austin, 5 Wharton, 313.
Seyfert *v.* Lowe, 7 WEEKLY NOTES, 39.

Dolman, contra.

THE COURT discharged the rule on the strength of the averment in the affidavit that the plaintiff had knowledge of the fact that defendant was agent of Maria Moss, and accepted the note as the note of Maria Moss, saying that if this were true he should have the opportunity to prove it before a jury.

C. P. No. 3. June 25, 1881.

Chandler v. Ziegler.

Practice — Sheriff's interpleader — Amount of claimant's bond — The Court will, in their discretion, allow the security to be measured by the value of the goods instead of the amount of the judgment.

Rule to show cause why claimant should not be allowed to enter security in double the amount of the goods claimed by her.

This was a sheriff's interpleader. The amount of the judgment was $15,765, while the value of the goods levied on, as shown by depositions, was less than $2800.

C. Stuart Patterson, for the rule.

The form of bond usually given by claimant in a sheriff's interpleader is for double the amount of the judgment. Under the statute and rules of Court, the amount of security is within the discretion of the Court. Here it would be unreasonable to demand security in double the amount of the judgment.

Dunn *v.* Chapman, 6 WEEKLY NOTES, 15.

G. C. Purves, contra.

THE COURT. Rule absolute.

U. S. Circuit Court—Equity.

March 25, 1881.

McCalmont et al. v. Phila. & Reading R. R. Company et al.
Taylor et al. v. Same.

Corporation—Railroad—Ultra vires—Power to borrow money—Does not include power to issue irredeemable bonds entitling the holder merely to a contingent share in the profits—Nor to issue irredeemable bonds secured by mortgage.

Petition for a revocation of an order made by the Circuit Court, and motion for a preliminary injunction upon a bill in equity filed by certain stock and bondholders of the Philadelphia and Reading Railroad Company, citizens and residents of the kingdom of Great Britain and Ireland, against the Philadelphia and Reading Railroad Company, a corporation of Pennsylvania, and against its president and managers individually.

The bill and petition set forth the following facts:—

That the complainants were large holders of the stock and bonds of the corporation defendant; that on or about May 21, 1880, the said corporation suspended payment; and upon a bill filed by a creditor, this Court, on May 24, 1880, appointed receivers of all the property of the said corporation, and also appointed special masters to pass upon the accounts, etc., of the receivers, and further ordered that an injunction be issued against the defendants, and all persons claiming to act by, through, or under them, and all other persons, to restrain them from interfering with the said receivers taking possession and managing the said property, with leave to any party in interest to apply for further directions.

That on Nov. 16, 1880, the petition of the said corporation defendant and of the said receivers was presented to this Court, setting forth that the principal cause of the embarrassment of the said railroad company had been the existence and pressure of the floating debt, which amounted to a total of $10,158,987.47, for which floating debt a large amount of collateral, the true value of which was very great, but much of which was not readily salable was pledged as security; any forced sale of which might be disastrous by causing a sacrifice and loss of securities important to the operation of the corporation defendant; that

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the following proposition had been made by responsible parties for securing a contribution to pay off the floating debt, viz. :—

"The company is to issue 686,000 obligations, of a par or nominal value of fifty dollars, to be known as deferred income bonds, on which interest only is to be payable, and that out of the annual surplus profits of the company remaining after the payment of a six per cent. dividend on the common stock. These remaining surplus profits are to be first applied to the payment of a yearly interest, not exceeding six per cent. on the deferred income bonds, and after each class has had six per cent. the deferred income bonds are to rank for further dividends *pari passu* with the common stock. The right of the latter to this participation in the surplus profits of the company, is to take effect as of December 1, 1880.

"The deferred income bonds are to be issued at thirty per cent. of their par value, or fifteen dollars per bond, payable in instalments, as follows: Three dollars on subscription, four dollars one month thereafter, four dollars three months thereafter, and four dollars five months thereafter, with the right to pay up in full at any time under six per cent. per annum discount. Scrip transferable to bearer will be issued if desired, on the payment of the first instalment. Each stockholder is to have an option of taking a *pro rata* share of these obligations, and all not thus taken are to be awarded to an association or syndicate of the promoters of the plan, by whom its success is to be guaranteed by the deposit of the sum of $2,058,000. . . . The company is to pay the guarantors a commission of five per cent. on the proceeds of the issue of deferred income bonds, and the net proceeds of the issue are to be applied to the payment of the floating debt."

The petition prayed for the approval of this proposition, and for leave to issue the bonds. It was accompanied by the report of one of the special masters approving the scheme.

On Nov. 18, 1880, the Court granted the prayer of the petition, and authorized the railroad company to accept the proposition of guarantee, and to issue the bonds. The money accruing therefrom to be paid to the receivers and applied to the payment of the floating debt and the redemption of the securities pledged therefor.

The bill further set forth that on December 7, 1880, the board of managers of the railroad company authorized the president to issue the deferred bonds in order to pay off the floating indebtedness, and at the same time resolved to issue in addition to these bonds other bonds to the amount of $150,000,000, secured by a new consolidated five per cent. funding mortgage. These latter bonds were to be used to retire all the outstanding funded indebtedness of the company, and were to be divided into two classes, A and B. Class A were to be either perpetual or 50 year obligations, with provision for renewal at the end of 50 years. They were to have priority over Class B, and were to be used in retiring the earlier obligations of the company. The interest on them was to be cumulative and subject to be collected by legal proceedings upon any default. Class B were to be perpetual obligations, and were to be used in retiring the later obligations of the company. The interest was to be cumulative, but no suit for such interest could be brought until three years after default. The bill set forth that this scheme was subsequently approved by the receivers, and the president authorized to carry it into effect. The bill further alleged that subscriptions for the deferred bonds had been invited and received from various parties, and that in the prospectus inviting these subscriptions it had been stated that the deferred income bonds would be irredeemable.

It further appeared that the only special authority of the corporation defendant to sell bonds at a discount was contained in the Act of Assembly of Pennsylvania, passed February 18, 1871 (P. L. p. 91), whereby it is provided—

"SECTION 2. That the president and managers of the Philadelphia and Reading Railroad Company may . . . secure such issues of bonds as they may deem advisable to make, bearing such rate of interest, with or without provision for the payment of taxes on the said bonds, and payable at such times as the president and managers may provide, either in United States money or sterling, by mortgaging from time to time the whole or any part of its railroads, real and personal estate, and corporate rights, and franchises acquired or to be acquired, and may dispose of the said bonds at such price and in such manner as they may determine; and any such mortgage may, at the option of the said president and directors, be made to secure bonds to be subsequently issued, as well as those issued prior to or contemporaneously with the date of the said instrument."

Complainants alleged that both the deferred bond scheme and the blanket mortgage scheme were beyond the power of the corporation, and prayed for an injunction to restrain respondents from carrying them into effect. Simultaneously with the filing of the bill, complainants, by leave of the Court, intervened in the suit in which the order allowing the issue of the deferred bonds had been granted, and filed the present petition for a revocation of that order.

On February 14, 1881, after a preliminary hearing upon the bill and petition, the following opinion and decree was filed, MCKENNAN, Circ. J. :—

In the matter of the Philadelphia and Reading Railroad we have two applications before us. One is a motion to revoke the order of November 18, 1880, and the other is a bill which seeks to restrain the managers and officers of the Read-

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ing Railroad from carrying into further execution what is known as the deferred bond plan and the $150,000,000 loan. As to the first of these motions, the circumstances under which that order was made are well understood from what has heretofore been said by the Court. It was made by one of the Judges of this Court at Chambers at Pittsburg. The other member of this Court, as it is now constituted, was not present and knew nothing of it, and is in nowise responsible in any sense for the order. It was made by the Circuit Judge alone, and he alone is responsible for it. A petition was presented asking for this order, in which the receivers of this Court and the Philadelphia and Reading R. R. Company united. It was approved and recommended by gentlemen of the bar who are eminently entitled to the confidence and respect of the Court, and, apparently, all interests which could intervene were represented in that application. It was referred to a master appointed by this Court, in whose intelligence and uprightness all confidence ought to be placed, and he advised the allowance of the application upon the ground chiefly that the plan proposed to be carried out was within the chartered powers of the company. It was, therefore, approved and an order made, which is now upon the record. That order, by its natural import, is an authorization by the Court to the Philadelphia and Reading Railroad Company to carry into effect the plan which is generally described in the petition and in the order. But such was not the real significance of the order. It is now conceded that such an order, or an order construed as I have said this one may be construed, was beyond the authority of this Court to make. It was, therefore, intended simply to allow the Philadelphia and Reading Railroad Company to exercise its chartered faculties without embarrassment from an injunction order which was made by this Court at the time the receivers were appointed. It is, therefore, clearly the duty of the Court to put that order into such form as will express the intention of the Court, and as will properly exercise the power which the Court had in the premises. We will now make this order.

And now, February 14, 1881, this motion having been fully argued by counsel, and duly considered by the Court, it is now ordered that such part of the said order of November 18, 1880, as purports to confer authority by this Court upon the Philadelphia and Reading Railroad to adopt and carry into effect the deferred bond plan, which is generally described in said order, be, and the same is hereby revoked, and that the said order shall be construed and taken only as relieving said company from the effect of the injunction ordered by this Court when receivers of the property of the said company were appointed, by permitting it to exercise, upon its own responsibility, and according to its own legal discretion, such powers as its charter conferred upon it, in providing means for the payment of its debts in the mode proposed.

BUTLER, J., filed the following concurring opinion: I desire to add just a word, and to guard against any danger of misunderstanding I have put it in writing. I desire to say that the conclusion just stated has received the full approbation of my judgment, after such careful examination and thought as its importance demanded. From the opening of the argument this result, in its main feature, seemed inevitable, and yet I was so impressed with the delicacy of the case, and the possible consequences of interfering at this time, as to incline me to listen with interest and favor to everything that could be urged against it. I heard nothing, however, which, in my judgment, would justify a different conclusion. All questions other than that *directly* involved in the orders about to be made, including, of course, the question of power in the corporation to do what the directors propose, I understand to be reserved for future determination, as has already been stated.

Subsequently the cause was argued upon the question as to the validity of the schemes for the issue of bonds set forth in the bill.

The affidavits read on behalf of defendants showed that the complainants had been informed by the president of the defendant company of the proposed issue of bonds some three months before the filing of the bill. That on December 8th, 1880, the president went to London, to make the necessary arrangements for the issue of the bonds, and upon his arrival there began to arrange for the issue of the same; that in interviews with the complainants, the latter informed him that every facility should be given him to successfully carry out the plan; that while they doubted its success, they would be only too glad if it were successful; that the complainants, who had been the agents of the defendant company, while unwilling to act as such in bringing out the bonds, had approved of those selected by the president; that subsequently, on January 5th, 1881, the prospectus was issued in London and in this country, inviting subscriptions, and a copy sent to complainants, who replied, acknowledging simply its receipt; that on January 15 the subscription lists were closed, by which time the bonds had all been subscribed for; that on January 24, 1881, allotment letters had been issued in London and in this country to the subscribers; that prior to the issue of such let-

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ters, the following correspondence had taken place:—

6 AUSTIN FRIARS,
LONDON, 20th January, 1881.

Messrs. McCalmont Bros. & Co.,

GENTLEMEN—The *Daily News* of this morning contains the following cable from New York: "Mr. McCalmont has issued a notice that the legality of the Philadelphia and Reading deferred bonds will be legally contested." As brokers for these deferred bonds, which have been so largely subscribed for (fully $20,500,000 have been taken by your fellow shareholders, holding 410,000 shares), we think it our duty to ask you whether you have authorized the publication of the notice above referred to.

We remain, gentlemen, yours respectfully,
(Signed) SATTERTHWAITE & Co.,
JOHN TAYLOR & Co.

16 PHILPOT LANE,
LONDON, E. C., 20th January, 1881.

Messrs. Satterthwaite & Co., Messrs. John Taylor & Co., 6 Austin Friars,

GENTLEMEN—We have your joint note of this date, and in reply beg to say that we cannot be responsible for what may appear in the newspapers. We can, however, say this, that our agents in the United States are acting under legal advice in the steps they are taking in order to secure a prudent management of the Philadelphia and Reading Railroad, in which we are so largely interested, both as shareholders and bondholders.

We remain, gentlemen, your obedient servants,
(Signed) MCCALMONT BROS. & Co.

Richard C. Dale, *Ashbel Green*, and *John C. Bullitt*, for complainants.

Whatever might be the power of the Board of Managers to make a new issue of ordinary stock, and even to sell such stock at as ruinous a sacrifice as they pleased, there seems to be no question that no such power exists to make an issue of stock with incidents attached thereto of a different character from ordinary stock, unless such power be expressly given by charter or statute.

Kent *v.* Quicksilver Mining Co., 78 N. Y. 159.
Curry *v.* Scott, 54 Pa. St. 270.
Field on Corporations, § 121.

The only Act under which this corporation could claim to sell these bonds is the Act of Feb. 18, 1871. But these so-called bonds are not properly bonds, as spoken of by the said Act.

Blackstone, Vol. II. p. 340.
Bouvier's Law Dictionary, title Bond.

They lack the essential element of being instruments for the payment of a sum certain at a day appointed. Nor is the scheme valid as an issue of stock, since a board of managers has no power to sell the stock of a corporation for less than its par value. Such an act is fraudulent both as to creditors and stockholders.

Sturges *v.* Stetson, 1 Biss. 249.
Fosdick *v.* Sturges, 1 Biss. 255.
Mann *v.* Cooke, 20 Conn. 179.
Fisk *v.* R. R. Co., 53 Barb. 513.
Upton *v.* Tribilcock, 1 Otto, 45.
2 Redfield on Railways, 444.

Courts of equity have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, etc.

Cunliff *v.* Manchester & Bolton Canal Co., 2 Russ. & Mylne, Ct. 480, n.
Ware *v.* Grand Junction Water Co., 2 Russ. & Mylne, 470.
Bagshaw *v.* Eastern Counties Railway Co., 7 Hare, Ch. R. 114.
Salomons *v.* Lanig, 14 Jurist, 279, Dec. 1850.
Wright *v.* Oroville Mfg. Co., 40 Cal. 20.
March *v.* Eastern R'way Co., 40 N. H., 548.
Heath *v.* Erie R. W. Co., 8 Blatch. 347.
Pond *v.* Vermont Valley R. R. Co., 12 Blatch. 280.
Manderson *v.* Bank, 4 Casey, 379.

John G. Johnson and *James E. Gowen*, contra.

While the jurisdiction of equity to enjoin any unauthorized departure from the original objects of an incorporation is unquestioned, a stockholder invoking the aid of the Court by injunction in such a case, must show promptness and diligence in the assertion of his rights, and if he waits until large sums of money have been expended, and great public interests created, he will not be allowed to enjoin.

High on Injunctions, § 768.
Graham *v.* Birkenhead, etc., R'w Co., 2 McN. & G. 146.
Greatwestern R'w Co. *v.* Oxford R'w Co., 3 De G. M. & G. 341.
Samuel *v.* Holladay, 1 Woolworth C. C. Rep. 400.

A preliminary injunction cannot be granted when the act sought to be restrained has been already done.

Salisbury *v.* The Metropolitan R'w Co., 39 L. J. Ch. 429.
Camblos *v.* Phila. & Reading R. R. Co., 9 Phila. 411.
Lehigh Coal & Nav. Co. *v.* Lehigh Valley R. R. Co., referred to in Andenreid *v.* Phila. & Reading R. R. Co., 68 Pa. St. 376.
Washington University *v.* Green, 1 Md. Ch. 97.
New York Printing & Dying Est. *v.* Fitch, 1 Paige, 97.
Bosley *v.* Susquehanna Canal, 3 Bland, 65.
Attorney-General *v.* New Jersey R. R. Co., 2 H. W. Green, Ch. R. 136.
Attorney-General *v.* City of Paterson, 1 Stockton, 624.

When the bill in the present case was filed, the contracts, the making of which was sought to be thereby enjoined, had been already completely made with some nineteen hundred different persons, by their acceptance of the offer contained in the prospectus.

County of Moultrie *v.* Rockingham Ten-cent Savings Bank, 2 Otto, 631.

The contracts having been completed, no decree can be made in a proceeding to which the subscribers are not parties.

Story's Equity Pl. § 76, *a*.
Mallow *v.* Hinde, 12 Wheaton, 193.
Marsh *v.* Burroughs, 1 Wood's C. C. Rep. 468.
Carlisle *v.* South Eastern Ry. Co., 1 McNaughton & Gordon, 689.

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Fawcett *v.* Laurie, 1 Drewry & Smale, 192.

A court of equity cannot interpose at the instance of a stockholder and assume to interfere with the control of the company by the directors, where it is not shown that their acts are *ultra vires* or fraudulent.

Forbes *v.* R. R. Co., 2 Woods C. C. Rep. 331.
Simpson *v.* Westminster Palace Hotel Co., 8 H. of L. Ca. 719.
Field on Corporations, § 397.
Green's Brice's Ultra Vires, p. 614, n. a.
High on Injunctions, § 761.

The bonds to be issued are within the power of the company, and therefore within the power of the managers, since all the powers of the company are by the charter and by-laws vested in the managers.

The Insurance Bank of Columbus *v.* Bank of U. S., 4 Clark, 125.
Green's Brice's Ultra Vires, 227, 229, 467, n. a.
Spain *v.* Hamilton's Admr., 1 Wall. 626.
Lloyd *v.* Scott, 4 Peters, 205.

This is not an issue of stock. If the bonds were redeemable at any future time, no matter how remote, it could not be contended for an instant that the mere agreement that the interest was dependent upon and payable out of profits constituted the holder a stockholder. Practically, there is no difference whatever between an irredeemable bond and one payable a hundred years off. It being admitted that the payment of interest out of profits does not make the holder a stockholder, what is there in the fact that the bonds are irredeemable to constitute him one? The two most vital and indeed the distinguishing characteristics of stock are wanting in this case, viz., the right to control the company's affairs, and a right to share in the property of the company in case of a sale and a balance remaining after payment of debts.

C. A. V.

April 21, 1881. THE COURT. MCKENNAN, Circ. J. The present proceeding is twofold; first, to obtain a rescission of an order made November 18, 1880, by one of the Judges of this Court at Chambers, touching the issue by the Philadelphia and Reading Railroad Company of $34,000,000 of "deferred bonds;" and second, to enjoin the issue of such bonds.

Whatever may be the literal import of the order of November 18, 1880, only the significance and effect of an order by consent can be given to it. The petition for it was referred to one of the masters in the cause. His report was favorable, all classes of interest supposed to be affected by it were apparently represented and concurring, and it was, therefore, made without argument and as of course. When it was afterwards challenged by the complainants here, the circumstances under which it was made were fully explained, and its phraseology was so changed as to exclude any inference of authoritative sanction of the plan referred to. The petition for the revocation of the order must then stand upon the same footing as to merit with the motion for the injunction.

The deferred bond plan is challenged, for the vital reason that the corporation is legally incompetent to institute it. It is notably peculiar in its features. It is a proposition by the corporation that the stock and bondholders shall subscribe and pay ratably over $10,000,000, to be used in extinguishing the floating debt of the corporation; that to each subscriber shall be issued a writing, the form of which is yet undetermined, entitling him to receive six per cent. on the sum of $50 for each $15 paid by him, out of the net earnings of the corporation, after paying all fixed charges and a dividend of six per cent. upon the common shares, and that for further interest these subscriptions will rank *pari passu* with the common shares. Is this proposition then authorized by the charter of the corporation?

The principle by which we must be guided in answering this question has been so often the subject of judicial recognition that it has grown into an axiom of construction. It is this: that the exercise of powers which are not conferred upon a corporation by express concession or clear implication must be taken as denied to it. It is thus comprehensively stated by Mr. Justice MILLER, in Thomas *et al. v.* The West Jersey Railroad Company (11 Otto, 82): "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

Whatever power the defendant has in the premises can only be found in its general authority to borrow money. Neither in the charter of the defendant, nor in the special Act which authorizes it to sell bonds, which it may issue below par, is anything contained to legalize the contested proposition, unless it can be put on the footing of a loan. Has it then this character? I think plainly not. It does not propose to create the relation of debtor and creditor between the defendant and the subscribers. The money obtained by the defendant could not be regarded as borrowed, because that implies reimbursement, and it is not demandable by the subscribers or payable by the defendant. It has not the essential and distinguishing qualities of a loan. It contemplates a stipulation that the subscribers,

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in consideration of the sums paid—not lent—by them, shall be entitled to receive, in a remote and uncertain contingency, a portion of the defendant's earnings, to be measured by a certain rate per cent. upon three times the sums paid by them, and after that shall participate with the common shareholders in the division of the residuary earnings. By what allowable definition of a loan or borrowing such a transaction can be embraced I am at a loss to conceive. Nor will the fact that it is to be evidenced by the sealed writing of the defendant change its inherent character and bring it within the range of a power to which it is not otherwise referable.

In one respect, and in one only, does the plan proposed, resemble a loan, and that is in the result to be attained. They are both expedients for raising money, but the method of accomplishing this result is of the essence of the power of the corporation. If its employment has not explicit legal sanction it cannot be made available. If the defendant were offered a rental for its property amply sufficient to relieve it from the burden of embarrassment with which it is now struggling, unless it could show that its legislative creator had endowed it with a right to make a lease, it could not accept such relief. (Thomas *v.* West Jersey Railroad Company, *ante*.) And, although it has power to acquire real estate for all necessary corporate purposes, no one would maintain that it could lawfully enter into a contract for the purchase of real estate merely to resell and thereby realize large gains. Authority to raise money by borrowing does not imply the use of another and different method of raising it, however well adapted to the end it may be. Even in the prospectus issued by the president of the defendant (Exhibit I) the proposed issue of "deferred bonds" is not in any aspect treated as a loan, and the system is correctly stated to be new in the United States, and to have been frequently adopted in Great Britain with great benefit to the companies and to subscribers. But we know that in Great Britain this "system" is expressly authorized by statute, and hence it may be assumed that such legislation was deemed necessary to legalize a resort to it. Is not this suggestive of the inference that, although it has been proved to be of great benefit in Great Britain, it is "new" in this country, because it has been regarded as without necessary legislative authorization?

I am, therefore, of opinion, that the issue of "deferred bonds," as proposed, is without warrant of law, and that the order of November 18, 1880, ought to be revoked and a preliminary injunction granted, and it is so ordered.

Concurring opinion by BUTLER, D. J.

I propose to consider one only of the several aspects in which this case has been presented. Are the contemplated acts charged in the bill *ultra vires*—in other words, have the defendants lawful authority to do what is proposed by the "deferred bond scheme?" As described in the president's "plan for financial reorganization," in the directors and receivers' petition to the Court, of November, 1880, and in the prospectus subsequently issued, and as illustrated by the sample before us of certificate or bond to be delivered to subscribers, it proposes an issue of $34,300,000 irredeemable income bonds of $50 each, at the price of $15 per bond, with interest at the rate of six per cent. on the face value, payable annually out of such surplus earnings as may remain after defraying expenses and affording dividends of six per cent. to the common stockholders, with a right to share equally with such stockholders any balance that may remain after six per cent. is thus paid. In the language of the president's London address, of December 23, 1880, it proposes to give "to every one who will pay $15 an obligation for the nominal value of $50, which is never to mature—with no liability on the company's part to pay the principal, and which shall entitle the holder, after the common shares have had a dividend of six per cent., to all that is earned up to six per cent., and thereafter to a further dividend *pari passu* with the common shares."

That the defendants have power to borrow money is not questioned, and could not be. The plaintiffs assert, however, that this is not a proposition to borrow money, but a scheme to sell stock. The defendants claim that it is strictly a proposition to borrow—conceding that, if it is not, but virtually is to sell stock, they have no lawful authority to carry it out. Thus a vital issue of law is sharply defined and presented. It is one that neither requires nor admits of extended discussion. Every admissible definition of the term borrow or loan, as applied to money and commercial transactions, embraces an obligation to return the property borrowed. A loan of money is universally understood to be the delivery of a certain sum to another, on contract for its return, generally with interest, as compensation for its detention and use. To call the payment of money to another, who is to receive and permanently retain it as his own, in consideration for an annual benefit or profit, a *loan*, would seem to be a plain misuse of language.

There is no such thing known to commerce or transactions in money as an irredeemable loan in the sense here involved. Governments have issued obligations without provision or stipulation for repayment of the principal borrowed; but such obligations are redeemable at pleasure. Running, however, for an indefinite time, with

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no power in the holder to exact payment, they have come to be regarded as irredeemable, and an investment in them is, therefore, treated and described, not as a loan, but as the purchase of an annuity or stock. Aside, however, from the abstract considerations involved in defining the term *borrow* or *loan*, the corporate powers of the defendants to borrow money must be held to apply only to such methods of borrowing as fall within the ordinary sense of the term—as understood by the community, and illustrated in commercial transactions. Applying this test to the proposition here under consideration, it becomes plain that the transaction contemplated is not a *loan*. The certificate proposed to be issued would vest in the owner a joint interest with the common stockholder in the capital or property of the corporation, an interest purchased with his money, the earnings of which would be paid to him in dividends.

In every essential respect, therefore, he would be a stockholder. The circumstance that he could not vote for directors would not change the character of his interest or the nature of his relation to the company and its property. His situation would be similar to that of a silent partner in a commercial firm. The proposition, therefore, is for the sale of interests in the capital of the corporation—a sale of shares, shorn of the privilege of voting, with the right to dividends regulated by contract. It would seem that the defendants contemplated, in the beginning, a sale of stock in the usual form, calling the transaction by its proper name. Testimony taken by the master tends to show this. The absence of power to make such sale, and the apparent impossibility of borrowing money at the usual rates and by the usual methods, and the obstacles interposed by usury laws, doubtless led to the change of plan, which, however, is little, if anything, more than a change in name.

The original thought and purpose have so far remained in the minds of the projectors, that the annual payments contemplated are still called "dividends," as appears by the "plan for reorganization," the directors' petition to Court, the "prospectus," and the president's London address, while the scheme itself is described by them as "an issue of stock," and called such in the circular (known as Exhibit K), wherein it is said, this "issue of stock, with such prospects, at $30 per $100, ought to produce a large bonus to such shareholders as may desire to sell their allotments, as its prospect of dividends is much better than those of many existing stocks standing at a higher price."

The English precedents which appear to have suggested this scheme, were, so far as we have been referred to them, all sales of stock in the usual form. In his London address, the president said: "This scheme is not a new one. Other companies in England have adopted this plan before. Within the last five or six years, according to a statement furnished me, the London, Brighton, and Southeast Railway issued £1,500,000 worth of ordinary stock at 45 per cent. of its par value. The Grand Trunk Railway of Canada issued £7,500,000 of ordinary stock at £22 8*s*. I am told that the Manchester, Sheffield, and Lincolnshire Company has issued £1,100,000 of ordinary stock at 50 per cent., and therefore we are not the first company to adopt a new scheme, which has been heralded by a good many people with a vast amount of ridicule."

Thus it appears by the statements of the president not only that the English precedents were issues of ordinary stock, but also that he regards this scheme as precisely the same. The unfortunate distinction, however, between it and the precedents is, that they were authorized by statute, while it is not. The 26th and 27th Victoria, of July, 1863, known as "The Companies' Clauses Act," provides not only for the issue of ordinary stock or shares at less than the par value, by railway companies chartered in pursuance of or conformity with it, but also for an increase of the capital by an issue of what is called debenture stock. That the defendants have no authority to issue stock for the purposes involved in the scheme under consideration, is not only clear on examination of the charter, and subsequent statutes relating to the subjects, but is fully conceded by their counsel. The proposed mortgage for $150,000,000 being liable to the same objection as respects a part of the bonds proposed to be secured thereby, no further reference to it is necessary.

Subsequently, in accordance with these opinions, the Court entered decrees enjoining the defendants from carrying out either the deferred bond scheme or the blanket mortgage scheme, as set forth in the petition and bill.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, SEPT. 1, 1881.* [No. 20.

Supreme Court.

Jan. '81, 7. Feb. 15, 1881.

Wynn, Admr., etc. v. Wood.

Statute of Frauds—Promise to pay the debt of another—When a promise by parties succeeding to the assets of a firm to pay the creditors of the firm is not a promise within the Statute of Frauds—Right of person beneficially interested in a contract to sue in his own name upon said contract.

If one deliver money or personal property to another under the promise of the latter to deliver it over to a third person who has a beneficial interest therein, or to convert it into money and pay him the proceeds, the third person can maintain an action therefor against the promisor.

A promise by partners who purchase the assets of a firm for a fixed price to be distributed *pro rata* among the creditors of said firm, is not a promise to pay the debt of another, and hence need not be in writing.

W. S. & H. purchased the assets of F. F. S. & Co., and verbally agreed to pay the debts out of the purchase-money; in an action by a creditor of the latter against the former:

Held (reversing the judgment of the Court below), that the creditor being beneficially interested in the contract could maintain an action in his own name.

Held further, that the contract was not within the Statute of Frauds.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Benjamin J. Wynn against Edward R. Wood, Ferdinand F. Sharp, and J. Gardiner Haines, late trading as Wood, Sharp, & Haines. The plaintiff having died subsequent to the trial, his administrator was substituted. Plea, the general issue.

On the trial, before FELL, J., it was shown that the plaintiff was a book-keeper and manager for F. F. Sharp &Co., a firm of glass manufacturers in Millville, N. J.; that the defendants entered into a copartnership, purchased the assets of Sharp & Co., and continued its business. There was considerable testimony that the defendants verbally agreed to pay eighty per cent. of the debts of Sharp & Co. And their articles of copartnership provided that the defendants should—

"pay for the property purchased by distributing the purchase-money among the creditors of F. F. Sharp & Co. until the said creditors are satisfied, supposing the purchase-money to go so far, and to pay the surplus, if any should be found after satisfying the creditors, over to F. F. Sharp & Company.

* * * * *

"In reference to any surplusthat may by chance arise from the assets of F. F. Sharp & Company, or of other preceding firms of which F. F. Sharp was a partner, after paying the debts of said firm and the claims of Isaac Sharpless, it is mutually agreed that previous to crediting the said chance surplus to F. F. Sharp, there shall be a credit to the amount of ten per cent. on the collections given to Wood, Sharp & Haines for care and trouble in making the collections and paying the debts of said firm of F. F. Sharp & Company.

"It is mutually agreed that the said Wood shall have general supervision of the business, and shall devote to it as much attention as his numerous other vocations will admit."

The plaintiff testified:—

"All these items that I have heretofore mentioned as due me, have many times been admitted to be due by F. F. Sharp. Mr. Edward R. Wood, as a member of the firm of Wood, Sharp & Haines, has also admitted the correctness of these. In August, 1873, Mr. Edward R. Wood received a statement of the whole of this indebtedness from me, and he came to see me and felt very bad about it. I said to him that he had promised, as the moneyed man of the firm of Wood, Sharp & Haines, and speaking for the firm, had promised to pay it. He said, 'Did I?' Mr. Wood made me that promise before August, 1873, and he called on me twice before that time in the office at Millville, and said to me, 'Make out your account and I will see that it is paid: I will pay it. You ought not to take eighty per cent.: you are entitled to all of it.'"

F. F. Sharp, one of the defendants, testified:

"The firm of Wood, Sharp & Haines did receive assets from F. F. Sharp & Co., amounting to about one hundred and fourteen thousand dollars ($114,000); it did assume certain liabilities of the firm it succeeded, to be eighty per cent. of the whole liabilities of F. F. Sharp & Co. . . . . I saw him in reference to the claim, and I told him he would be paid as the others were (I mean the plaintiff); this was in consideration of services that had been rendered by the plaintiff to the firm of F. F. Sharp & Co. These promises were made at about the time of the commencement of the new firm."

It was also shown that the firm had paid most of the creditors and had paid Sharp $12,000, and Sharpless, his late partner, $5000.

Upon motion of defendant's counsel, the Court "expressing the opinion that there was no evidence of any promise either express or implied, that the firm of Wood, Sharp & Haines had assumed the liabilities of F. F. Sharp & Co.," granted a nonsuit, which the Court *in banc* subsequently refused to take off.

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Thereupon plaintiff took this writ, assigning for error the action of the Court.

John Scollay, for plaintiff in error.

If one, in consideration of funds being placed in his hands, agree to pay the debt of another, although that other may still continue liable, nevertheless such an agreement is not within the Statute of Frauds, and it need not be in writing.

Justice *v.* Tallman, 5 Norris, 147.
Townsend *v.* Long, 27 Smith, 143.
Taylor *v.* Preston, 29 Sm. 436.

The plaintiff could maintain an action on the contract in his own name.

Guthrie *v.* Kerr, 4 N. 303.
Blymire *v.* Boistle, 6 W. 182.
Torrens *v.* Campbell, 24 Sm. 470.

S. S. Hollingsworth, for defendants in error.

Under the plaintiff's testimony no liability to him was shown; the defendants' contracts could not be enforced by an action of assumpsit by one of Sharp & Co.'s creditors.

Townsend *v.* Long, *supra.*
Beach *v.* Hotchkiss, 2 Conn. 425.
Treat *v.* Stanton, 14 Id. 445.
Reeside *v.* Reeside, 13 Wr. 322.
Stone *v.* Justice, 9 Phila. 23.

That the promise is within the Statute of Frauds if the contract was simply to pay the creditors of the old firm is settled by—

Shoemaker *v.* King, 4 Wr. 107.
Maule *v.* Bucknell, 14 Id. 39.

Either the defendants agreed to take the assets of the plaintiff's debtors and pay their creditors in whole or part—in which case the plaintiff's *debtors*, *i. e.* (the promissee), alone could sue.

Blymire *v.* Boistle, 6 Watts, 182.
Campbell *v.* Lacock, 4 Wr. 448.
Railroad Co. *v.* Railroad Assoc., 8 Phila. 108.

And even the promissee in such case could not sue unless the promise was in writing.

Shoemaker *v.* King, 4 Wr. 107.
Maule *v.* Bucknell, 14 Wr. 39.

Or the defendants agreed to take the assets of plaintiff's debtors, and either distribute their proceeds or the price agreed upon as their value, among *all* the creditors of the plaintiff's debtors. In such case assumpsit will not lie by *one* of such creditors.

Reeside *v.* Reeside, 13 Wr. 322.
Gallagher *v.* Gallagher, 6 Phila. 528.
Clapp *v.* Lawton & Wright, 31 Conn. 75.

May 2, 1881. THE COURT. The Court thought the evidence of the plaintiff insufficient to submit to the jury. It, therefore, ordered a compulsory nonsuit, and refused to take it off. This presents the alleged error. The defendants, Wood, Sharp & Haines, are copartners in the business of manufacturing and selling window glass, and in selling oils and paints. They are the successors of the firm of F. F. Sharp & Co. This original firm was indebted to the plaintiff before and at the time of the transfer to the defendants. It transferred all its stock in trade, good-will, fixtures, and book accounts to the defendants. The contention is whether the terms of transfer and subsequent transactions gave the plaintiff a legal right of action against the defendants to collect the debt due him, or any part thereof.

It is true, as a general rule, an action on a contract must be in the name of the party holding the legal interest therein. Yet this is not invariably so. In many cases a third person may maintain an action on a promise made to another. Hence if one deliver money or personal property to another, under the promise of the latter to deliver it over to a third person who has a beneficial interest therein, or to convert it into money and pay him the proceeds, the third person can maintain an action therefor against the promissor. (Hind *v.* Holdship, 2 Watts, 104; Beers *v.* Robinson, 9 Barr, 229; Vincent *v.* Watson, 6 Harris, 96; Bellas *v.* Fagely, 7 Id. 273; Torrens *v.* Campbell, 24 P. F. Smith, 471; Townsend *v.* Long, 27 Id. 143; Kountz *v.* Holthouse, 4 Norris, 235; Justice *v.* Tallman, 5 Id. 147.)

What then was the evidence? As it stood, uncontradicted, was it sufficient for the jury to have passed upon it?

All the terms and conditions of the bargain were not reduced to writing at the time the defendants acquired the property of F. F. Sharp & Co. The terms are proved partly by parol, and partly by an instrument in writing executed about the same time by the defendants between themselves. F. F. Sharp was one of the previous firm, and became one of the new or defendants' firm. He testified, *inter alia*, that the defendants' firm did receive assets from F. F. Sharp & Co. amounting to about $114,000, and was to pay eighty per cent. of the liabilities of the firm of F. F. Sharp & Co., and the indebtedness due the plaintiff was among the liabilities thus assumed by the defendants. The written articles of partnership between the defendants recite, whereas said firm "did agree to purchase from them, F. F. Sharp & Co., all their stock in trade, good-will, fixtures, and book accounts at the full market value thereof, as by reference to the proper bills of sale will more fully appear, and to pay for the property purchased by distributing the purchase-money among the creditors of F. F. Sharp & Co. until the said creditors are satisfied, supposing the purchase-money to go so far, and to pay the surplus, if any should be found after satisfying the creditors, over to F. F. Sharp and his partner, Isaac Sharpless."

This agreement of copartnership further stipulated that, "Wood shall have general supervision of the business." The evidence of Wynn, the plaintiff, taken in his lifetime, is that he was in the employ of F. F. Sharp & Co. at the time the

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property was transferred to the defendants on the 20th February, 1873. The defendants reported to him that they took the assets of F. F. Sharp & Co., and assumed their liabilities to the extent of eighty per cent. He further testified that after the transfer to the defendants, Wood promised to pay him the amount due, if he would make out the amount and give it to him; that he made it out and gave it to him. Wood said to him he ought not to take eighty per cent., but was entitled to all of it, that he would pay it. Haines had previously urged him to make out the account and send it to Wood, that he had promised to pay it if plaintiff would make it out; that Sharp, while a member of the firm, told him that Wood had the account and promised to pay him. F. F. Sharp, one of the defendants, also testified, "I did promise Wynn, the plaintiff, that Wood, Sharp & Haines would pay him for the services he rendered the preceding firm."

It is unnecessary to refer to more of the evidence in detail. As already shown, the defendants made no payment at the time they took possession of the property valued at $114,000. The evidence of F. F. Sharp leaves it uncertain precisely what sum the defendants should pay, and whether that sum was not to be gauged by, and paid out of, the sum realized out of the property taken by them. Their own written averment is that they were not to pay F. F. Sharp & Co. anything until the creditors were satisfied, if the purchase-money was sufficient for that purpose. If the contract of the defendants was one of purchase, their agreement was not to pay the debt of another, but to pay their own debt incurred in the purchase of the property, and perhaps a jury might find that the extent of their obligation to pay was to be limited to the application of the proceeds of the property of which they took possession. The evidence shows the defendants carried on the business for a short time. They collected the accounts assigned to them so far as they were collectable, and applied some of the proceeds to their own use. They also paid most of the creditors of their predecessors. Still further, they paid $12,000 to Sharp, who was a member of both firms, and $5000 to Sharpless, the other member of the firm of F. F. Sharp & Co. As they were not to be paid anything until the creditors were satisfied, this fact might create some presumption that the defendants had previously realized, out of the assets, a sum sufficient to pay all the creditors. This might have an important bearing in arriving at the true character of the transaction. We think the evidence is amply sufficient to have been submitted to the jury under proper instructions.

Objection was made on the argument that the evidence was not admissible under the narr. Inasmuch, however, as no objection appears to have been taken to its admission when offered, we will now consider it as properly received.

Judgment reversed, and a venire facias de novo awarded.

Opinion by MERCUR, J.

Jan. '80, 169. March 7 and 8, 1881.

Van Horn v. Gilbough et al.

Custom of brokers—Validity of—Pledge of stock by broker—Powers of brokers over stock pledged—Estoppel—Admissions.

A general custom that a broker may pledge his customer's stock for the purpose of raising money to carry it, is valid.

When the market value of stock so pledged falls below a price that will reimburse the broker for all expenses, a custom of brokers to sell out the customer's stock without notice, and hold the latter liable for the loss, is valid.

Aside from any usage, the admission of the customer that he never intended to pay for, and take up the stock, estops him from complaining of want of notice, or informality in the giving of notice.

Error to the Common Pleas of Luzerne County.

Amicable action in assumpsit, by John Gilbough and Francis L. Bond, trading as Gilbough, Bond & Co., to the use of W. Price Davis against A. H. Van Horn.

The cause was referred, in 1877, to Henry M. Hoyt as referee, whose finding of facts and of law was as follows:—

1st. In May, 1872, the defendant, through Thomas Wilson, directed the plaintiffs, Gilbough, Bond & Co., a firm of brokers in Philadelphia, to purchase for him at the market price three hundred shares of the capital stock of the Philadelphia and Reading Railroad Company. The plaintiffs immediately made the purchase at $58⅞ per share, that being the market price, and the stock was delivered to them on the same day, or the day following. The defendant paid $1500 on account, and the plaintiffs raised the balance for defendant, by a pledge of the stock as collateral, and they duly rendered him a statement, showing a balance against him, 31st May, 1872, of $16,254.75. That the stock would be retained as collateral to the balance due, was understood by defendant at time of purchase. Plaintiffs, in order longer to carry the stock for defendant, paid the interest and the usual broker's commissions, as cost of carrying the same, and charged such cost against the defendant.

2d. That where stock is only partially paid for by party ordering its purchase, it was and is the custom of brokers to use the stock as collateral to raise money to carry the same for the custo-

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mer, and the custom was known to Thomas Wilson at the time he ordered the purchase for the defendant.

3d. That whenever the market value of the stock falls below a price that will fully reimburse the broker for all outlays and expenses, it is the custom between brokers, as well as between brokers and their customers, to sell out the latters' stock at the Stock Exchange without notice, and hold the customer for the loss; this custom being likewise known to Mr. Wilson.

4th. That plaintiffs, by letter dated September 23, 1872, gave notice to defendant to take up by 12 M. next day the stock already pledged by them as collateral, and advise them by telegraph.

Again by letter on the 8th October they notified defendant to pay for and take up the stock. No answer was ever sent nor any attention paid by the defendant to either of these letters.

5th. That on the 22d day of September, 1873, the parties to whom the same were pledged sold out two hundred shares of the defendant's stock at the Stock Exchange, Philadelphia, at $48 per share, and on the 18th of October, the remaining one hundred shares at $50¼, the loss of price being borne by plaintiffs; that the prices received were the market prices of the stock on the respective days of sale, and that between those dates the market price dropped as low as $45; that the highest price attained since the last sale of defendant's stock was $59 per share, 27th of March, 1874, and its market value at time of trial was about $15 per share.

6th. That notwithstanding the sale of the two hundred shares, the plaintiffs at any time up to the 18th of October (ten days after the last notification to defendant to take up his stock) were able and willing to deliver to defendant three hundred shares of Philadelphia and Reading stock on payment of balance due by him.

7th. Notice that the stock had been sold was promptly sent to and received by the defendant to which he paid no attention; and from the time of purchase in May, 1872, down to the 1st of January, 1874, statements in detail of the accounts between the parties were at regular intervals of about thirty days sent to and received by defendant. These statements taken together show a purchase of the stock and its price; the charges of interest and commission, and $75 extra interest as cost of carrying the stock; the credit of dividends received; the sale of two hundred shares September 22, 1873, at $48 and one hundred shares October 18, at $50¼, and that the balance claimed by plaintiffs the 1st of January, 1874, was $1389.41.

8th. That each statement of the account received by defendant contained the request, "*Please examine and report on this account as soon as convenient,*" but down to the time of trial the defendant never objected to the account as stated, nor to the sale of stock as made. He never demanded the stock, nor offered to pay for it and take it up, and in fact admits when sworn in his own behalf that he did not at any time intend to pay for it, and take it up in case it declined in price.

Are the plaintiffs or the use party to whom their claim has been duly assigned, entitled to recover on the facts as found? The stock having actually been bought in for the defendant, and the certificates delivered to the plaintiffs, the transaction was legitimate so far as they were concerned, and was not a gambling transaction, notwithstanding the defendant on his part did not intend to pay for and take up the stock so purchased. (Smith *v.* Bouvier, 20 P. F. S. 325; Maxton *v.* Gheen, 25 P. F. S. 166.) Other questions, however, are raised affecting the right of recovery.

1st. Did the defendant have actual previous notice of the sales?

Of course the letter of 23d September was not notice of an intended sale on the 22d, for that had already occurred, and the letter of the 8th October, as a mere notice of sale was defective in not naming the time and place.

2d. Are the customs noted in the 2d and 3d conclusions of fact valid and binding upon the defendant?

They will be considered separately—

I can perceive no real objection to the validity of a general usage that a broker may use his customer's stock as collateral to carry it for the customer. Such usage contravenes no statute or principle of public policy. The customer can, of course, avoid all trouble in this respect by paying for his stock in full, but where, as here, he only pays a small percentage of its value, while his agent the broker must provide for the balance, it would not seem unreasonable, that the broker should for that purpose pledge it as collateral. Knowledge of this custom on the part of Mr. Wilson, who ordered plaintiffs to purchase the stock for defendant, is to be imputed to the defendant himself. I, therefore, regard it as within the known terms and scope of the broker's agency, and that they had authority not only to purchase the stock, but to deal with it in the manner they did in order to carry it for the defendant.

As to the custom to sell without notice, under the circumstances mentioned in the 3d finding of fact, I assume that if good against the plaintiffs, it was binding upon the defendant their principal. I am not unmindful of the general rule of law that a sale of collateral should be upon notice of time and place of sale, but, as said by Judge MITCHELL in Colket *v.* Ellis (32 Legal Intelligencer, 82), this is a privilege that

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may be waived, and the waiver be evidenced as well by a custom known to and acquiesced in by the parties as by express contract. The custom was known both to Mr. Wilson and the plaintiffs. There was then at least constructive notice of sale to them, and constructive notice to a servant is held to be notice to his principal. (Whitesall *v.* Crane, 8 W. & S. 373.) As between the plaintiffs and the actual holders of the pledge, the sale was undoubtedly sanctioned by the custom. It bound the plaintiffs (themselves brokers) and through them, as I believe, their principal, this defendant; for if correct in the view already expressed that they had authority under the circumstances to make the pledge, the latter was subject to the incident of sale in pursuance of the custom. I, therefore, hold both customs valid and lawful and binding on both parties.

3d. Aside from these customs, however, and even conceding that they do not vary the general rule already stated so as to affect the defendant, I am of the opinion that, since the defendant by his own admission never intended to pay for and take up the stock, he did not act in good faith, and is estopped from complaining of want of notice of sale or any other formality in connection with it. The very object of notice is to enable a party to come forward, pay up and prevent the sacrifice of the pledge, but when he says he would not have availed himself of such notice, nor have interfered to protect the stock by paying the amount he still owed upon it, of what advantage would it have been to him to have had notice, or how has he been harmed by the want of it?

The stock was not sold below the market price, and under no circumstances could it be expected to bring more, if he himself was unwilling to interfere. The result to the defendant was, therefore, as favorable as if he had had the fullest notice of the intended sale.

4th. Independently of any of the foregoing considerations, there are further reasons sufficient in my judgment to entitle the plaintiffs to recover in this action.

The failure of the defendant to object to the sale, within a reasonable time after receiving notice, I believe amounts to an implied ratification (see Kelsey *v.* Bank of Crawford Co., 19 P. F. S. 426). And the statements in evidence giving an account of sales, and particularly the balance claimed as due the plaintiffs 1st January, 1874, not being objected to within a reasonable time, constitute an account stated between the parties. (Bevan *v.* Cullen, 7 Barr, 281; Porter *v.* Patterson, 3 H. 229.)

What is reasonable time can only be determined upon the special circumstances of each case, as is well illustrated in the opinion delivered in Colket *v.* Ellis, already cited.

The financial panic of 1873 was almost unprecedented, and parties were bound to act without unnecessary delay.

For nearly a month after the sale of the two hundred shares, the plaintiffs were still in a position to furnish the defendant the whole number of shares.

The propriety and necessity of his acting with reasonable promptness if he objected to the sale as made is obvious, for there was still time for the plaintiffs to correct the error, if one had been committed. From the failure of the defendant to object to what had been done, the plaintiffs might reasonably infer that he acquiesced, and after the lapse of years it is altogether too late to make the objection at the trial. Treating the account rendered 1st January, 1874, as an account stated, I am of the opinion that the plaintiffs' use party is entitled to recover the amount shown due by said account, notwithstanding it includes a charge of $75 extra interest, such extra interest as well as the other charges being for actual disbursements on part of plaintiffs in defendant's behalf.

Judgment should therefore be entered at this time against defendant for the sum of seventeen hundred and fifty-nine dollars ($1759.00), being the amount due 1st January, 1874, with interest to this date.

The defendant filed numerous exceptions to the findings of the referee, which were dismissed by the Court, and the report confirmed. The defendant thereupon took this writ, assigning for error the dismissal of his exceptions.

William L. McLean, for the plaintiff in error.

The carrying of stock by a broker for a customer upon a margin creates the relation of pledgor and pledgee between the parties.

Gilpin *v.* Howell, 5 B. 41.
Baker *v.* Drake, 66 N. Y. 518.
Stanton *v.* Jerome, 54 N. Y. 480.
McNeil *v.* 10 Nat. Bank, 55 Barb. N. Y. 59.
Thompson *v.* Toland, 40 Cal. 99.

Corporate bonds and stocks held as collateral securities may be sold like ordinary pledges, after the debt secured becomes due, without judicial process and decree of foreclosure, upon giving reasonable notice, but the sale must be by public auction, and the notice must specify the time and place of it.

Diller *v.* Brubaker, 52 Pa. 498.
Conyngham's Appeal, 57 Pa. 474.
Gay *v.* Moss, 34 Cal. 125.
Robinson *v.* Hurley, 11 Iowa, 410.
Davis *v.* Funk, 39 Pa. 243.
Markham *v.* Jaudon, 41 N. Y. 235.

Evidence of usage that stocks, held as collateral, might be sold without notice is inadmissible.

Markham *v.* Sandon, 41 N. Y. 235.

But there is no evidence of such *usage*, or that the plaintiff in error had *knowledge* of it.

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If the customer's stock was unlawfully sold, it was the duty of the brokers within a reasonable time to make him whole by a tender of an equal number of shares, and any advance upon same between the sale and tender. This was not done. The plaintiff in error had, therefore, the right to set off against the claim of the defendants in error the highest value of the stock between the sale and the tender, which was claimed, but not allowed by the referee.

Esser *v.* Linderman, 71 Pa. 76.
Sitgreaves *v.* Mechanics' Bank, 49 Id. 359.
Conyngham's Appeal, 57 Id. 474.
Bank of Montgomery *v.* Reese, 26 Id. 143.

George R. Bedford, for the defendants in error.

A pledge to raise money to carry the stock pledged is a lawful custom; that it was a custom, was established by the finding of the referee. If the broker could not thus hypothecate, the customer could reclaim it from a third party.

The notice could be waived by express consent, or by custom.

Colket *v.* Ellis, 32 Leg. Int. 82.

The presumption is that the parties dealt under the established custom.

Sutton *v.* Tatham, 37 E. C. L. R. 25.
Mitchell *v.* Newhall, 15 M. & W. 308.
Bayley *v.* Wilkins, 18 L. J. C. P. 273.
Bayliff *v.* Butterworth, 17 L. J. Ex. 78.
Coles *v.* Bristowe, L. R. 4 Ch. 3.
Horton *v.* Morgan, 19 N. Y. 170.
Walls *v.* Bailey, 49 Id. 473.
Milliken *v.* Dehon, 27 Id. 374.
Carter *v.* Phila. Coal Co., 27 Sm. 290.
McMasters *v.* Pa. R. R. Co., 19 Id. 374.
Helme *v.* Ins. Co., 11 Id. 109.
Gilpin *v.* Howell, 5 B. 42.

The defendant is estopped by his intention not to pay for the stock; notice to him would not have served him. His silence was acquiescence.

Cairnes *v.* Bleecker, 12 Johns. 300.
Foster *v.* Rockwell, 104 Mass. 172.

The rendering of accounts and the silence made an account stated.

Smedley *v.* Williams, 1 Pars. Eq. Cas. 359.
Ruffner *v.* Hewitt, 7 W. Va. 585.
Lockwood *v.* Thorne, 11 N. Y. 170.
Smith *v.* Marvin, 27 Id. 137.
McClelland *v.* West, 20 Sm. 187.
Hawkins *v.* Long, 74 N. C. 781.

March 21, 1881. THE COURT. Upon the facts, as found by the referee in the Court below, we think the conclusion at which he arrived was entirely right. We cannot review his findings of fact.

PER CURIAM. Judgment affirmed.

[See Act of June 10, 1881, P. L. 107.]

Jan. '81, 39. March 22, 1881.

Chester County v. Barber et al.

Attorney and client—Contingent fees—County Commissioners—Power of, to contract with counsel for their fees—Limits of power.

The power of County Commissioners to contract with counsel for professional services is limited to binding the county to a reasonable compensation.

Inasmuch as County Commissioners act in a fiduciary character, any agreement to return more than a fair compensation is against public policy, *ultra vires*, and void.

Whether or not the English statutes against champerty are in force in Pennsylvania, not decided.

MERCUR, GORDON, and GREEN, JJ., dissent.

Error to the Common Pleas of Delaware County.

Debt, by William E. Barber, Joseph Hemphill, and James W. M. Newlin against the county of Chester, to recover $10,699.17, counsel fees. Pleas, "nil debet, payment with leave, etc."

A charge of venue having been granted from Chester to Delaware County, the cause was tried before CLAYTON, P. J. The following facts appeared: The suit was brought on an agreement, entered into between the plaintiffs, the two former of whom were members of the bar of Chester County, and the latter a member of the Philadelphia bar, and John Hey, David Ramsay, and John McWilliams who were at the time Commissioners of Chester County, and signed as such. The agreement was dated March, 1877, was witnessed, and the county seal was affixed by the clerk; its material clause was as follows:—

"Said Commissioners having retained the parties of the second part to represent Chester County upon an application, and for the proceedings to secure a rebate to said county, for the amount of taxes added by the State Revenue Board, for the years 1875, 1876, and 1877, to the return of said county: It is hereby understood and agreed by the parties hereto, that the parties of the second part shall be paid a sum equal to fifty per centum of the amount which shall be finally adjudged to have been illegally charged to the said county of Chester as aforesaid, and in the event of the said suit being decided against the said county of Chester, then the parties of the second part are to make no charge for their services, and are further to relieve the parties of the first part from all costs and expenses in the premises."

It appeared that in 1877 the attention of the County Commissioners was directed to the action of the State Board of Revenue Commissioners in their tri-annual assessments relating to the returns of moneys at interest in Chester County; that the plaintiffs expressed the opinion that said action was illegal and might be avoided; and that after several interviews running over a period of about a year, the above agreement was entered into. The testimony was uncertain and conflicting as to whom the suggestion, finally

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adopted, first came from. The plaintiffs made application to the Auditor-General in pursuance of the agreement, but were refused. A petition to the Supreme Court for a mandamus was refused; and finally an appeal was brought in the Common Pleas of Dauphin County, which resulted in success, and a credit settlement to the county for $21,398.34, for the tax charges of 1875, 1876, and 1877. It appeared that Barber was at the time the standing and salaried counsel of the County Commissioners, and that Newlin had entered into substantially similar agreements with a number of other counties similarly involved.

This suit was thereupon brought under the agreement to recover fifty per cent. of the amount for which the county obtained credit with the State.

The defendant presented the following points:—

1. The alleged contract between the plaintiffs and defendant, put in evidence in this case, providing that they should receive one-half part of the results of their efforts, is against the policy of the law, and is incapable of enforcement by action. The jury is therefore instructed to disregard it. *Answer.* The contract, if fair and free from fraud, is not against the policy of the law, and, if the plaintiffs have faithfully performed their part, the defendant must keep the other part.

2. There is no evidence in this cause which entitles the plaintiffs to anything more than a just and reasonable compensation for the professional services rendered by them to the defendant. *Answer.* The plaintiffs are entitled to a verdict for the sum stipulated to be paid by the written agreement, provided the jury find that there was no fraud, false representation, or over-reaching on the part of the plaintiffs in the making of the agreement. If the jury find that the agreement was fairly made, and that it is free from any taint of fraud, then the "*just and reasonable sum*" to which the plaintiffs are entitled, is the amount named in the agreement, with interest thereon.

3. Inasmuch as Mr. Barber, one of the plaintiffs, was at the time of the making of the alleged contract, counsel for the defendant, and this fact was within the knowledge of the other plaintiffs, no recovery can be had upon the contract in question. *Answer.* If the jury find that Mr. Barber actually took advantage of the Commissioners, and caused them by reason of his influence with them as their counsel, to enter into an unreasonable agreement, and that the agreement would not have been signed except through his counsel and advice, for his own benefit, then the plaintiff cannot recover.

4. Inasmuch as Mr. Barber, one of the plaintiffs, was at the time of the making of the alleged contract, counsel for the defendant, he cannot recover in the present action. *Answer.* To this point I give the same answer as that given to the third point.

5. As this is a joint action, and as Mr. Barber is not entitled to recover, the verdict must be for the defendant. *Answer.* I do not say that Mr. Barber is not entitled to recover; as before stated, unless the jury find some fraud, false representation or undue advantage on his part, he is entitled to recover the sum agreed upon. But if the jury should find that he is not entitled because of fraud or deception practised by him, or because he has improperly exerted his influence as attorney for the Commissioners, then the other plaintiffs cannot recover, as they would be bound by his acts. I say to the jury that the salary of $150 a year, paid to Mr. Barber, did not include his compensation for the services here claimed.

6. The Commissioners of Chester County had no lawful authority to contract with the plaintiffs that the county would pay them one-half part of any abatement which they might secure, upon any claim made by the Commonwealth against said county, and the alleged contract was therefore not binding upon the defendant. *Answer.* If the Commissioners were not deceived, defrauded or improperly influenced, they had the right to make the contract, it apparently being for the benefit of the county.

Verdict for plaintiffs for $11.540.16, and judgment thereon, whereupon the defendant took this writ, assigning for error the answers to its points.

Wayne MacVeagh (with whom was *H. T. Fairlamb*), for the plaintiff in error.

Fifty per cent. of the claim was largely in excess of a fair professional compensation; especially from a perfectly solvent client. Whether contracts for contingent fees be incapable of enforcement or not, they are to be narrowly scrutinized.

Ex parte Plitt, 2 Wallace, Jr., 454.

But this contract is tainted with champerty, and while the question has never arisen in this State, such bargains have frequently been condemned in others.

Elliott *v.* McClelland, 17 Ala. 206.
Holloway *v.* Lowe, 7 Porter, 488.
Boardman *v.* Thomson, 25 Ia. 502.
Scobey *v.* Ross, 13 Ind. 117.
Thurston *v.* Percival, 1 Pick. 415.
Lathrop *v.* Bank, 9 Met. 489.

The contract is also void because (1) it was shared in by the standing counsel of the County Commissioners, and (2) it was against public policy. Under it the plaintiffs became part owners with the County Commissioners of the claim.

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Darlington's Appeal, 5 N. 512.

The plaintiffs are entitled to full compensation, but not for that provided in the contract.

W. B. Waddell and *D. W. Sellers*, for the defendants in error.

The jury have determined that there was no fraud, over-reaching, or false representation on the part of the counsel.

The contract was within the powers of the County Commissioners.

Cooper *v.* Lampeter Township, 8 W. 127.
Vankirk *v.* Clark, 16 S. & R. 290.
Schuylkill, etc. Co. *v.* McCreary, 8 Sm. 318.
Hunter *v.* Albright, 5 W. & S. 426.
Hamilton *v.* Ins. Co., 5 B. 339.
Schwamble *v.* Sheriff, 10 H. 18.
County of Allegheny *v.* Western Pa. Hospital, 12 Wr. 126.
Jefferson Co. *v.* Slagle, 16 Sm. 202.

The Commissioners, having acted within their powers, are to be presumed to have contracted for a proper compensation.

Kennedy's Appeal, 4 B. 149.
Stroecker *v.* Hoffman, 7 H. 227.
Rooney *v.* Second Ave. R. R. Co., 18 N. Y. 368.

An agreement for a contingent fee is valid and enforceable.

Porter *v.* Parmly, 39 N. Y. 219.
Haight *v.* Moore, 37 Id. 161.
Ex parte Plitt, 2 Wallace, Jr., 453.
Trist *v.* Child, 21 Wallace, 441.
Wylie *v.* Coxe, 15 Howard, 415.
Wright *v.* Tebbitts, 1 Otto, 252.
Stanton *et al. v.* Embrey, Admr., 3 Otto, 556–7.
McPherson *v.* Cox, 6 Otto, 404.

That Barber was solicitor for the County Commissioners is immaterial, for his salary was not to compensate him for services rendered as an advocate.

The statute of 33 Edward I., chapter 3, relating to champerty, is not in force in Pennsylvania.

Robert's Digest of the British Statutes, 96, note.
Foster *v.* Jack, 4 W. 334.
Patten *v.* Wilson, 10 C. 299.
6 Pennsylvania Law Journal, 309.
Sharswood's Legal Ethics, 102.
Gray *v.* Packer, 4 W. & S. 17.
Maus *v.* Montgomery, 11 S. & R. 329.
Thallheimer *v.* Brenckerhoff, 15 Am. Dec. 320.

May 2, 1881. THE COURT. This was an action of debt brought in the Court below against the county of Chester by three members of the bar, two of whom reside in said county and the other in the city of Philadelphia. The action was founded upon an agreement under seal, properly executed by the three plaintiffs and the three gentlemen who were at the time the Commissioners of said county. The seal of the county is affixed and attested by the clerk of said Commissioners. The agreement provides that the Commissioners have retained the plaintiffs to represent Chester County in proceedings to secure a rebate to the county from the State for the amount of taxes added by the State Revenue Board for the years 1875, 1876, and 1877, and a return thereof to the county, that the attorneys should be paid for their services fifty per centum of the amount which should be recovered or allowed to the county on settlement; and if unsuccessful, no charge was to be made for services, and the county was to be relieved from all costs and expenses in the premises.

In pursuance of this agreement, the plaintiffs entered upon their employment and succeeded in obtaining a credit from the State in favor of the county of the sum of $21,398.34. They then brought suit upon the said agreement for their fees and recovered a verdict in the Court below for $11,540.16.

It is proper to state that one of the plaintiffs was the regular solicitor of the County Commissioners at the time the agreement was made.

The whole case turns upon the single question of the power of the Commissioners to bind the county by such an agreement.

The power of counsel to contract with their clients for contingent fees is not necessarily involved, and we shall not therefore discuss the legality or the ethics of such transactions. Nor need we stop to consider whether the agreement as set out in the narr. is *champertous*, nor whether the English statutes in regard to this offence are in force in this State.

We rest our decision upon the broad ground, that the Commissioners had no power to bind the county by such a contract; that it was against public policy, and therefore null and void. The learning and industry of the plaintiffs have failed to call our attention to any case which sustains such a contract, nor have I been able to find one. Wylie *v.* Coxe (15 Howard, 415); Trist *v.* Child (21 Wallace, 441); Wright *v.* Tebbitts (1 Otto, 252); Stanton *v.* Embrey (3 Otto, 556), and McPherson *v.* Cox (6 Ibid. 404) are not in point. It is true these cases rule that a contract for a contingent fee in the prosecution of a claim against the government, when fairly made, may be enforced. They are all cases, however, in which the contract was made with a private claimant. That an attorney may make any contract he sees proper with his client in regard to his compensation, where the client is a private citizen, and acting in his own behalf and with reference to his own property, is not denied. All that the law will do in such case is to scrutinize the transaction and see that it is fair and that no unconscionable advantage has been taken either of the necessities or the ignorance of the client.

How stand the facts here? There was a large fund in the treasury of the State, which belonged either to the latter or to the county of Chester.

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In either event it was public money and was not the property of the County Commissioners. It was their right and their duty to collect the same if possible, and place it in the county treasury, or to obtain a proper credit therefor, which is practically the same thing. It was strictly in the line of their duty to employ competent professional assistance for such purpose. Having an experienced attorney as their standing counsel, the necessity of employing two others, one of them out of the county, does not clearly appear. Conceding such necessity, however, to have existed, the Commissioners could not bind the county for more than a reasonable compensation. What is a reasonable compensation under such circumstances is perhaps a question for a jury. We will not pass upon it further than to say that a charge of one-half for recovering so large a sum in the hands of a solvent debtor, cannot be regarded as reasonable upon any principle which should govern professional conduct.

These Commissioners were acting in a fiduciary character. They were but trustees of the money, when received, for the use of the county. When therefore they contracted to give one-half of it to the plaintiffs for their services, they exceeded their power. They were giving what did not belong to them. As well might a trustee contract to give away one-half of the trust estate as compensation to counsel for services in connection therewith. And if he may give away one-half, why not three-fourths or even a greater proportion? Can it be doubted that a court of equity would strike down such a contract as improvident and a legal fraud?

We are not unmindful of Cooper *v.* Lampeter Township (8 Watts, 125); Vankirk *v.* Clark (16 S. & R. 286); Hunter *v.* Albright (5 W. & S. 423); Schwamble *v.* The Sheriff (11 Harris, 18); County of Allegheny *v.* Western Hospital (12 Wright, 123); Schuylkill and Dauphin Improvement Company *v.* McCreary (8 P. F. S. 304), and cognate cases, in which it is held that County Commissioners are clothed with the corporate powers of their respective counties and may contract therefor. This principle is not denied where Commissioners act in the line of their duty and within the scope of their powers. They exceed both when they attempt to give away the property of the county.

This ruling does not deny the plaintiffs all compensation. Whether the plaintiff, Barber, can recover anything will depend upon the terms of his previous engagement as solicitor to the Commissioners. The other plaintiffs are entitled to recover a fair compensation—nothing more. But there can be no recovery upon this agreement, for it is clearly *ultra vires*. It is set out in *hæc verba* in the narr., and being thus upon the record, we are enabled to reach the merits of the case, notwithstanding the defective character of the bill of exceptions.

The judgment is reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

Justices MERCUR, GORDON, and GREEN dissent.

Jan. '81, 187. March 22, 1881.

Wagenseller v. Simmers.

Marriage—Action for damages for breach of contract of—What is reasonable time for fulfilment of contract—How refusal to fulfil may be manifested.

A contract to marry without specification of time is a contract to marry within a reasonable time.

Age and pecuniary circumstances are proper elements in the consideration of what is a reasonable time.

A refusal to fulfil a contract of marriage may be manifested as unmistakably by conduct as by words. Where so manifested, a formal demand is not a necessary prerequisite to bringing an action for breach of promise.

Error to the Common Pleas of Chester County.

Case, by Emma Simmers against James Wagenseller, to recover damages for breach of contract of marriage. Plea, "Not guilty."

Upon the trial, before FUTHEY, P. J., the following facts appeared: The plaintiff was twenty-three years of age, and the defendant several years older. On March 4, 1877, the defendant first commenced paying attention to her, continuing so to do, while she remained in her capacity of domestic servant in the family of Mr. Robinson until she left in January, 1878. During that period of time he visited her repeatedly, always once a week, frequently twice, and sometimes thrice a week, often staying with her until late in the night; and sometimes through the week, when at the post-office, also calling to see her, at which times the family of Mr. Robinson would leave them alone. The plaintiff testifies that an engagement of marriage took place in October, 1877, while she was thus residing at the residence of Mr. Robinson; that shortly after the engagement of marriage he gave her a plain gold ring, which was followed by other small presents. The plaintiff left the residence of Mr. Robinson in July, 1878, and went to her sister's, where she remained about a week, the defendant taking her from Mr. Robinson's to her sister's, where he subsequently visited her. She then went to her father's residence, remaining there until the spring of 1879, and during this period the defendant continued his visits to her in

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the same manner as he had done at Mr. Robinson's, visiting her frequently, and remaining with her until a late hour of the night. In the spring of 1879, when she went to live in the family of the Messrs. Dilworth, where she remained until the next year, the defendant continued to visit her in the same manner he had previously done at Mr. Robinson's and her father's. This attention upon his part, according to the plaintiff's testimony, continued until the 4th of October, 1879, with the exception of a few weeks, when, on account of a quarrel, he then ceased his visits to her. The testimony further shows that during this period, from the time he first commenced to visit her until he finally ceased his visits, with the exception of a few weeks when he did not visit her, in addition to remaining in her company until a late hour at night, he took her to church pic-nics, entertainments of various kinds, and returned with her home, remaining with her some time after reaching her home.

The defendant did not fulfil his promise of the night of October 4, 1879, to return on the following Sunday; but after that time abandoned the society of the defendant, and thereafter was frequently seen in the company of other women at church and public resorts; and their conduct was construed by the plaintiff as personally insulting to her. On October 16, 1879, the plaintiff wrote to the defendant expostulating with him, and expressing her pain at his neglect of her. No reply was received to this. On November 30, 1879, she wrote him the following letter, which also remained unanswered:—

"*Jim:* I think it is a sin and disgrace, I cannot come into church without you and . . . making fun of me, to-night two weeks there was a lady, a perfect lady, told me, when I came in you and . . . began to laugh, and . . . told you to not cry.

Jim, if you want to make fun of me you must go somewhere else to do it, for no one in this neighborhood thinks anything of you. All they call you is McConkey and the Marsh Hog. . . . is the only friend you have got, and you have to pay him for going with you. I hear that he has been talking about me over on the other side, but I don't care for him, he told . . . he was not the cause of not going with me. I suppose you think that you have got a rich one now, but such is not the case, every one knows how rich they are. Well, if I am poor, I do not wear the one hat for five or six years like she does, and turn it hind part before like she does. There was a person told me that . . . girls made fun of me, when I went out of church. You always promised me that you would marry me, and I have been told by dozens of people to sue you, and get some of your money. I don't want you, for I know that I would have a devil's life of it. There is people tell me that I could put you where the dogs would not bark at you, or get some of your money. As you have so much of it, I send a letter away to-day, and I am waiting for an answer from it. There is plenty of lawyers, and some a great deal smarter, too, than . . . Jim, you think that you can worry me, but you cannot do it. I did worry at first, but do not now; to think you have been depriving me of other company all this time, everybody is talking about how you have been using me. Now, I am going to use you as bad as the law will allow me to do it. I would not do anything with you, but if I cannot go out without you and . . . making fun of me. If you were poor I would not do anything with you; so rich, so gossipping, so deceitful, so fun-making, underhanded, and sneaking. If you were any kind of a gentleman, you would not act as you have. I pray night and day that you may never prosper in this world. I just pray for every hair in your head to come out. Why could you not tell me that you were not coming back, as well as to tell . . . for I heard he was telling it all around, he told old . . . that he had to be blamed with you not going with me. I am the one that blamed him. You know that I always told you that he tried to coax you away, he knows that you have been going with me year after year, but the time will be here that you will like me more or less, but you have no mind of your own, and can be coaxed into anything by . . ."

The defendant was a farmer, possessing an estate worth $10,000 or $12,000. He admitted having been frequently in the society of the plaintiff, but denied any engagement of marriage, the voluntary giving of the ring, and other less material portions of her testimony.

The defendant presented the following points:—

(5) "That to support the action for breach of promise of marriage, if the defendant has not married another (in this case he has not) the plaintiff must show that she offered to marry the defendant, and he refused. If she does not so show, the verdict must be for the defendant." *Answer.* "This point is not affirmed. If the evidence satisfies the jury that the defendant broke this engagement of marriage, and that fact is shown, either by the words or the acts of the defendant, it is not necessary that the plaintiff should have made an offer to marry the defendant before bringing suit."

(6) "If no time is fixed and agreed upon for the performance of the contract, and no request is made by the plaintiff upon the defendant, the defendant is entitled to your verdict." *Answer.* "If no time is fixed for the performance of the marriage ceremony, if an agreement of marriage

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took place, the law presumes that it is to take place in a reasonable time, and as I have said, it was not necessary for the plaintiff to make any request, if the defendant, by his words or acts dispenses with the necessity for making the request."

(7) "That the plaintiff, in order to support her action for breach of promise, must show conclusively and beyond doubt, that she made a demand upon the defendant to marry her, and he expressly refused. If she has not done so the verdict must be for the defendant." *Answer.* "This point is not affirmed, and in further answer to it, I refer you to what I have previously said upon the same subject."

(8) "To entitle the plaintiff to recover, even if the jury believe from the evidence, that he paid particular attention to her, she must prove the declarations of the man in the same connection. If she does not the defendant is entitled to a verdict." *Answer.* "This point has been substantially answered by what the Court has previously said in this charge."

(9) "If the jury do not believe that the plaintiff was willing and ready, and offered to marry the defendant, and no time was agreed upon, the law presumes that the same would take place within a reasonable time after request, and if there has been no request, the defendant is entitled to the verdict." *Answer.* "I have already answered this point in the general charge and in my answers to the previous points."

(10) "If the plaintiff wrote the letter 'A,' which has been properly shown here, wherein she states, with other matters, that she would not have the defendant, and made other personal and offensive remarks about the defendant (such as would mortify the feelings of the defendant) the defendant is entitled to your verdict." *Answer.* "This point is not affirmed."

(11) "In order to entitle the plaintiff to recover for breach of promise when the time between the cessation of the visits of the defendant to the plaintiff and the time of bringing suit has been so short as in this case, not over two months, and where the defendant has not married any other person, or from the evidence, solicited any other person to marry him, the plaintiff must prove that she demanded of the defendant the fulfilment of his contract, and that he refused to do so." *Answer.* "This point is not affirmed, with the observations I have already made upon the question, as to whether this breach of contract, if there was a contract of marriage and a breach of it, was made by the defendant. If the defendant, by word or act, broke this contract, then it was not necessary for the plaintiff to prove that she demanded a fulfilment of the contract, and that he refused it."

In answer to the plaintiff's points, the Court said to the jury: "An engagement to marry 'may be inferred from such unequivocal conduct, attentions, acts, and intercourse as clearly imply a reciprocal understanding and agreement of marriage,' but the evidence is for you to say whether there was such conduct, attentions, acts, and intercourse between these parties from which you can imply an agreement to marry. . . .

"I say to you that, if the defendant, Mr. Wagenseller, either by words or acts, declared the contract at an end, it was not necessary for Miss Simmers to make a formal offer on her part before bringing suit, and therefore, as the defendant denied that there was any contract of marriage, it was not necessary, upon her part, to ask him to perform the contract of marriage before bringing suit."

Verdict for plaintiff for $5000, which, upon a motion for a new trial, was reduced to $2000, and judgment thereon. Whereupon the defendant took this writ, assigning for error the answers to his points.

Wayne MacVeagh (*Joseph I. Lewis* with him), for the plaintiff in error.

Assuming the contract to have been made, any action for its breach must have been preceded by a demand for fulfilment. For a contract, the time of fulfilment of which is not fixed, means marriage within a reasonable time; if the time be unnecessarily protracted, there should be evidence of dissatisfaction by demand. The defendant had not, as by marriage to another, put it out of his power to fulfil the supposed contract; nothing less, therefore, than demand will satisfy the requirements of the law.

1 Addison on Contracts, p. 678.
1 Troubat & Haley, 175, note 2.
Gough *v.* Farr, 2 C. & P. 631.
Burks *v.* Shain, 2 Bib. 341.
Martin *v.* Patton, 1 Littel's Rep. 233.
2 Starkie on Evidence, 511.

But not only is the evidence of the tender wanting, but there is direct evidence, if the defendant had offered to fulfil the alleged contract, the offer would have been rejected.

The last letter is conclusive on this point.

R. E. Monaghan and *P. F. Smith*, for the defendant in error.

It is not necessary to fix a definite time for the consummation of the contract of marriage, to make it binding on the parties to it. In the absence of a fixed time for the performance of the contract, the law presumes it will be performed in a reasonable time.

2 Hilliard on Contracts, p. 118.
3 Addison on Contracts, 447.
Caines *v*, Smith, 15 M. & W. 189.
Stevenson *v.* Pettis, 4 WEEKLY NOTES, 151.
Nunan *v.* Bourquin, 7 Phil. 239.

There was a refusal to fulfil the contract. The abandonment of the plaintiff for the society of another is evidence of it.

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Southard *v.* Rexford, 6 Cowan, 256.
Greenup *v.* Stoker, 8 Ill. (3 Gilm.) 202.
Pettingill *v.* McGregor, 12 N. H. 179.

The defendant having denied the contract, it was not necessary to prove refusal to fulfil it.

Magarge, etc., *v.* Life Ins. Co., 9 WEEKLY NOTES, 425.
Franklin Ins. Co. *v.* Coates, 14 Md. 285.
McComas *v.* Ins. Co., 56 Mo. 573.
Tayloe *v.* Ins. Co., 9 Howard, 403.

The defendant, by his conduct, had rendered demand upon him impossible.

Gast *v.* Miller, 2 WEEKLY NOTES, 361.
1 Addison on Contracts, § 236.
Freeth *v.* Burr, L. R. 9 C. P. 208.
Jones *v.* Barkley, 2 Doug. 694.
Southard *v.* Rexford, 6 Cowan, 256.

The letter of October 16 shows that the plaintiff then desired the defendant to marry her. His silence was a refusal, and the letter of November was but the natural result of the refusal.

May 2, 1881. THE COURT. Three grounds of defence are taken by the plaintiff in error: First. He never promised to marry; second, he did not refuse to marry; and third, that she released him from his promise to marry. These different defences may have appeared rather inconsistent to the minds of the jurors. As he appears to have urged each with equal persistency, if they were clearly satisfied that he did promise, they may have given less weight than they otherwise would have done to his evidence bearing on the other points. If so, he has no just cause of complaint at a result produced by his own evidence.

1. The evidence to prove the contract of marriage was most ample to submit to the jury. It consisted in part in showing that he began to visit her in March, 1877. From that time until October, 1879, except during a few weeks in January, 1878, he visited her from once to three times a week. He took her to pic-nics and celebrations, and to and from church. He kept her private company at her house, usually remaining until twelve o'clock at night. He also took her out riding, and gave that special attention which is considered evidence of the existence of a marriage contract. She further swore that in October, 1877, he expressly promised to marry her and she to marry him, that he gave her a ring in recognition of their engagement; that this was followed by his presenting her with other small articles at different times. She further testified that he renewed his promise of marriage on Sunday evenings.

2. The evidence of his refusal to marry is not so express and direct. The question is whether his conduct and all the attending circumstances justified the jury in finding a refusal.

A contract to marry without specification of time is a contract to marry within a reasonable time. Each party has a right to a reasonable delay, but not to delay without reason or beyond reason. The age of the parties and the pecuniary ability of the man to support a family are proper matters to consider in deciding on the reasonableness of the delay in a particular case. In this case, the woman was twenty-three years of age when the plaintiff in error first became her suitor. He was several years older. Her pecuniary means were quite limited. She was at service as a domestic servant. He was a well-to-do farmer, worth from $10,000 to $12,000. In view of the reasons, which usually influence persons to enter into the marriage relation, these facts had some tendency to prove her willingness to marry, and that he had no just reason for postponing it. In fact, he gave no reason for postponing it during the two whole years. She testified that he passed the evening of 4th of October, 1879, in her company, remaining until after twelve o'clock; that he left, promising to call the next Sunday, and take her to church. He came not. She had understood they were to be married the next winter. She soon heard that he was paying attention to another lady. The second Sunday passed without his coming. She then wrote to him, expressing her regret at his not keeping his promise, and her grief and pain at his neglect of her, and at his attentions to another girl, and asking his forgiveness for some remark she had previously made. To this letter he made no reply, and never visited her after the previous 4th of October. Sunday evenings thereafter she saw him at church in company with a young lady, and both looking at her in an insulting manner, but without speaking to her. This abrupt abandonment of her, his continued and persistent neglect of her, his assuming intimate relations with another lady and paying her marked attentions, his treatment of her in public, were all proper evidence from which the jury might find his refusal to marry. It was not necessary that he should say to her in express words, "I will not marry you," nor that she should run after him and say, "I entreat you to marry me." Marriage is a civil contract. A refusal to fulfil it may be as unmistakably manifested by conduct as by words. The true question was, whether the acts and conduct of the plaintiff in error evinced an intention to be no longer bound by the contract. This has been held a correct rule in case of an agreement of sale of personal property. (Freeth *v.* Burr, L. R. 9 C. P. 208.) We think this rule applies with greater reason to a marriage contract, which should rest on mutual affection. His denial that he had ever promised to marry her, was of itself very strong evidence of a refusal. Coupled with his acts and persistent conduct, it fully justified the jury in finding a refusal.

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3. The last position of the plaintiff in error is that she released him from his promise. This is claimed to be proved by the letter she wrote him on the 30th November, 1879. It is true that letter does not express a desire to marry him, nor an existing affection for him, and she does say, "I don't want you." Regard, however, must be given to the whole letter, and to the time when, and the previous and existing facts which lead to it. Relying on his promise of marriage, she had avoided the society of other gentlemen for two whole years. Her youth was passing. She had not received any answer to her letter of 16th October. She saw him weekly in the society of another. She thought he treated her with scorn and contempt. She recognized his conduct as unequivocal evidence of his re-refusal to marry her. Under these circumstances, it is very natural that all the bitter and angry feelings of a woman's nature should be aroused. She makes no pretence of a continuing affection, yet she does not indicate any intention of releasing him from his legal obligation for refusing to marry. Thus she says, "You always promised me that you would marry me, and I have been told by dozens of people to sue you and get some of your money." Again, "As you have so much of it [money], I send a letter away to-day, and I am waiting for an answer." "There are plenty of lawyers." "Now I am going to use you as bad as the law will allow me to do it." Thus, instead of notifying him that she has released him from his marriage contract, she reminds him of the position in which he has placed himself, and of her determination to hold him responsible for his breach of contract, and to resort to the law to punish him and to recover her damages.

The whole case was well and clearly presented by the learned Judge. We discover no error in the record.

Judgment affirmed.

Opinion by MERCUR, J.

Common Pleas—Equity.

C. P. N.o 4. June 14, 1881.

City v. Kensington and Oxford Turnpike Co. et al.

Equity—Jurisdiction to compel restoration of money obtained under a judgment at law alleged to have been procured by fraud and imposition on the Court—Affirmance of the judgment by the Supreme Court on certiorari, and not on the merits, does not oust the jurisdiction in equity.

Sur petitions of Henry C. Terry and Joshua H. Fletcher, praying for an order upon the Receiver, "The Pennsylvania Company for the Insurance on Lives and Granting Annuities," to return to the petitioners the money, bonds, and coupons delivered by them to said Receiver in pursuance of an order heretofore made by this Court.

The facts of the case, as stated in the opinion of the Court, were as follows:—

"On the 6th of February, 1878, the city of Philadelphia filed a bill in equity in this Court, charging the turnpike company and Henry C. Terry with having 'procured by fraud and imposition upon the Court of Quarter Sessions' the confirmation of a report of appraisers awarding the sum of $70,180.75 for the taking of the said turnpike road by the city. The bill further charged that this sum of $70,180.75 had been paid to Terry by the City Treasurer, in pursuance of a writ of mandamus sued out by Terry on the order of confirmation thus fraudulently obtained. The prayer of the bill was for a decree that the defendants might be compelled to restore the money to the city, and that, in the mean time, they might be restrained by injunction from parting with it until the further order of the Court. Thereupon the usual preliminary injunction was granted.

"On the 16th of February, 1878, the bill was amended by adding an averment that, since the filing of the bill, it had been ascertained that of the $70,180.75 received by Terry, he had paid $20,000 to the turnpike company, which had distributed that sum among its stockholders; that he had paid $6250 of the money to Joshua S. Fletcher without any consideration whatever, and had retained the balance for himself. Thereupon it was ordered that Joshua S. Fletcher be made a party defendant, and on the 18th of February, 1878, on the motion of the City Solicitor, and upon depositions taken to sustain the case presented in the bill, and after argument by counsel, the Court of Common Pleas made an interlocutory decree, appointing 'The Pennsylvania Company for Insurance on Lives and Granting Annuities' Receiver in this case, and requiring Terry to deliver to the Receiver certain United States bonds and coupons, in which it appeared by his own admission he had invested the money which he had retained, such interlocutory decree to remain in force until otherwise ordered by the Court. By a similar decree, subsequently made, Fletcher was also required to pay into the hands of the Receiver appointed by the Court the $6250 which, in his deposition he said he had received as a present from Terry, and which Terry also in his testimony declared he had given to Fletcher as a present out of the moneys paid to him by the city.

"From these interlocutory decrees in equity

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the defendants, Terry and Fletcher, appealed to the Supreme Court, and that Court, after argument, affirmed the decrees, dismissed the appeals, ordered the appellants to pay the costs, and the record to be remitted to this Court for further proceedings, thus clearly indicating their opinion that the money had been rightfully impounded by the Court, and that if the city should succeed in establishing the case presented in their bill the defendants could not retain the money of the city alleged to have been obtained by fraud and imposition."

Subsequently, on May 2, 1881, the Supreme Court confirmed the proceedings in the Quarter Sessions in this case up to and including the confirmation of the report of the appraisers and the return of the mandamus execution; and reversed and set aside all the proceedings commencing with the petition of February 2, 1878, and including all subsequent orders and decrees. (The facts, proceedings, and opinion of the Court are fully reported *In re* Kensington and Oxford Turnpike Co., *ante*, p. 177, *q. v.*)

Upon filing a remittitur, the defendants presented these petitions.

David W. Sellers, *Lewis C. Cassidy* (*F. Carroll Brewster* with them), for Henry C. Terry.

The Supreme Court has decided that the award was valid; hence the distribution of the sum becomes unimportant to the city. This Court appointed a Receiver to protect the fund until it should be determined to whom it belonged; this question having been settled by the Supreme Court, it is the duty of this Court to cease to further interfere.

The award, when confirmed by the Court, is a final judgment, and the liability of the city is absolutely fixed thereby.

In re Sedgeley Avenue, 7 Norris, 509.
Denver *v.* Roane, 9 Otto, 359.

Richard Vaux (with him *M. Arnold*), for Joshua Fletcher.

Charles E. Morgan, Assistant City Solicitor (with him *Wm. N. West*, City Solicitor), for the city.

The city has amended its bill so as to raise the question of fraud, of which the Supreme Court in the Quarter Sessions' case say there was no sufficient allegation. The Quarter Sessions' case was decided on purely technical grounds.

As a Court of Chancery this Court has power to impound the fund until the cause is finally decided.

Reeside *v.* Reeside, 6 Phila. 507.
Jackson *v.* Summerville, 1 H. 359.

C. A. V.

June 25, 1881. THE COURT. In view of the judgment of the Supreme Court affirming the legality of the decrees which required the defendants to pay this money into the hands of the Receiver during the pendency of the suit in this Court, it is altogether unnecessary to enter into any vindication of those decrees. The tribunal of last resort has passed upon them, and determined that they were in all respects legal and regular. It is in vain, therefore, to renew here the arguments which were found to be insufficient there.

But it seems to be supposed, and indeed to be assumed as conclusive, that because the Supreme Court have reversed the order made in the Court of Quarter Sessions, opening the decree of confirmation and setting aside the appraisement, therefore the bill in equity pending in the Common Pleas falls to the ground, and that all the defendants have to do is to exhibit the remittitur of the Supreme Court in the Quarter Sessions' case, and to ask for the money. But this is a great mistake. The bill pending in this Court is a proceeding altogether independent of the proceedings in the Quarter Sessions. The object which it contemplates is the restitution of money alleged to belong to the plaintiff, and to have been obtained by means of a fraudulent judgment. Now nothing can be plainer than that the city is not estopped by the reversal of the order made in the Quarter Sessions from showing, if she can, that the recovery against her there was obtained by fraud and covin, and is, on that account, altogether null and void; for it is familiar law that a decree or judgment may be impeached in a collateral proceeding for fraud in procuring it. (Hall *v.* Hamlin, 2 Watts, 354.) In such cases, as was said by Chief Justice DE GREY, in the Duchess of Kingston's Case, although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. This has been the law ever since Fermor's Case (3 Coke, 77). All judgments and decrees obtained by fraud may be relieved against in equity, and this, not by reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth. (3 Bl. Com. 438; 3 P. Wms. 148; 1 Madd. Ch. Pr. 236; 8 Beaven, 503; 9 Ib. 90; 1 Story Eq. § 252; 2 Leading Cases in Eq. 1365.) The jurisdiction in equity has been repeatedly affirmed in this State. (Johnson's Appeal, 9 Barr, 425; Marr's Appeal, 28 Smith, 69; McClurg *v.* Wilson, 7 Wright, 439.)

The decision of the Supreme Court upon the certiorari to the Quarter Sessions determined nothing in regard to the merits of the equity case pending in the Court of Common Pleas. Indeed, it determined nothing in regard to the merits of the case in the Quarter Sessions. The learned Judge who delivered the opinion of the Court took occasion to explain that very fully in his opinion. "A certiorari," said he, "brings up nothing but the record, and the Supreme Court is confined strictly to questions affecting

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its regularity. This Court cannot look into the evidence, though incorporated in the opinion of the Court below;" and again, "It is quite time that it was understood that this Court has no power to review such cases upon the merits. We have no power to review the testimony, and strictly no right to look at it." He distinctly points out that the order in the Quarter Sessions was reversed exclusively upon technical grounds, viz., because it was made after the lapse of the monthly term, without any allegation of fraud appearing upon the face of the petition. He expressly declares that had there been such an allegation of fraud in the petition, the Court must have affirmed the order opening the confirmation and setting aside the appraisement, "for the reason that the evidence upon which the Court acted does not come up with the record, and we could not review such a question of fact." "If," says he, "the fact be asserted that a great fraud was perpetrated in this case, it is unfortunate for the city that such fraud was not distinctly and clearly averred upon the record." Of course, it is unfortunate for the city that the petition presented to the Quarter Sessions to open the confirmation and set aside the appraisement, did not contain in terms a specific allegation of fraud, and that the Supreme Court felt itself obliged, by reason of that technical defect, to reverse the order, notwithstanding it is quite clear and indisputable from evidence dehors the record that the confirmation and appraisement *were* set aside expressly upon that ground and no other. The opinions delivered in the Quarter Sessions by my colleagues, Judges BRIGGS and ELCOCK, demonstrate, beyond doubt, that the confirmation and appraisement was set aside for fraud and nothing else, and that they regarded the fraud as clearly proven by the depositions; but the Supreme Court, unfortunately for the city, could not lawfully look either at those opinions or at the depositions. It was conceded that the expiration of the term offered no obstacle to the setting aside of the confirmation and appraisement, if only the petition to set them aside had contained an allegation of fraud, and for this technical defect the order was reversed.

The matter then stands thus. The Supreme Court reversed the order of the Quarter Sessions setting aside the confirmation and appraisement upon the technical grounds already referred to. But how does this affect the bill in equity, which seeks to restrain the defendants from availing themselves of the confirmation of the appraisement alleged to have been obtained by a fraud? Undoubtedly it removes one difficulty from the path of the defendants, for had not the order of the Quarter Sessions been reversed they would have been concluded and estopped in the equity suit here by the record of the Quarter Sessions establishing the fact of the fraud. But the reversal of the order of the Quarter Sessions does not disprove the fraud. It affects the plaintiff no further than this; it deprives the city of the benefit of that order as evidence, and leaves the question of fraud an open one, to be determined upon the evidence to be taken in this cause. The case laid in the bill is that the appraisement and confirmation which constitute the title of the defendants to retain the money were obtained by fraud. The city can not now prove its case by putting in evidence the order of the Quarter Sessions setting aside the appraisement and confirmation, but it is altogether competent for the city in the equity suit to prove the case laid in the bill as amended, and to show by other evidence that the appraisement and confirmation in the Quarter Sessions were obtained, as charged in the bill, "by fraud and imposition upon the Court." The city might, according to the well established principles of equity practice, have done that without going into the Quarter Sessions for relief, and if no order at all had been made there setting aside the confirmation. Her ability to do so now is in no respect diminished by reason of the reversal of the order upon grounds not affecting the merits. The object of the present suit is not to set aside a judgment, but to recover money alleged to have been obtained by a fraudulent judgment. The city has the right to establish the fraud if she can by other evidence than the record of the Quarter Sessions. She has an undoubted right to prove by any competent evidence the fraud set forth in the bill, because that fraud, if proved, proves the case set up in the bill, destroys the defendants' title to the money, and breaks in pieces the shield which the defendants interpose, viz., the order of the Quarter Sessions affirming the appraisement. The only question in the case is whether the money was obtained by the defendants fraudulently. If it was, equity will decree its restoration, and the confirmation of the appraisement by the Court of Quarter Sessions can not avail them, if it can be satisfactorily proven that that confirmation was obtained by fraudulent practices.

It would not perhaps be difficult, if it were necessary to the vindication of this decision, to demonstrate by an appeal to the highest authorities, that a bill in equity will lie to compel the repayment of money obtained by means of a fraudulent judgment. Indeed it might be said that this very question was involved in the decision of the Supreme Court already referred to, affirming, upon appeal, the interlocutory decrees made by this Court in this case, by which the defendants were required to pay the money which they had obtained into the hands of the Receiver *pendente lite*, for those decrees, it would seem, could not have been affirmed, except upon

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the assumption that the bill discloses good grounds for relief. But I prefer, upon the decision of a merely collateral motion like the present one, not to enter into a protracted discussion of questions which underlie the whole controversy, and upon which it must finally be determined. Nor do I wish to be understood as expressing any opinion upon the merits of the case or the principles which must be ultimately applied to it. It will be in time to do that when the evidence on both sides is concluded, and the case set down for argument and a final decree. At present it is only necessary to show, as I have attempted to do, that the action of the Supreme Court in reversing upon technical grounds the order of the Quarter Sessions, setting aside the appraisement and confirmation, has not ended the present suit, nor destroyed the case presented in the plaintiffs' bill, and that it by no means furnishes a reason why the interlocutory orders securing the fund during the pendency of the litigation should now be revoked.

Ordered that the prayers of the petitioners, respectively presented by Henry C. Terry and Joshua S. Fletcher, be refused.

Opinion by THAYER, P. J.

Common Pleas—Law.

C. P. No. 4. June 13, 1881.

Hagan v. Philadelphia and Grays Ferry Railway Co.

Negligence—Contributory negligence—Jumping from street car while in motion is contributory negligence—Refusal or neglect of conductor to stop car when requested, does not justify passenger in jumping off, especially in a case where it does not appear that he would have suffered any damage or even serious inconvenience by waiting a few moments.

Rule to take off a nonsuit.

Case for negligence. On the trial the plaintiff's evidence showed that the plaintiff, a man upwards of seventy years of age, was a passenger on one of defendant's cars, that desiring to get off at Thirtieth Street and Grays Ferry Road, he requested the conductor to stop the car, that, the car not being promptly stopped, the plaintiff jumped off, fell, and received severe injuries. The plaintiff having rested, THAYER, P. J., entered a nonsuit on the ground that the plaintiff should have stayed on the car until it stopped, and then sued the company for the inconvenience and loss of time sustained, and that if he jumped off he did so at his own risk.

H. G. Harris, for the rule.

R. L. Baird and *Jos. Hopkinson*, contra.

June 25th, 1881. THE COURT. The plaintiff being a passenger in a street car requested the conductor to stop the car at a particular point. His request not being immediately complied with, he leaped from the car and was injured. That this was an act of contributory negligence does not appear to us to admit of doubt. The defendant's conductor was undoubtedly guilty of negligence in not stopping the car immediately, upon being requested to do so, but that did not compel the plaintiff to subject either himself or the company to the risk of jumping from the car while it was in motion. The plaintiff was a man of mature years and must be presumed to have been acquainted with the danger he encountered in getting off, and to have taken the risk upon himself. No urgent necessity required him to get off at that particular time and place, nor was there the least evidence that he acted under any excitement, agitation, or confusion of mind. He got off deliberately of his own free will because the car was not immediately stopped. He was not under the influence of any terror, nor did he leave the car in obedience to the demand of any superior duty. The inconvenience to which he was subjected by being carried a few rods further than he desired to be carried was very slight, and the car actually stopped at a very short distance beyond the point at which he jumped off. Under these circumstances the Judge who tried the cause did not think himself justified in leaving it to the jury to find damages for an injury which was due mainly to the plaintiff's own negligence. It would be an unjust and pernicious rule to establish that a passenger is justified in leaping from a street car because the car is not immediately stopped upon his request. Such a rule would be alike dangerous to passengers and carriers, for it would offer an inducement and temptation to carelessness and imprudence. The case at the trial was ruled principally upon the authority of Railroad Company *v.* Aspell (11 Harris, 147). That was the case, it is true, of a steam railway, and of course it is more dangerous to leap from a car propelled by steam than from one drawn by horses. On the other hand when we consider that a passenger in a street car always alights within a very short distance of the point where he desires to get off, if his request is not obeyed, the neglect of the conductor in not stopping the car immediately can scarcely be considered a justification for incurring the hazard of getting off while the car is in motion, especially in a case where it does not appear that he would have suffered any damage or even serious inconvenience by waiting a few moments. The case of Crissey *v.* Hestonville Railway Company (25 Smith, 83), cited by the plaintiff's counsel, was ruled by the circumstances that the plaintiff was a lad of thirteen, and was not to be held to the exercise of the same degree of care and discretion as an adult.

Rule discharged.

Opinion by THAYER, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, SEPT. 8, 1881.* [No. 21.

Supreme Court.

Jan. '81, 265. March 22, 1881.

Mitchell v. Buffington.

Fraud—Fraudulent entry of satisfaction of judgment—Statute of Limitations—When it begins to run—Difference in different forms of action—Effect of wrongful entry on public records.

The entry of satisfaction on a judgment by the assignor of the bond, which is secured by the judgment, is an actual fraud upon the assignee of the bond.

The Statute of Limitations runs, not from the fraudulent entry of satisfaction, but from the discovery of the fraud.

This rule is not altered by the fact that there may be no evidence of concealment, and that the means of discovery were open; for the assignee had no reason to suspect fraud, nor was he bound to examine the docket to see if it had been committed.

Per STERRETT, J. The *cause* of action, rather than the *form*, determines the applicability of the statute.

The public records are constructive notice to everybody only as to such entries which are rightfully made thereon.

Difference of the running of the Statute of Limitations in actions *ex contractu* and *ex delicto* explained.

Error to the Common Pleas of Chester County.

Case, by Mary and Sophia Mitchell against Richard Buffington, to recover for the loss occasioned to plaintiffs by the alleged fraudulent entry of satisfaction on a judgment by defendant.

The summons issued May 14, 1879.

Pleas, "Not guilty, and *actio non accrevit infra sex annos*."

Upon the trial, before CLAYTON, P. J., the following facts appeared:—

On April 1, 1862, Richard Buffington loaned to Levis Bernard $2000, taking as security a bond to himself for $2000, with warrant of attorney to confess judgment, executed by Levis Bernard as principal, and Cyrus Hoopes as surety. Judgment was entered on this bond April 14, 1862. On March 28, 1866, Bernard paid to Buffington $400 of the principal of the bond together with the arrears of interest, thus reducing the bond to $1600, and on the same day Buffington assigned the bond for $1600 to the plaintiffs, Mary and Sophia Mitchell. The money was paid, the assignment indorsed upon the bond, and the bond delivered to the plaintiffs. The assignment was not noted on the record. On May 1, 1866, Buffington, without the knowledge of the plaintiffs, Mary and Sophia Mitchell, entered satisfaction upon the record of the judgment. On April 1, 1867, and annually thereafter until 1876, Bernard paid the interest on the bond to the plaintiffs, in whose possession the bond remained. The lien of the judgment expired April 14, 1867, and was never thereafter revived until January 11, 1877, when Bernard by an *amicable* scire facias, signed only by himself, and without the knowledge of the plaintiffs, revived it against himself. In 1876 Bernard became insolvent, and on January 12, 1877, made an assignment for the benefit of his creditors. From his assigned estate the plaintiffs realized $184.67. The plaintiffs then made demand upon Hoopes, the surety, for the balance of the bond and interest still unpaid, and, upon his refusal to pay, brought suit against him. They first discovered the entry of satisfaction at the time of the institution of that suit. Upon the trial of the action against Hoopes, his defence was that in the year 1867, in searching for liens against his property, he discovered the entry of satisfaction made by Buffington, and that relying upon this entry as evidence of the payment of the debt by Bernard, he neglected to keep the lien of the judgment alive against the real estate of Bernard until the time of the assignment for the benefit of creditors of the latter, when other liens had intervened and the security of his real estate was lost, and that, resting under the belief that the debt had been paid, he again went security for Bernard in 1875 for $1800, upon which transaction he lost $706.34. He therefore denied his liability upon the bond, by reason of his having been misled to his injury by Buffington's act in entering satisfaction. The verdict was for the defendant, upon which judgment was entered and a writ of error taken to the Supreme Court, where the judgment of the Court below was affirmed. (See Buffington *v.* Bernard *et al.*, 9 Norris, 63.)

This suit was then instituted against Buffington to recover from him damages for the loss sustained by the plaintiffs. Their loss at the time of the trial amounted to $1848.24.

The defendant offered no evidence.

The plaintiffs presented the following points: (1) In actions upon the case for consequential damages in cases of pure *torts*, the Statute of Limitations runs from the time when the damages are first developed and not before. *Answer.* I answer this point by saying that the statute begins to run from the time any damages, though only nominal, were developed.

(2) If the jury believe that the defendant committed *actual* fraud upon the plaintiffs in enter-

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ing satisfaction upon the judgment, and that said fraud was not discovered until within six years before this suit was brought, to wit, the 14th day of May, A. D. 1879, then this action will lie, and the verdict must be for the plaintiffs. *Answer.* This point is negatived, there being no evidence of concealment, and the means of discovering it being open.

(3) If the defendant has committed *constructive* fraud in entering satisfaction on the judgment, and said fraud was not discovered by the plaintiffs until within six years before this suit was brought, the Statute of Limitations is no bar to this action, and the verdict must be for the plaintiffs. *Answer.* I make the same answer to this as to the second point.

(5) The Statute of Limitations in this case commenced to run at the time of the discharge of Cyrus Hoopes. *Answer.* This point is negatived.

(7) The Statute of Limitations did not commence to run prior to the insolvency of Levis Bernard. *Answer.* This point is negatived.

(8) The time of the discharge is for the jury. *Answer.* This point is negatived.

(9) If the jury believe that Cyrus Hoopes was not discharged as surety before the insolvency of Levis Bernard, and that said insolvency occurred within six years prior to the commencement of this suit, then the verdict must be for the plaintiffs. *Answer.* Negatived.

The Court charged the jury as follows: "The jury are instructed upon all the evidence that their verdict ought to be for the defendant, it appearing that suit was brought more than six years after the entry of satisfaction, at which date I hold that the cause of action accrued."

Verdict for defendant and judgment thereon, whereupon the plaintiffs took this writ, assigning for error the answers to their points, and the charge *ut supra.*

W. E. Barber and *Charles H. Pennypacker* (*W. T. Barber* with them), for the plaintiffs in error.

In an action on the case for consequential damages for pure torts, the statute does not begin to run until the right is complete to institute the action, and not merely when nominal damages are developed.

Wickersham *v.* Russell, 1 Sm. 71.
Gillon *v.* Boddington, 1 Car. & Payne, 541.
Roberts *v.* Read, 16 East, 215.
Collinge *v.* Heywood, 1 P. & D. 502.
Huntley *v.* Sanderson, 1 Cr. & Meeson, 478.
Bank *v.* Waterman, 26 Conn. 324.
Leinhart *v.* Forringer, 1 Penn. 492.
Van Horn *v.* Scott, 4 C. 316.
Jones *v.* Trimble, 3 R. 381.
Overton *v.* Tracey, 14 S. & R. 311.
Stout *v.* Kindt, 12 H. 452.
Wheatley *v.* Baugh, 1 C. 534.
Hanna *v.* Holton, 28 Sm. 334.
Campbell *v.* Boggs, 12 Wr. 524.
Funk *v.* Smith, 16 Sm. 28.

The entry of satisfaction was a pure tort.

Dewitt's Appeal, 26 Sm. 287.
Roberts *v.* Halstead, 9 B. 32.
Kisterbock's Appeal, 1 Sm. 485.
Kirby *v.* Ingersoll, 1 Harrington's Ch. 172.

If not a fraud *per se*, it amounted to such, and being secret, barred the statute.

Pennock *v.* Freeman, 1 W. 401.
Wilmerding *v.* Russ, 33 Conn. 80.

It was secret because no duty was imposed upon the assignees to examine the record continually; nor were they bound to revive the judgment.

The damages were not developed until the decision of the Supreme Court affirmed the discharge of the surety; then the statute began to run.

Alfred P. Reid (with whom was *Wayne Mac Veagh*), for the defendant in error.

The declaration alleged a breach of duty and special consequential damages. The cause of action was the breach of duty. The duty of Buffington arose out of his contract. The statute, therefore, ran from the breach.

Angoll *v.* Bryant, 1 Sanford, 98.
Hinsdale *v.* Larned, 16 Mass. 68.
Baker *v.* Atlas Bank, 9 Metcalf, 182.
Hamilton *v.* Hamilton, 6 H. 21.
Derrickson *v.* Cady, 7 B. 31.
Howell *v.* Young, 5 B. & Cress. 259.
2 Addison on Torts, § 1361.
Bretherton *v.* Wood, 3 Brod. & Bing. 54.

It is immaterial that the damages were merely nominal.

Bank *v.* Waterman, 26 Conn. 324.

Ignorance does not toll the statute, unless induced by the fraud of the defendant.

Railroad Co. *v.* Bridges, 7 B. Monroe, 556.
Wilcox *v.* Plummer, 4 Peters, 172.
Wordsworth *v.* Harley, 1 B. & Adol. 391.
Grange *v.* Grange, 5 Barn. & Cress. 149.
Short *v.* McCarthy, 3 B. & Alderson, 626.
Angell on Limitations, §§ 183–304.

The records were public, and open to the assignees. They should have had the judgment marked to their use.

Fisher *v.* Knox, 1 H. 626.
U. S. *v.* Simpson, 3 P. & W. 437.

The statute makes no distinction. All actions on the case are barred in six years.

Downey *v.* Garard, 12 H. 52.
Finney *v.* Cochran, 1 W. & S. 112.
Campbell *v.* Boggs, 12 Wr. 524.
Rhine's Ex. *v.* Evans, 16 Sm. 192.
Barton *v.* Dickens, 12 Wr. 518.
Morgan *v.* Tener, 3 WEEKLY NOTES, 398.
Moore *v.* Duvenal, 8 Id. 411.
Owen *v.* Savings Fund, 9 Id. 465.

The record of the suit against Hoopes could not bind Buffington; he was not a party to it.

May 2, 1881. THE COURT. The act of the defendant in satisfying the judgment against

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Bernard and Hoopes, after he had parted with his interest therein, was an actual fraud upon the plaintiffs, to whom he had previously assigned the bond on which the judgment had been entered, and the result was that Hoopes, the surety, was discharged, and plaintiffs thereby sustained loss, for which undoubtedly they had a good cause of action against the defendant. The learned Judge, in affirming plaintiffs' fourth point, correctly instructed the jury that "if the defendant, after assigning all his interest in the judgment to the plaintiffs for a valuable consideration, subsequently, without their knowledge or consent, entered satisfaction of record upon said judgment, and by so doing caused loss to the plaintiffs, he is guilty of such gross negligence and misconduct as amounts to actual fraud." The proof of the facts embodied in this point was so clear and satisfactory that the jury could have had no hesitation in saying that they were true, and the conclusion of law deduced from them is so obviously correct that the citation of authority in support of it is unnecessary. In DeWitt's Appeal (26 P. F. Smith, 283), it is said that the entry of satisfaction by the mortgagee after the assignment of the judgment secured thereby will not discharge the mortgage security so far as respects the assignee of the judgment. "It was a fraud upon the rights of the assignee as owner of the mortgage debt." When the defendant entered satisfaction on the record, he must have known that the bond on which the judgment had been entered, did not belong to him. He had assigned it and received the money about a month before, and thus, with full knowledge of all the facts, committed the wrong by which the surety, relying on the entry of satisfaction, was misled and thereby released from all liability for the default of his principal. There was no attempt made to explain the tortious act of the defendant. He was a competent witness, but, instead of offering some excuse for his conduct, he remained silent. All the presumptions are against his innocence in the transaction, and every just inference points to it as an actual fraud. But even if he was not actuated by any improper motive, the act would nevertheless be fraudulent in its result. An act innocent in the intention may be so injurious in its consequences that the law declares it to be a fraud. (Kisterbock's Appeal, 1 P. F. Smith, 485.) But the mantle of charity, broad as it is, will not cover such a transaction as that disclosed by this record. Whatever may have been defendant's motive, there is nothing to indicate that it was a good one. As the case stands upon the evidence, his act was a positive fraud on the rights of his assignees, for which he should be compelled to respond in damages, unless he is successfully shielded by the Statute of Limitations. This brings us to the consideration of the cardinal question in the case.

The plaintiffs, in their second point, requested the Court to charge as follows, viz: "If the jury believe that the defendant committed actual fraud on the plaintiffs in entering satisfaction of the judgment, and that said fraud was not discovered until within six years before this suit was brought, viz: May 14, 1879, then this action will lie, and the verdict must be for the plaintiffs." To this and the next point, which was the same except that *constructive* is substituted for *actual* fraud, the learned Judge's answer was, "This point is negatived, there being no evidence of concealment, and the means of discovering it being open," and then, in his general charge, instructed the jury that upon all the evidence "their verdict ought to be for the defendant, it appearing that suit was brought more than six years after the entry of satisfaction, at which date I hold that the cause of action accrued." The question is thus distinctly raised, whether the statute begins to run from the commission of the fraud, or from its discovery by the injured party.

In actions *ex contractu*, of course, the general rule is, that the statute commences to run from the breach; and in an action on the case for professional negligence. When the element of fraud is absent, the same rule applies, for the reason that the action is grounded either on the implied undertaking or on the duty springing from the relation that existed between the parties; and as soon as the breach occurred, the injured party had an immediate right of action. The same principle holds good also in actions for official negligence. In both these cases, the parties occupied to each other a relation, from which the duty sprang or the undertaking was implied, for the breach of which the suit was brought. It has been repeatedly held that, in the absence of fraud, the statute in these and similar cases, runs from the breach. (Rhine's Adm'r *v.* Evans, 16 P. F. Smith, 192; Moore *v.* Juvenal, 8 WEEKLY NOTES, 411; Owen *v.* The Western Saving Fund, 9 WEEKLY NOTES, 465.) The same principle is recognized by text writers. In Story on Contracts, pl. 704, the rule is stated thus: In cases of contract and in actions *ex delicto quasi ex contractu* the Statute of Limitations begins to run from the breach of contract or duty and not from the time when the damage accrues. The rule in such cases is, that the cause of action arises immediately on the happening of the default, and is not postponed to the damage thereby occasioned (Angel on Lim. 123). And in actions for official or professional negligence the cause of action is founded on the breach of duty which actually injured the plaintiff and not on the consequential damage. (2 Greenleaf on Ev. 433.)

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As to the form of action, it matters not whether it be assumpsit, or a special action on the case.

The *cause* of action rather than the *form* determines the applicability of the statute.

From what has been said it may be inferred that the rule is different in cases where the cause of action springs, not from a breach of duty or an implied undertaking, but from the fraudulent act of the defendant. In the latter class of cases, the statute does not begin to run until the fraud is discovered; and there is no reason why it should. The fraudulent act has no necessary connection with any relation, contract, real, professional, official, or otherwise, between the parties, and it may be committed long before the damage is developed or the injured party is aware of the act. The learned Judge in this case gives as a reason for refusing plaintiff's points that there was no evidence of concealment and the means of discovery were open. But what of that? The plaintiffs had bought and paid for the judgment and had the bond in their possession. They had no reason to suspect the defendant would dare to tamper with their security, and were not bound to examine the docket for the purpose of learning whether he had done so or not. Nor were they bound to keep their judgment alive. If they were satisfied with the personal responsibility of the principal or his surety they had a right to rely thereon, as they appear to have done; and, but for the tortious act of the defendant, by which the surety was released, they would have sustained no loss. The public records are said to be constructive notice to every body, but this is true only of such entries as are rightfully made thereon. An entry apparently proper, but in fact fraudulent, if actually seen on the record by a party interested, may be accepted and acted on as true, as was done by the surety in this case; and no party injured by a fraudulent entry can be affected by constructive notice.

It is clear to us, on principle as well as authority, that owing to the fraudulent character of the act that worked the injury, the plaintiff's claim was not barred. The principle appears to have been recognized in Jones *v.* Conoway (4 Yeates, 109); Rush *v.* Barr (1 Watts, 110); Harrisburg Bank *v.* Forster (8 Watts, 12); Ferris *v.* Henderson (2 Jones, 49); Wilmerding *v.* Russ (33 Conn. 80), and other cases. The law is not so tenderly solicitous about the interests of tort-feasors as to presume that the injured party had notice of their wrongful acts when in fact he had none.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by STERRETT, J.

Jan. '81, 163. March 29, 1881.

Wilson v. Silkman.

Married woman—Separate estate—Burden of proof in a contest between a wife and her husband's creditors.

Where a husband confesses judgment in favor of his wife, it is necessary for the wife, in a contest with her husband's creditors, to establish that the judgment was given *bona fide* to secure a debt of the wife from the husband, from the moneys of the separate estate of the wife; in the absence of proof of such a character, the judgment will be regarded as fraudulent and void against the existing creditors.

In favor of the existence of a separate estate of a wife there is no legal presumption; the husband, on the contrary, is presumed to be the owner of the property of which he and his wife have the joint possession.

Per GORDON, J. "If a wife has nothing else to depend on than the presumption arising from her husband's act in confessing judgment to her, she is leaning upon a broken staff, for the husband's confession of judgment to his wife is *prima facie* little better than the confession of a judgment to himself."

Error to the Common Pleas of Lackawanna County.

This was a feigned issue framed by the Court below to try the validity of a judgment for $11,755.12, confessed by Daniel Silkman to William Shoemaker in trust for Catharine Silkman, the wife of Daniel Silkman.

Silkman's real estate had been sold, under a judgment confessed by him to Sarah A. Silkman and Almira Silkman, and subsequently marked to the use of Catharine Silkman.

Catharine Silkman became the purchaser and claimed to have both her judgments receipted for on account of the purchase-money. This was resisted by a large number of Silkman's judgment creditors, and upon their application the issue was framed, the creditors being plaintiffs and Catharine Silkman defendant.

On the trial, before HAND, J., the plaintiffs proved that Silkman was a member of the firm of Winton, Silkman & Co., which at the time of the confession of judgment by Silkman, was very largely indebted, and that Catharine Silkman was the wife of Daniel Silkman, and rested.

The defendant offered no testimony. The plaintiffs requested the Court to charge, *inter alia*—

1. When a judgment is taken in the name of a trustee for the wife against her husband, it is necessary for the wife in a contest with creditors of the husband, as in this case, to establish that the judgment was taken *bona fide* to secure a debt of the wife from the husband for moneys of the separate estate of the wife. In the absence of such proof the judgment must be regarded as fraudulent and void, as against such

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creditors. *Answer*. In view of all the facts of this case we decline to affirm this point; we answer in the negative.

In the general charge his Honor said:—

"He who alleges fraud must prove it. It is a fact to be proved as any other fact; it may be proved directly, or it may be proved by circumstances from which the law will infer fraud, or from which as a matter of fact fraud may be found. But the fact still remains that he who alleges fraud must prove it in order to make out his case. The law in no case presumes fraud to exist. Consequently, when parties come into Court alleging fraud, the law holds them to the same rule that it does in regard to any other fact which is alleged to be proved in a court of justice. They must furnish testimony sufficient to substantiate their claim, and if they fail to furnish such testimony, they fail in their case and the defendant is not obliged to respond."

Verdict and judgment for defendant. Plaintiffs took this writ assigning for error, *inter alia*, the answer to their first point.

R. W. Archbald and *Gunster & Welles* (with them *S. B. Price*), for plaintiffs in error.

In the absence of proof, any acquisition of the wife from her husband is presumed to be a gift voidable as against creditors.

Kelly's Ap., 27 Sm. 236.
Graybill *v.* Moyer, 9 Wr. 533.
Keeney *v.* Good, 9 H. 355.
Black *v.* Nease, 1 Wr. 440.

It makes no difference that the wife is protected by a judgment.

Hinde *v.* Longworth, 11 Wheat. 199.
Bergey's Ap., 10 Sm. 417.

A. H. Winton and *E. N. Willard*, for defendant in error.

The judgment confessed, possessed all the qualities of a judgment upon a verdict.

William's Ap., 11 Wr. 307.
Braddee *v.* Brownfield, 4 W. 474.
St. Bartholomew's Church *v.* Wood, 11 Sm. 96.

If nothing more real than a doubt be thrown upon the party charged, the presumption of honesty, until the contrary be proved, rebuts that, and he need do nothing.

Roberts *et al. v.* Guernsey, 3 Grant's Cases, 237.

May 2, 1881. THE COURT. On the 10th of June, 1878, Daniel Silkman executed his judgment note to William Shoemaker in the sum of $11,755.12 in trust for his wife, Catharine Silkman. On this note, judgment was entered on the 21st of November, 1878. At the time of the execution of the note above mentioned, Silkman was a member of the firm of Silkman, Winton & Co., which firm was largely indebted, so largely, indeed, that it appears, from the evidence, it was unable fully to liquidate its obligations, in other words, it proved to be insolvent.

It appears further, that on the 4th of June, 1878, a judgment was entered in the Common Pleas of Luzerne County against Silkman, and in favor of Almira and Sarah A. Silkman, in the sum of one thousand dollars. This judgment was transferred to Lackawanna County on the 12th of December, 1879; upon it execution was issued, a levy made upon the property from which the fund in controversy was raised, and sold by the sheriff to Catharine Silkman, the defendant, for the sum of $10,150.00, she having on the same day, received an assignment of the judgment on which the sale was made. She being thus the owner of the first, as well as the second judgment against the property, claimed the right to have them receipted upon her bid. To prevent this, the plaintiffs, creditors of Silkman, Winton & Co., who in the mean time had obtained judgments upon their claims, interposed, and at their instance, the issue now trying was framed.

From this summary of facts, about which there is little or no dispute, we turn to the legal question on which the case was determined in the Court below.

Several assignments of error have been presented for our consideration, but as the ruling of the Court below on the plaintiff's first point, in effect involves the whole controversy, we may confine our attention to it alone. That point reads as follows: "When a judgment is taken in the name of a trustee for the wife against the husband, it is necessary for the wife, in a contest with creditors of the husband, as in this case, to establish that the judgment was taken *bona fide* to secure a debt of the wife from the husband from moneys of the separate estate of the wife. In the absence of such proof, the judgment must be regarded as fraudulent and void as against such creditors."

The point thus put was refused by the Court.

We hesitate not to say, that in this the Court made a mistake. Under the circumstances of the case, the affirmative was upon the defendant. It was for her to show that the judgment executed to the trustee for her use by her husband represented the proceeds of her separate estate. The contest was with her husband's creditors, and if the judgment was not founded upon a valuable consideration, however good it might be against him or his estate, it would be fraudulent and void as to contemporaneous creditors.

Before the Act of 1848, the marriage contract vested the right to the personal property of the wife in the husband. She had no such thing as a separate and independent personal estate. Since that Act, she may not only continue to own and hold the property she had at the time

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of the marriage, but she may during coverture acquire a separate estate.

In favor of such an estate, however, there is no legal presumption, but the contrary; the husband is presumed to be the owner of the property of which he and his wife have the joint possession. Does she purchase lands or goods, their price is presumed to come from the pockets of the husband; or does he transfer to her property, real or personal, it is presumed to be a gift from him to her. Thus the Act of 1848, whilst it makes it possible for a feme covert to have and enjoy a separate estate, raises no presumption in favor of the existence of such an estate. She must affirmatively establish that fact, and this, not only because of the ease with which the husband's creditors might otherwise be defrauded, but because, ordinarily, it is impossible for her to have a possession separate and distinct from her husband, hence one of the most obvious and prominent marks of proprietorship is, in her case, not only wanting, but such possession being usually attributed to the husband, a presumption of his ownership naturally follows by which his credit is increased. Even in a case where a widow claims property as against her husband's estate, it has been held "that she must show by evidence which does not admit of a reasonable doubt, either that she owned it at the time of her marriage, or else acquired it afterwards by gift, bequest, or purchase. In case of a purchase after marriage, the burthen is upon her to prove distinctly that she paid for it with funds which were not furnished by the husband." (BLACK, J., in Gamber *v.* Gamber, 6 Harris, 363.) Again it was said by the same learned Justice in Keeny *v.* Good (9 Har. 342), "To bring the property of a married woman under the protection of the Act of 1848, it is made necessary by the letter, as well as by the spirit of the statute, to prove that she *owns* it. She must identify it as property which was hers before marriage, or prove how she came by it afterwards. Evidence that she purchased it amounts to nothing unless it be accompanied by clear and full proof that she paid for it by her own separate funds. In the absence of such proof, the presumption is a violent one that her husband furnished the means of payment."

Like doctrine will be found in Gault *v.* Saffin (8 Wr. 307), and many other cases to which we need not revert.

Apply the rule thus established, to the case in hand, and the error of the Court below is obvious. Here is the confession of a judgment in the sum of eleven thousand dollars by a husband to a wife, at a time when he was in fact insolvent. She furnishes no proof that she had so much as a single dollar to invest in that or any other kind of property, and yet by all rule she was bound to show by clear and full proof that it was confessed to her for a valuable consideration proceeding from her own separate estate, acquired either independently of her husband, or, if from him, at a period antecedent to his indebtedness. The inquiry is not only a legal but a natural one, How did she get the right to demand so large a sum of money from her bankrupt husband? If, indeed, she has nothing else to depend upon than the presumption arising from his act in the confession of the judgment, she is leaning upon a broken staff, for the husband's confession of a judgment to his wife is, *prima facie*, little better than the confession of a judgment to himself.

The presumptions are all against the defendant's right to the money in controversy, and unless she proves to the satisfaction of a jury, that the consideration for the judgment against her husband was money, or other property, from her separate estate, she cannot maintain her claim.

The judgment is reversed, and a new venire ordered.

Opinion by GORDON, J.

Jan. '79, 151. March 8, 1881.

Lynch's Appeal.

Equity—Rescission of contract—Kind and degree of proof necessary to—Fraud—Mistake—Misrepresentation—When equity will refuse to interfere for either party—Difference of ground on which contract will be enforced or rescinded.

A decree of a court of equity rescinding a contract for the sale of land, should be made only on the ground of mutual mistake or misrepresentation and fraud; unless the evidence of these be so clear as to leave no room for hesitation or doubt in the mind of the court, the parties should be remitted to their legal remedies.

A chancellor may refuse to enforce the execution of a contract on the ground of improvidence, surprise, or hardship; but should rescind a contract only for fraud, illegality, or mistake.

If an agent of the vendor attempt to impose on the vendee by representations which he ought to have known to be false, and which he did not know to be true, and the vendee falsely state the object of his purchase, in order to get a better bargain, neither of the parties act fairly, and a chancellor should refuse to interfere either to execute or rescind the contract, but should leave the parties to any legal remedies they may have.

Appeal of I. V. Lynch, J. C. Miles, and John W. Miller from a decree of the Common Pleas of Luzerne County.

Bill in equity, filed by Victor Koch against I. V. Lynch, J. C. Miles, and John W. Miller, praying that certain articles of agreement for the sale of land by defendants to complainant be

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rescinded, and the moneys paid thereon be returned, on the ground of the misrepresentations of W. H. Stanton, the agent of the defendants.

By the articles of agreement, the defendants sold to the complainant for $6000, to be paid in instalments, "the coal in and upon and under the (described) tract of land, with all the privileges of mining and transporting the same, with the full and free right to enter upon said land, sink shafts," etc.

The answer alleged misrepresentations on the part of the plaintiff, and denied the authority of Stanton.

George R. Bedford, the Examiner and Master, reported as follows upon the law and the facts:—

The defendants, being the owners of a piece of land in the township of Blakely, containing about a hundred acres, sold the surface of the same to a third party, reserving the coal. Upon the suggestion of one W. H. Stanton, that he thought he could find a purchaser of the coal, the defendants, or at least one of them, said to Stanton, that if he could bring them a customer they would pay him for it. Stanton negotiated with several parties, and finally, on the 2d September, 1873, with Koch, the plaintiff, to whom he stated that the coal was for sale, and that Koch could buy it at a bargain, and proposed that they should together visit the premises, some five miles distant, which they proceeded to do the same day. Arrived upon the ground, Stanton, claiming to be familiar with coal lands, asserted that there were three underlying veins of coal, though it was apparent that there was no development of the land, or evidence of its having been subjected to any test to determine the existence or non-existence of coal. Koch, however, was evidently impressed with Stanton's sagacity, and put entire faith in the latter's opinion. Together they went the next day to see Miles and Lynch, two of the defendants, and on their way there it was arranged between them that Koch should represent that he wanted to buy the place for the purposes of a summer resort, and was indifferent as to the coal, except that he would not want to be annoyed by parties prospecting for it, under an outstanding mining right, and therefore would like to purchase the defendants' interest in the same. At the interview with the two defendants named, the plaintiff offered to buy and pay four thousand dollars, and put his offer on the ground already suggested, namely, to get rid of an outstanding mining right. At this time no representations were made as to the coal, except that to Koch's question as to how much coal there was, it was answered one hundred acres; and when he said Stanton stated there were one hundred and four acres, one of the defendants replied that there was a little over one hundred acres, "but we only guarantee one hundred acres." This answer, it is evident, had reference to the area of the tract. The offer of four thousand dollars was declined, and it was arranged that all parties, including Mr. Miller, the other defendant, should meet next day in Scranton. In pursuance of this arrangement, the parties came together in Scranton on the 4th of September, 1873, and the defendants offered to take six thousand dollars. The plaintiff demurred to the price, and raised his offer to five thousand dollars, which was declined by defendants, one of them (Miles) saying, that if the others chose to sell for less, he would prefer to retain his interest with Koch. Such an arrangement, Koch said, would not suit him, and after some further discussion by all parties, the defendants asserting their belief of the existence of coal, and one of them stating that he had been informed by a practical miner, who had seen the property, that there were three veins of coal upon it; Koch acceded to the defendants' terms, and the parties the same day entered into the agreement for the sale on the one hand, and the purchase on the other, of the coal upon the premises mentioned. The price to be paid was about sixty dollars per acre; while as high as three hundred and fifty dollars per acre had been obtained for other coal lands in the vicinity. Upon the execution of this contract, Koch paid the defendants the sum of five hundred dollars. Shortly after this transaction the plaintiff had the property examined, and it was established beyond much question, and shown by the testimony taken in this case, that there is and was only from five to seven acres of coal, and this in such condition as not to be workable, and therefore worthless. Upon making this discovery, the plaintiff at once asked to be relieved from his undertaking; and to April Term, 1874, filed this bill for a decree rescinding the contract, and for the re-payment of the money paid thereon by plaintiff.

The first question to be determined is, how far Stanton had authority to bind the defendants by his representations to the purchaser. Now, his agency, it is pretty clear, was a limited one, and did not extend to consummating the sale, or even to fixing its terms. This is inferable from the whole evidence, and, among other things, from the fact that he brought the parties together, and they themselves thereafter conducted the negotiations and agreed upon the details, without Stanton's assuming in any way to act in their behalf. The arrangement, however, with Stanton, to bring a customer, would of necessity involve the idea that he should show the property to parties proposing to purchase, and make statements regarding it. In

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this respect he may have far exceeded his instructions, but this is immaterial; for a principal, though not cognizant of his agent's representations, is so far bound by them that he cannot enforce a contract induced by the agent's fraudulent or untrue statement, upon the truth of which the purchaser had a right to rely. (Wharton on Agency, §§ 158 *et seq.*, § 478, and cases cited.)

Granted, for the purposes of the present discussion, that the proposition that Stanton should find a customer, was unknown to two of these defendants, or even that he acted so far without any authority from either one of the three, it does not, in the light of the authorities, as the Master conceives, alter their liability if they have profited by his acts. It cannot be denied that the sale was brought about in a large measure, if not altogether, by his efforts. The defendants accept the benefits *cum onere*. One cannot take the fruits of a transaction and reject its burden; and for this reason courts hold that a principal, who has profited by the frauds of even a *volunteer* agent, may be held responsible for such frauds, so far as he has had any advantage from them. Reaping the benefits is equivalent to express ratification. The cases upon this point are, to a considerable extent, collected in Mundorff *v.* Wickersham (13 P. F. S. 89). See also Wharton on Agency, § 89.

The conclusion of the Master is, that the relations of Stanton with these defendants were such that he could bind them by his representations in the course of his negotiations with the plaintiff.

The next inquiry is, did the plaintiff rely on the representations made by Stanton, that there was coal in the quantity named, and was he, by reason thereof, induced to enter into the contract of purchase? It is urged by the defendants that from the fact that plaintiff made inquiries from Mr. Pierce as to the value of lands in the neighborhood, and what sum the latter had sold for, it is evident that the plaintiff was not induced to purchase solely by reason of the representations made by Stanton, but was largely influenced by the answer of Mr. Pierce, that he had sold for three hundred and fifty dollars per acre. It does not, however, satisfactorily appear, that the conversation with Mr. Pierce preceded the plaintiff's purchase, and indeed the probability is that it was subsequent; for the bargain between the parties was fully consummated the next day but one after plaintiff's attention was first called to the property, and the interval of time was pretty fully occupied by the negotiations between the parties, who lived some ten miles apart, and who necessarily travelled over this distance to and fro in the course of the transaction.

Upon the showing made before him, the Master feels bound to decide that the plaintiff was induced to enter into the contract for the purchase of the coal on the premises mentioned in it, by the representations of Stanton that three veins of coal in fact existed over the whole tract. The Master does not attach any importance to the remark of one of the defendants already quoted, that there were one hundred acres, for he is satisfied that such remark had reference to the size of the tract rather than the quantity of coal, and was not misunderstood by the plaintiff.

It being determined that the defendants were bound by Stanton's representations, and that the plaintiff, relying upon them, was induced to enter into the contract, it is next in order to decide, whether the plaintiff is estopped from obtaining the relief prayed for, by his statement to defendants, that he wished to purchase for a summer resort, and that his contemplated purchase of the coal was but incidental, and to avoid any annoyance from parties claiming to own it. Good faith on the part of a party seeking relief in equity, is a fundamental condition. It is clear that it was coal, and the coal only, that the plaintiff desired to purchase, and if his statement to the contrary, made to the defendants, actually misled them, he would hardly be in a position to ask the interference of a court of equity, but from the outset that the real purpose of plaintiff was to buy coal was known to Stanton, who was in some sense the defendants' agent. That such was plaintiff's object, must have been apparent to the defendants also. The principal discussion between the parties themselves, particularly at the last interview, was about coal, and it would be a reflection on the shrewdness of these defendants to say, that they were deceived by the talk about a summer residence. The fact then, that the plaintiff did not, at his first interview with defendants, state truly the object of his purchase, is not regarded under the circumstances as material, and therefore does not estop him from maintaining his bill in this case.

This brings us to consider the last, and manifestly the most important, question in the case, and that is, what is the effect of Stanton's representations? That the plaintiff purchased on the strength of such representations, and that they were untrue in point of fact, we have already decided, but it is not every misrepresentation of a fact that will avoid a contract, upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it. Now, the Master confesses that during the whole progress of the case, his impressions on this point were all against the plaintiff, and with the defendants, and that the rule of *caveat emptor* applied. This view was strengthened by the language of

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the present Chief Justice in the case of Watts *v.* Cummins (9 P. F. S. 91). In that case the agent of the vendors asserted the premises to be oil territory, and in fact it turned out to be worthless, and Judge AGNEW said, "Had Campbell (the agent) expressed the strongest belief of the existence of oil in the tract, as an absolute certainty, still the defendant knew it was but matter of mere belief and uncertain. It was opinion only, no matter how confidently expressed. It is plain he had no right to rely upon it as an assured fact, but must still experiment to find it out." This language is comprehensive enough to govern the disposition of the question in controversy here, but an examination of the case cited shows that the circumstances were peculiar. The contest was between persons who were all parties to a speculation in oil lands, and the Court declared "that all knew that they were bargaining about a matter altogether problematical." As matter of fact, too, in the case cited, it appears that the agent, whose misrepresentations were the ground of defence to recovery of purchase-money, did not assert the existence of oil as a fact known to him, but that he said it was "oil territory." The language of the opinion therefore would seem to go further than was required by the circumstances of the case, and when we add to this that the decision was made by a divided Court the opinion loses something of its force when applied to the facts of the case now under consideration. Coal is less an unknown quantity than oil, and not so entirely speculative. It may, therefore, well happen that a different rule should obtain. Perhaps a case more analogous to the present one than Watts *v.* Cummins, both as to subject matter of the contract and the attendant circumstances, is that of Fisher *v.* Worral (5 W. & S. 478), where it is held substantially that a misrepresentation by a vendor of an occult quantity in land, although made in ignorance of the truth, and although the vendee agrees to run the risk of this, is, in an action to enforce specific performance of the contract of sale, a decisive objection to the plaintiff's recovery. The action there was one of covenant upon articles of agreement for sale of iron ore lands. The vendor asserted the existence of iron ore in large quantity on the premises, relying upon which the vendee purchased. It turned out that there was none of any consequence, and the vendee declared he would not take the land. The purchaser was himself an iron master, and therefore an expert, and in addition to this, it was proved that he had said "he had to take the risk of getting ore," and yet the Court, speaking through Chief Justice GIBSON, relieved the purchaser from his bargain. Judge GIBSON said, "The object of the purchase, induced, as it was, by the vendor's positive assertion of a fact which he at least did not know to be true, had utterly failed," and that "to assert for a truth what a party does not know to be so, is equivalent to the assertion of a known falsehood; and that a chancellor will not execute a purchase where the vendee has relied on the vendor's unfounded assertion." In accord with this decision is the case of Rosevelt *v.* Fulton (2 Cowen, 130). There the contract was to pay an annuity for twenty years for use of a coal mine, and it turning out in fact that there was not such a coal mine as was represented, the Court awarded a perpetual injunction to restrain the vendor from suing at law for the annuity, and held that the purchaser need not work the mine in order to determine the quantity of coal. The Court says, "The question is whether the contract respecting the annuity was entered into on part of the purchaser in consequence of representations which were either fraudulent or untrue in point of fact, and founded on mistake" (pp. 132–3), and adds, "It is not material whether the intent was fraudulent or the representation proceeded from misapprehension or mistake." In Smith *v.* Richards (13 Peters, 26), complainants filed their bill to rescind their contract for the purchase and sale of a tract of land in Virginia, on which there was a gold mine, alleging fraudulent misrepresentation on part of vendor. The decree of the Circuit Court sustaining the bill was affirmed, on appeal, by the Supreme Court of the United States, the latter Court holding that "the party selling property must be presumed to know whether the representation he makes of it is true or false, and that it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud." Untrammelled by the decisions, the Master would hold that the most positive assertion of the existence of coal, where it was apparent to all parties that there was no development of the premises, should be treated as opinion only, and though confidently expressed and relied on by the other party, yet as affording no real ground for relief in equity. He believes, however, that the decisions settle it otherwise, and upon the authority of Fisher *v.* Worrall (*supra*), which the Master concludes is not overruled or even materially modified by Watts *v.* Cummins, and must therefore be regarded as still the correct exposition of the law as held in this State, the Master reaches the conclusion, though with much hesitation, that the plaintiff had a right to rely on the statements made by Stanton as to the existence of coal, and that being untrue, it matters not whether the misrepresentation was intentional or otherwise. The low price of sixty dollars per acre, it is urged, indicates that the purchaser was to take his chances, but the ruling in Fisher *v.*

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Worrall is, that even an agreement to take the risk amounts to nothing, if the purchaser is actually misled by the representation, and buys on the faith of it. Then, too, on the other hand, it is remarked that the low price of sixty dollars per acre would indicate that the vendors had not much real faith in the existence of coal.

It being determined that the defendants were bound by the representations of Stanton; that they were not true; that the plaintiff had a right to rely upon them, and in fact did rely upon them, and purchased, believing them to be true, it follows that the plaintiff is entitled to have his contract with the defendants rescinded, and the Master, therefore, in conclusion, reports that, in his opinion, it is proper to decree that, so far as said contract remains unexecuted by the actual payment of the purchase-moneys, the same be rescinded and delivered to be cancelled; but that the prayer for the repayment of the five hundred dollars be denied.

To this report the defendants filed various exceptions of law and of fact, which were dismissed by the Court; whereupon they took this appeal, assigning for error the dismissal of their exceptions, and the confirmation of the Master's report.

J. V. Darling (with whom were *Isaac P. Hand*, *J. G. Miller*, and *E. P. Darling*), for the appellants.

The relations of Stanton towards the parties were not such as to constitute his representations those of the defendants. The plaintiff never supposed that he was an agent of the defendants, but they both agreed to impose upon the defendants as to the object of the purchase. The defendants did not know of Stanton's representations, for part of the plan was to conceal them.

At best, and assuming the agency for the defendants, the representations as to the existence of coal was but a matter of opinion. The facilities for ascertaining its existence were equally open to both parties.

Watts *v.* Cummins, 9 Sm. 91.
Cumming's Appeal, 17 Id. 404.
Clark *v.* Everhart, 13 Id. 350.

The case of Fisher *v.* Worrall (5 W. & S. 478), was a question of the enforcement of a contract, and involves very different principles of law.

A. Ricketts, for the appellee.

A principal adopting the advantages of an agent's bargain becomes responsible for his misrepresentations.

1 Sugden on Vendors, 381.
Wilson *v.* Fuller, 3 Adolph & Ell, N. S. 68.
Veazie *v.* Williams, 8 How. 134, 156.
Perry on Trusts, § 211.
Jeffreys *v.* Bigelow, 13 Wendell, 518.
Hern *v.* Nichols, 1 Salk. 289,
Irvine *v.* Motley, 7 Bingh. 543.
Mason *et al* *v.* Crosby *et al.*, 1 Woodb. & Min. 342, and cases there cited.
Doggett *v.* Emerson, 1 Id. 1.
Story on Agency, § 451.
Doggett *v.* Emerson, 3 Stor. R. 700.
Olmsted *et al.* *v.* Hotailing, 1 Hill, 317.
Taylor *v.* Green, 8 Carr & Payne, 316.

March 21, 1881. THE COURT. This is a case where the Court below in the exercise of its equity powers has undertaken to rescind a contract under seal between the defendants Lynch, Miles, and Miller of the one part, and the plaintiff, Victor Koch, of the other part, for the sale of all the coal lying under one hundred acres of land therein described. This could be done only on the ground of mutual mistake, or misrepresentation and fraud, and of these the evidence should be so clear as to leave no room for hesitation or doubt in the mind of the Court. If there be any such hesitation or doubt the bill ought to be dismissed, and the parties turned over to their legal remedies. Herein it is, that we think both the Master and the Court below fell into a mistake.

The decree was based on certain representations, alleged to have been made by W. H. Stanton, who as the Master found, was acting as the agent of the defendants in the sale to Koch, but he has not found that these representations were, at that time, known by either Stanton or his principals to be misrepresentations. The Master says: "Arrived upon the ground, Stanton, claiming to be familiar with coal lands, asserted that there were three underlying veins of coal, though it was apparent there was no development of the land, or evidence of its having been subjected to any test to determine the existence, or non-existence, of coal. Koch, however, was evidently impressed with Stanton's sagacity, and put entire faith in the latter's opinion."

It is thus quite obvious that Stanton's representations were not and did not profess to be of known facts, but were expressions of opinion only. It is true he may have impressed Koch with the idea that he was an expert, and thus may have given to his opinions a weight which they otherwise would not have had, nevertheless they were but opinions, and were not represented as facts. Indeed such could not well be, for Koch was upon the land, and could, and did see for himself that the land was not developed. He, therefore, knew certainly that Stanton's representations were merely the expressions of his opinions. Then when he met with the defendants in person, they dealt with him at arm's length; they made no representations whatever; they had what they believed to be a coal reservation to sell; to them Koch professed to be utterly indifferent whether it contained coal or not, representing that his object was to acquire their right for the purpose of relieving the surface, which he alleged he was about to buy from intru-

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sion by those who otherwise might enter to prospect a mine. Under such circumstances as these, a chancellor might well hesitate about the rescission of a solemn contract of the parties. It may be admitted that the agent of the defendants did attempt to impose on the plaintiff by representations, which he ought to have known to be false, and which he certainly did not know to be true; on the other hand it is an uncontroverted fact that the plaintiff approached the defendants with a falsehood in his mouth in order to conceal his true purpose, and get their claim for as low a price as possible.

Here then is more than doubt; neither of the parties is acting fairly with the other, hence a chancellor will interfere for neither. Under such conditions he will interpose neither to execute nor rescind their contract, but will leave them to their legal remedies, if any such they have.

But there is another principle involved in this case, which seems to have been overlooked by both Master and Court, and that is the wide difference between the facts and circumstances necessary to move a chancellor to refuse the execution of a contract, and those necessary to induce him to rescind it. In the one case interposition will be refused on the ground of improvidence, surprise or even mere hardship; in the other a court will act only on the ground of fraud, illegality, or mistake. (Graham *v.* Pancoast, 6 Cas. 89; Edmond's Appeal, 9 P. F. Smith, 220; Yard *v.* Patton, 1 Har. 278; Stewart's Appeal, 28 P. F. S. 88; Rockafellow *v.* Baker, 5 Wr. 319.)

The Master confesses "that during the whole process of the case, his impressions on this point were all against the plaintiff, and with the defendants, and that the rule of caveat emptor applied." He, furthermore, says, that he reached the conclusion that the plaintiff had a right to rely on the statements made by Stanton as to the existence of coal with much hesitation. This hesitation was overcome by what he supposed the binding authority of Fisher *v.* Worrall (5 W. & S. 478); and Smith *v.* Richards (13 Peters, 26). But the former was a case of specific execution, and the latter one of plain misrepresentation and fraud, so that neither was in point. On all authority then this very hesitation should have led him to a different result. It might well be, especially if the testimony of Vanhooser is to be believed, that neither a chancellor nor a court and jury would enforce this contract against Koch, but under all the circumstances, especially in view of the fact that Koch himself approached the defendants with falsehood and misrepresentation, though perhaps they were not deceived thereby, yet as it may have induced them to deal with him differently from what they would otherwise have done, a chancellor will refuse his interposition to relieve him by the rescission of his contract.

The decree is reversed, and bill dismissed at the costs of the appellee.

Opinion by GORDON, J.

Common Pleas—Law.

C. P. No. 4. May 21, 1881.

Matthews v. Dalsheimer.

Attachment under Act March 17, 1869—Practice—Depositions—Burden of proof—Where affidavit of plaintiff contains a general allegation of fraud the burden of proof is on the plaintiff, and he must take depositions, but where it contains specific charges the burden of contradiction is on the defendant.

Rule to show cause why an attachment, issued under the Act of March 17, 1869, should not be quashed.

The affidavit of the plaintiff, upon which the writ was issued, set forth that the defendants were indebted to him in the sum of $697.10, and that they had property, rights in action, etc., which they fraudulently concealed, and that they had assigned and transferred their estate with the intent to defraud the plaintiff.

The affidavit of the defendant set forth that the defendants had not committed, nor did they contemplate committing, any of the acts alleged in plaintiff's affidavit, nor had they disposed of, assigned, or transferred any of their property with intent to defraud the plaintiff or any of their creditors.

Chas. F. Hinckle, for the rule.

[THAYER, P. J. Where are your depositions?]

Where the affidavit of the defendant denies the fraud set out in plaintiff's affidavit, it is incumbent on the plaintiff, and not the defendant, to take depositions.

Lewis W. Barringer, contra.

Under the decision in Sharpless *v.* Zeigler (8 WEEKLY NOTES, 190) the filing of the affidavit by the plaintiff puts the burden on the defendant, hence it is his duty to take depositions.

[THAYER, P. J. A case within the terms of the statute must be made out to entitle the plaintiff to a writ. It has been the invariable practice

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to take depositions before the case can be heard by the Court. Sharpless *v.* Zeigler (*supra*) has not altered the practice. Each case depends on its own circumstances. Where the plaintiff sets out a specific fraud the burden of contradiction is on the defendant, but when the allegation is general in its terms the burden is upon the plaintiff, and he must take depositions.]

By agreement the case was left open to permit the plaintiff to take depositions.

C. P. No. 4. June 9, 1881.

Ballinger v. Killam.

Practice—Consolidation of causes—Appeal from Prothonotary's taxation of costs brings up the merits of taxation.

Appeal from Prothonotary's taxation of costs in five suits brought by Ballinger against Killam & Blake in Magistrate's Court No. 6, each of which was to recover $3 for hire of wharf used by defendants during five successive days. The wharfage was from day to day, and upon refusal by defendants to pay the bill as rendered each day, successive writs of summons issued returnable on different days. Judgment was given in each case for the plaintiff for $3 and costs, by the Magistrate, who refused to consolidate the suits. A certiorari was taken and defendants' exceptions to the Magistrate's judgments dismissed. The Prothonotary taxed the costs at $9.82 in each suit, or $49.10 altogether, from which the defendants appealed.

Arthur Biddle, for the appeal.

The costs of only one suit should be allowed, as the five suits might have been brought together.

Towanda Bank *v.* Ballard, 7 W. & S. 434.
Curtis *v.* Buzzard, 15 S. & R. 21.

[THAYER, P. J. You must show that bringing so many suits was vexatious. If the first had been brought after the several causes of action accrued it would be so.]

The only reason why they were not brought at once was to prevent an appeal being taken.

Theodore M. Etting (with him *Henry R. Edmunds*), contra.

The authority of a justice of the peace is purely statutory, and he is powerless to consolidate causes under the Act of 20 March, 1810, § 3 (Purd. Dig. 853).

The only question here is whether the Prothonotary committed any error in the taxation, not whether the plaintiff is or is not entitled to costs.

Yeagley *v.* Wenger (C. P. Lancaster Co.), 5 Luzerne Leg. Reg. 119.)

[THAYER, P. J. No; the appeal brings up the merits of the taxation. The Court retains control of the question of costs until there is satisfaction of the debt; and it is immaterial whether the question is raised on motion or by appeal.]

C. A. V.

June 17, 1881. THE COURT. Appeal dismissed.

C. P. No. 4. June 25, 1881.

O'Conner v. Weeks.

Practice—Depositions—Time for filing—Duty of counsel to file depositions as soon as read to the Court.

Rule on defendant to file depositions taken by him in support of motion for a new trial.

Plaintiff obtained a verdict. Defendant moved for a new trial, and took depositions in support of his motion, which were read at the hearing of the rule. The rule for a new trial was made absolute.

W. Herbert Washington, for the rule.

Depositions are not the property of him on whose behalf they are taken; upon reading they should be filed; defendant has no right to withhold them.

1 Troub. & H. Pr. § 615.
Gordon *v.* Little, 8 S. & R. 549.
Vanarsdalen *v.* Dickerson, 2 WEEKLY NOTES, 111.

H. Pleasants, contra.

Defendant cannot be compelled to file depositions until the costs of taking them are paid him.

Martin *v.* Dearie, 9 Phila. 186.

THE COURT. Depositions must be filed as soon as read—it is a breach of duty not to file them. The moment they are read they belong to the Court, and ought to go at once upon the record.

Rule absolute.

Per THAYER, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, SEPT. 15, 1881.* [No. 22.

Supreme Court.

May, '81, 167. June 7, 1881.

Home Ins. Co. v. Davis.

Fire insurance—Conditions in policy—Proof of loss—Waiver of condition—When waiver may be inferred.

A policy of insurance against fire, upon a house and personal property therein, contained a provision that persons sustaining loss or damage by fire should forthwith give notice of said loss in writing to the company, and as soon thereafter as possible render a particular statement of such loss, signed and sworn to by them. The property insured being destroyed by fire, the agents of the company notified the home office, as was their custom, of the loss. Shortly afterwards, a special agent of the company visited the ruins, and, under another provision of the policy, procured from the insured a statement, under oath, of the origin of the fire, and the loss. A month later, the insured was criminally prosecuted by the agent of the company on the charge of having himself set fire to his house, but was acquitted. In October, three months after the fire, he forwarded to the company a proof of loss, which was returned to him as informal, with the regular blanks to be used. These he filled out and returned to the company. Their receipt was acknowledged by the general adjuster. The money not being paid, this suit was brought:

Held (affirming the judgment of the Court below), that the notice of the destruction of the premises by the agent, so far as the house was concerned, was a sufficient compliance with the terms of the policy. As to personal property, the question whether the proofs of loss were furnished to the company in accordance with the terms of the policy was rightly submitted to the determination of the jury.

Held also, that, from the conduct of the company, the jury might have inferred an entire waiver of these proofs; the Court might have found that there was an unqualified acceptance of the proof of loss, and hence a waiver of the condition, and need not have left the question to the jury. The statement made under oath by the insured was equivalent to the statement of loss required by the policy. Under all the circumstances of the case, the company cannot complain of the delay as unreasonable.

SHARSWOOD, C. J., TRUNKEY and GREEN, JJ., dissent.

Error to the Common Pleas of Clinton County.

Debt, upon a policy of fire insurance, by Thomas Davis against the Home Insurance Company, of the city of New York, to recover damages alleged by the plaintiff to have been sustained by him by reason of a fire which destroyed his house, in the city of Lock Haven, and personal property therein contained.

Upon the trial, before ORVIS, J., the following facts appeared:—

By a policy dated 31st July, 1877, the Home Insurance Co. insured the dwelling house of Thomas Davis, the plaintiff, in the sum of $900, and his furniture and clothes, in the south end of the same, in the further sum of $100. On July 7, 1878, this property was totally destroyed by fire. At the instance of the assured, notice of the loss was immediately sent to the home office by the Lock Haven agents of the company, through whom the insurance had been effected. The 9th section of the policy provided:—

"The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examination when reduced to writing; and shall also produce their books of account and other vouchers, and exhibit the same at the office of the company," etc.

On July 17 Mr. Morgan, a special agent of the company, came to Lock Haven, inspected the ruins, got from Davis a statement under oath of the origin of the fire, and the loss, and left, promising to return, which he did not do.

On August 15th H. O. Chapman, one of the Lock Haven agents of the company, began a criminal prosecution against Davis, on the charge of having burned his house with intent to defraud the company. This trial resulted in an acquittal of the defendant. After his acquittal, Davis began proceedings with the view of recovering on his policy.

The terms of the policy required that persons sustaining loss or damage by fire should forthwith give notice of said loss in writing to the company, and as soon thereafter as possible render a particular statement of such loss signed and sworn to by them, etc. On the 4th of October Davis forwarded to the company a proof of loss, which the company, in a letter signed by its special agent, Morgan, informed him was not in due form, and not satisfactory, inclosing blanks which the plaintiff was requested to fill out and return, "due examination and attention" being promised on their receipt. This request was complied with, and on December 12, 1878, a new proof of loss, prepared on the forms sent Davis, was mailed by his counsel to the company. The receipt of these papers was acknowledged by the general adjuster of the company in a letter to the Lock Haven agents, in which he said: ". . . The papers have been forwarded special agent L. S. Morgan, who has the matter in charge for examination. Should he require any further information touching the loss, he will call for it in due time." The money not being paid, the plaintiff brought this suit.

The defendants offered evidence to show that the plaintiff set fire to the house himself, and also claimed that the conditions of the policy had not

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been complied with, and therefore the plaintiff could not recover. The Court left it to the jury to say whether the proof of loss was forwarded to the company "as soon thereafter as possible," or not. They also submitted to the jury the question whether the plaintiff set fire to the property or not, instructing them that if they believed he did, the verdict must be for the defendants. The jury were also instructed to find the value of the property destroyed.

Verdict for the plaintiff for $819.83, and judgment thereon.

The defendants thereupon took this writ, assigning for error:—

(1) The admission in evidence of the proof of loss dated Oct. 4, 1878, nearly three months after the fire, and, therefore, not in compliance with the terms of the policy; (2) the admission of the corrected proof of loss of Dec. 12, 1878; . . . (4) the submission to the jury of the question whether the plaintiff had forfeited his right by neglecting to make proof of his loss; (5) the submission to the jury to determine, as a question of fact, whether the proof of loss was made as soon after the fire as possible; (6) the Court erred in admitting the preliminary proofs and permitting them to be read to the jury without restriction, in disregard of the specific objections made by the defendant below.

H. T. Harvey, for plaintiff in error.

The preliminary proofs to be made and forwarded to the company as soon after the loss was sustained as possible were a condition precedent to the right of the assured to recover. Not only is the form and substance of the proof of loss important, but time is of the essence of this condition, and goes to the very root of the inquiry. Any unreasonable delay would work a forfeiture of the right of the defendant in error to recover, if insisted upon by the plaintiff in error, as the whole of the contract must be complied with in order that the defendant in error may maintain his action.

Shaw *v.* The Turnpike Co., 2 Pen. & W. 454.
Insurance Co. *v.* Sennett, 5 Wr. 161.
Roper *v.* Lendon, 28 Law J. R. Q. B. 260.
Insurance Co. *v.* Stauffer, 9 Casey, 397.

The contract of insurance was forfeited by the neglect of the defendant in error to comply with the conditions of the policy. A contract of insurance cannot be revived or revivified after forfeiture, except by an express agreement of the insurers. The unauthorized letter of the special agent, Morgan, was not sufficient to give the contract new vitality and revive the plaintiff's cause of action.

Diehl *v.* Adams Co. Ins. Co., 8 P. F. Smith, 452.
Beatty *v.* Insurance Co., 16 P. F. Smith, 9.
Trask *v.* Insurance Co., 5 Casey, 198.
Barclay *v.* Weaver, 7 Harris, 401.

The general agents of an insurance company have no power to waive an express condition in the policy.

Mentz *v.* Insurance Co., 29 P. F. Smith, 475.

A fortiori, a *special* agent has no such power, without showing what his duties as special agent are. A party who wishes to avail himself of the acts of an agent in order to charge the principal must prove the authority under which the agent acted.

Hays and Wick *v.* Lynn, 7 Watts, 524.
Moore's Executors *v.* Patterson, 4 Casey, 505.
Union Refining Co. *v.* Bushnell, 7 Norris, 89.

The determination of the question whether the plaintiff below used due diligence in forwarding his proofs of loss was for the Court, there being no facts disputed or controverted, and it was error to submit it to the jury.

Bennett *v.* Young, 6 Harris, 261.
Smith *v.* Fisher, 12 Harris, 223.
Haly *v.* Brown, 5 Barr, 181.
Brenzer *v.* Wightman, 7 W. & S. 264.
Jones *v.* Wardell, 6 W. & S. 399.
Leaming *v.* Wise, 23 P. F. Smith, 173.
Morgan *v.* M'Kee, 27 P. F. Smith, 228.
Addison on Contracts, 1129.
Klein *v*, Insurance Co., 1 Harris, 247.
Insurance Co. *v.* Sennett, 5 Wright, 161.
Trask *v.* Insurance Co., *supra.*
Beatty *v.* Insurance Co., *supra.*
Edwards *v.* Insurance Co., 25 P. F. S. 380.

"Reasonable diligence" . . . requires promptness, and excludes unnecessary delay. For the length of delay held to avoid a policy, see—

Mellen *v.* Insurance Co., 17 N. Y. 609.
McEvers *v.* Lawrence, Hoffmann Ch. 172.
Truman *v.* Insurance Co., 12 Wend. 452.
Kimball *v.* Insurance Co., 8 Gray, 33.
Parson's Law of Business, 400.

The insured cannot avail himself of his own statements to prove his own loss, or the particulars of it; nor is there anything in the policy itself to vary the common law rule of evidence on this point.

Insurance Co. *v.* Sennett, *supra.*
Insurance Co. *v.* Schreffler, 6 Wr. 191; s. c. 8 Wr. 269.
Thurston *v.* Murray, 3 Binney, 328.
Senat *v.* Porter, 7 Durnford & East, 158.
Klein *v.* Insurance Co., *supra.*

T. C. Hipple and *C. S. McCormick*, for defendant in error.

Good faith on the part of the underwriters requires that if they mean to insist on a mere formal defect in the preliminary proofs, they should apprise the assured that they considered them defective in that particular, or to put their refusal to pay upon that ground, as well as others, so as to give him an opportunity to supply the defect before it could be too late; and if they neglected to do so, their silence should be held a waiver of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the condition of the policy.

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Girard Ins. Co. *v.* Mutual Life Ins. Co., 38 Leg. Int. 194.
Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385.
Insurance Co. *v.* Schreffler, 6 Wr. 188.

The evidence offered to show waiver of specific proof of loss was correctly submitted to the jury.

Crawford Co. Ins. Co. *v.* Cochran, 7 Norris, 233.
Buckley *v.* Garrett, 11 Wr. 212.
Insurance Co. *v.* Todd, 2 Norris, 278.
Insurance Co. *v.* Stauffer, 9 Casey, 397.
Insurance Co. *v.* Taylor, 23 P. F. Smith, 353.

The sixth assignment of error is without foundation in fact.

The paper-book shows beyond a question that the only use made of the proof of the loss was to show a compliance with the conditions of the policy of insurance.

June 22, 1881. THE COURT. By a policy dated on the 31st of July, 1877, the defendant below, plaintiff in error, insured the dwelling-house of Thomas Davis, the plaintiff below, in the sum of nine hundred dollars and his furniture and clothes, in the south end of the same, in the further sum of one hundred dollars.

On the 7th day of July, 1878, there was a total loss of this property by fire. At the instance of the assured, as the jury have found, notice of the loss was immediately forwarded to the home office by the resident agent of the company, through whom the insurance had been effected. So far as the house was concerned, the loss being total, as was held in the case of the Lycoming Mutual Insurance *v.* Schollenberger (8 Wr. 259), and very recently in the Farmers' Mutual Insurance Co. of Schuylkill Co. *v.* Moyer (10 WEEKLY NOTES, 129) this notice was, of itself, a sufficient compliance with the terms of the policy without other or further statement of loss. This rule, however, does not apply to the personal property; if, as to it, proofs of loss were not furnished to the company in accordance with the terms of the policy, the plaintiff ought not to have been permitted to recover. Whether such proofs were so furnished was one of the questions submitted to the jury for determination, and the chief complaint made against the rulings of the Court below has its foundation in this submission.

The policy required that proofs of loss should be made and forwarded to the company as soon as possible after the happening of the fire by which the loss occurred. The fact was that the proofs thus required were not furnished until nearly three months after the fire. The defendant contend that this was too late, and that the Court should so have instructed the jury. We agree that without evidence explanatory of the delay this contention would have irresistible force. We think, however, that there was such evidence, and that of a character that warranted the submission that it did account for the delay as the jury have found. As we have before said, the policy requires the proofs of loss to be furnished as soon as possible after the fire, but this language must be construed to mean that the assured is, for this purpose, to have a reasonable time, but what is such reasonable time must depend largely upon circumstances, and as a rule, a question of this kind must, for its solution, be referred to a jury.

From the conduct of the company, the jury, in this case, might well have inferred an entire waiver of these proofs, had that question been submitted to them; but, as it was not submitted to them, we can take no notice of a point of this kind, though, in effect, precisely the same principles were applicable to the question raised in the trial of the case.

In the Lycoming Co. Mutual Insurance Co. *v.* Schollenberger, *supra*, the policy required proofs of loss to be made within thirty days from the time of the fire, but it was held that an agent authorized to settle the loss might waive that requirement and bind the company by the acceptance of such proofs after that time. So in the Inland Insurance Co. *v.* Stauffer (9 Cas. 397), it was announced as sound law that such waiver may be inferred from acts evincing a recognition of liability, or even from a refusal to pay for some other reason than a want of preliminary notice or statement of loss.

But why may not the plaintiff's delay be accounted for on similar principles? Was his delay reasonable under all the circumstances? This was the question submitted by the Court to the jury. His preliminary notice of the fire was in time; and why were not his proofs of loss? *Prima facie*, even to the officers of the company, they were in time. Davis made and forwarded his statement on the 4th of October, 1878; but Morgan, the special agent of the defendant, pronounced it informal and returned to him the company's blanks with instructions to fill them up and return; this was done, and under date of December 13, Mr. Bigelow, the general adjuster of the company, writes to Esq. McCormick, the plaintiff's attorney, acknowledging the receipt of the amended statement, and saying that the papers had been forwarded to Morgan, and if he required further information touching the loss he would call for it. Now one would naturally suppose that this was the end of the matter, and that nothing remained to be done but to pay over the money. Clearly up to this time, the officers of the defendant had not regarded the delay of the assured as unreasonable, or they would have so intimated.

In fact, here was an unqualified acceptance of the proofs of loss, and so the Court might have

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instructed the jury, instead of leaving that body to puzzle over the question of reasonable time; the mistake, however, was one favorable to the defendant, and of which it has no right to complain.

But again, the 9th section of the policy, the same which requires the statement of loss, and directs how it shall be made out, reads thus: "The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examinations when reduced to writing. And shall also produce their books of account and other vouchers, and exhibit the same at the office of the company," etc.

Was this intended as an equivalent of the statement of loss directed by the preceding part of this section? Is it probable that the officers of the corporation so understood it, otherwise they would hardly have furnished Davis blanks for his statement at a date so late as the fourth of November, or afterwards have accepted it without hesitation or demur. However this may be, this much must be conceded, that an ordinary layman, uninformed to the contrary, might well suppose that, having given his statement, under oath, to an agent sent from the home office for that purpose, every question having been fully and unhesitatingly answered, put down in writing, and that writing subscribed and delivered, he had done and performed all that could possibly be required of him. Now, it may be that this man was mistaken; that it was his duty to make another paper of like import, swear to it, and place it in the hands of this same agent. There is, however, this one thing of which we have no doubt, and that is, if it were necessary to go through so useless a ceremony in order to get what the defendant had agreed to pay, an unlettered and unskilled man, like Davis, must be allowed a reasonable time to recover himself from the delusion into which he had been drawn by the company, and to learn, if possible, that something more was required of him.

But, immediately following this examination, a prosecution was instituted against Davis, on information of the local agent of the company, charging him with having, himself, burned the insured premises. The result of this prosecution was a verdict of not guilty. After all this consumption of time, produced by the action of the officers of the underwriters, the plaintiff came to the conclusion that he had better forward regular proofs of loss. Accordingly they were forwarded; were returned, not as rejected, but for correction; were corrected, reforwarded, and, as we have before stated, accepted. After all this we cannot understand how the company can be heard to complain of the delay as unreasonable.

The foregoing disposes of all the material assignments of error, except the sixth; but this cannot be considered.

The complaint is, that the Court admitted the preliminary proofs, and permitted them to be read to the jury, "without restriction, in disregard of the specific objections made by the defendant below." This assignment is not according to rule, for the specific objections here mentioned are not set out, hence it should be be passed without notice. Passing this, however, whilst the paper was offered in evidence, which was altogether proper, I cannot find where it was read to the jury. I suppose it was not so read, for I find no record of any exception to such reading, but only the general one that it was mailed too late to meet the requirement of the policy, an exception already fully disposed of.

Judgment affirmed.

Opinion by GORDON, J. SHARSWOOD, C. J., TRUNKEY and GREEN, JJ., dissent.

Jan. '81, 87. March 15, 1881.

Lycoming Fire Insurance Co. v. Rought.

Mutual insurance companies—Assessments on premium notes—What is a sufficient assessment.

In levying an assessment upon the premium notes of members of a mutual insurance company, it is not necessary for the directors to make a separate assessment on each member by name; nor is it necessary to levy an ascertained sum upon each member; a general assessment upon all the members for a given percentage upon their premium notes is sufficient.

Error to the Court of Common Pleas of Wyoming County.

Covenant, by Leonard Rought, Jr., against the Lycoming Mutual Fire Insurance Company. Pleas, the general issue, and certain special pleas.

On the trial, before INGHAM, P. J., the plaintiff proved the company's policy and his loss by fire.

The defendant offered in evidence the by-laws of the company, of which the following are the material parts:—

13. Every person wishing to become a member of this company, shall previous to being insured, deposit his application and premium note with the secretary (or with an agent or surveyor) of said company, and if approved, the policy shall bear date on that day, and take effect at noon, unless directed by the applicant to be dated on a future day. Five per cent. of the premium note shall be paid at the time of making the application, and one dollar for survey, and fifty cents for policy.

20. Notice of assessment shall be given by the secretary, by publication in at least one of the newspapers published in the county of Lycoming, at least three weeks successively, the last publication of which shall not be less than fourteen days prior to the time fixed for the payment thereof; and in such other newspapers as the directors may deem necessary or expedient. The directors may

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also cause such notice to be published in handbills, posted up at such places as they may direct.

21. Whenever an assessment shall have been made upon the premium notes, and the same is not paid within 30 days after having been demanded by the company through their agents or receivers, the policy of insurance given upon such notes, shall be null and void, until the said assessment be paid, and the directors shall retain such premium notes and collect thereon such sum or sums so assessed.

Defendant also put in evidence the minute-book of the board of directors of the company, in which was the following, passed at a meeting held on October 19, 1871:—

Whereas, the losses by fire in Pennsylvania have been heavy within the last few months, and recently an extraordinary fire has occurred in the city of Chicago, involving a large amount of loss to the company, therefore resolved, that an assessment of 12½ per cent. be made on all premium notes held by the company, and in force on the 10th day of October, A. D. 1871.

This assessment was known as assessment No. 29. The secretary testified that the assessment was made in accordance with this resolution upon all members of the company. It was not paid by the plaintiff, and at the time of his loss by fire he was more than thirty days in default, although he had been duly notified by a notice containing a reference to the by-laws of the company.

On the trial, the defendants were not able to produce the plaintiff's premium notes, and offered in evidence the following deposition of H. H. Walton.

"I am the treasurer of the Lycoming Fire Insurance Company, formerly "the Lycoming County Mutual Insurance Company. . . . I was clerk in this office during the year 1870, and up to the time I was elected treasurer.

"I can't produce the premium note given by Leonard Rought, Jr., on application No. 109,221. I have made diligent search among my papers as treasurer, for that paper; the premium notes belonging to this company are under my control as treasurer. My knowledge of the business of this company is, that this company has always used the same printed form of premium notes. Until the name of the company was changed the notes were made payable to the Lycoming County Mutual Insurance Company, and since the change, to the Lycoming Fire Insurance Company.

"Paper marked, etc., shown witness. I believe this to be a copy of the original premium note. Assessment No. 29, on Policy No. 109,221, issued to Leonard Rought, Jr., was reported by the collectors unpaid, and stands open and unpaid on the books of the company; the assessment amounted to $39.56. I presume I have seen the Leonard Rought premium note, but cannot answer positively."

This testimony was objected to, "because it is sought to prove the contents of a note by a witness who says he never saw the note; and because it is sought to show an assessment by parol which could only be shown by the written assessment."

The Court ruled as follows: "So much of these depositions as tends to show or is given for the purpose of showing the contents of the premium note by witnesses who do not themselves testify as to having had actual knowledge of its contents at any time—that is rejected. Exception for defendants." (Third assignment of error.)

Upon the application for insurance, signed by the plaintiff, was the following:—

Amount of premium note, $316.50.

And upon the back of the policy was:—

Rate of Risk, 25. Premium Note, $316.50.
Per Cent. Paid $15.82. Application and Policy, $ 1.50.
D. G. BLACK, *Agent.*

The defendants requested the Court to charge, *inter alia*, (2) "The directors of the company, having acted in good faith, and in accordance with their act of incorporation and by-laws in the making of assessment No. 29, and no evidence of gross mistake or fraud having been produced to impeach their action in making the same, the assessment must be considered valid in law and binding upon the assured." To this we answer there is no evidence which calls into question the good faith of the company. The Court decline to say to the jury that the assessment must be considered valid in law, and binding upon the assured. (Tenth assignment of error.)

In the general charge, his Honor said: The defence to the claim is that the plaintiff neglected to pay his assessment on his premium note for more than thirty days after demand, and that the loss occurred while such assessment remained unpaid. This would be a good defence if both facts alleged were established by the evidence—the demand for the payment of an assessment and neglect to pay it, was proven. But the fact of the assessment is not sufficiently established. The burden is upon the company of proving the assessment; it is an official act of the officers of the company, and the proof should be clear and satisfactory. (Then reciting the resolution *ut supra.*)

[While perhaps the form of this record is immaterial, yet it cannot be an assessment if it does not set forth the name of the maker of the note and the amount assessed upon it. There is no evidence that such an assessment was made on the premium note of the plaintiff in this case, nor does the notice of an agent that such an assessment had been made supply the defect. Notice that something had been done which had not been done is a mere nullity.] (Ninth assignment of error.)

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Verdict and judgment for the plaintiff. Defendants took this writ, assigning for error, *inter alia*, the ruling upon the testimony, the answer to defendants' points, and the portion of the general charge inclosed in brackets.

Jacob A. Hazen and *Wm. M. Piatt & Sons*, for plaintiffs in error.

The Court was not warranted in saying to the jury that there was no assessment made on the plaintiff. The minute-book showed a resolution to make assessment; the very notice which the plaintiff offered in evidence showed that the assessment had been made and the amount of it, and the Court should have said to the jury that the assessment was a valid and binding one upon the defendant.

The plaintiff below was a member of the company, and as such was bound by the action of the board of directors.

Mitchell *v.* Ins. Co., 1 Sm. 402.
Buger *v.* Ins. Co., 21 Id. 422.
Hummel's Ap., 28 Id. 320.
Ins. Co. *v.* Cochran, 7 N. 234.

Sittser & Harding (*Chas. E. Terry* with them), for defendant in error.

The ruling of the Court that the assured could not be assessed without being named is supported by authority.

Catlin *v.* Smith, 2 S. & R. 267.
Greenough *v.* Coal Co., 24 Sm. 486.

May 2, 1881. THE COURT. It is well settled, if a member of a mutual insurance company is in default in the payment of an assessment on his policy, after due notice according to the by-laws and rules of the company, the protecting power of the policy is suspended until the assessment is paid. No recovery can be had for a loss sustained during the continuance of such default. (Hummel *et al.'s* Appeal, 28 P. F. Smith, 320; Columbia Ins. Co. *v.* Buckley, 2 Norris, 293; Washington Mutual Fire Ins. Co. *v.* Rosenberger, 3 Id. 373; Crawford County Mutual Ins. Co. *v.* Cochran, 7 Id. 230.)

The main contention here is, whether the alleged assessment was actually made on the 19th of October, 1871. It is known as assessment No. 29. The minute-book of the company, duly proved, shows that a meeting of all the directors was held on that day, and the following preamble and resolution were adopted: "Whereas the losses by fire in Pennsylvania have been very heavy within the last few months, and recently an extraordinary fire has occurred in the city of Chicago, involving a large amount of loss to the company, therefore Resolved, that an assessment of 12½ per cent. be made on all premium notes held by the company, and in force on the 10th day of October, 1871." The secretary of the company testified that, in pursuance of that resolution, an assessment was made on all the premium notes, as directed by the board of directors. Among the others, an assessment was made on the premium note of the defendant in error. H. A. Smith testified that he, as agent of the company, sent a notice of this assessment, No. 29, to the defendant in error about the first of December, 1871. The learned Judge thought there could be no assessment that did not set forth the name of the maker of the note, and the amount assessed upon it, and therefore charged there was no evidence that such assessment was made on the premium note of the defendant in error, nor did the notice of an agent, that such an assessment had been made, supply the defect.

In holding that an assessment could not be valid unless the resolution levying it set forth the name of the defendant in error, and the sum assessed on his note, there was error. We believe a reference to the maker of each note by name is unusual and wholly unnecessary. The resolution covered all notes in force at the date specified. It imposed a specific percentage on each. That is certain which may be made certain. It was very easy to ascertain the sum imposed on each note. The work was merely clerical, and could be readily performed by any person who understood the multiplication table. The precise sum he was required to pay was ascertained and stated in the notice sent to him. He was therein required to pay the specific sum within thirty days, and also reminded of the by-law which declared the policy to be null and void unless so paid. It is true a notice of an assessment, when, in fact, none had been made, would not supply the defect. But that is not this case. The notice showed him the precise sum the percentage produced, and relieved him from making the calculation. Levying a specific percentage on a note of a certain and fixed amount, is wholly unlike fixing a rate of taxation on land on which the valuation is not yet ascertained. Until the valuation of the land is determined, no computation can show the sum to be paid.

There is some force in the argument of the counsel for the defendant in error, that the record does not show clearly what portion of the deposition was received in evidence. There is, however, an assignment to meet each view of the case. If the part to which we have referred was rejected, it was error. If it was admitted, then it was error to charge there was no evidence of an assessment.

Much useless contention appears to have arisen on the trial, when the witnesses on the part of the plaintiff in error referred to the amount of the premium note. The amount of it was distinctly stated on the foot of the policy which the defendant had already given in evidence. We think the evidence was amply sufficient to submit to the jury to find whether the assessment

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had been made. In so far as the objections covered by the assignments are in conflict with this opinion they are sustained.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J.

Jan. '80, 130. Jan. 19 and 20, 1881.

Green and Coates Streets Passenger Railway Company v. Bresmer.

Master and servant—Relative duties and obligations of—Negligence—Contributory negligence.

Although a master in no sense warrants the safety of his servants, he is, nevertheless, under an implied contract to furnish such instruments, means, and places for conducting the business in which he employs them, that they can perform their duties safely and without exposure to danger which is not within the reasonable scope of their employment.

A servant will be presumed to have contracted to run all the reasonable risks incident to his employment; à fortiori is this the case where he has had an opportunity to become acquainted with such risks.

A., being employed as an hostler by a passenger railway company, was injured while grooming a vicious mare belonging to the company by a kick received from her. Her vicious propensities were known to A., to other employés of the company, and to the officers thereof. She had previously kicked A., but he had made no complaint, and had not asked to have her removed from his charge. At the time of the injury A. had not tied the mare up as he usually did when grooming her, having lost his strap. In an action by A. against the company to recover damages for the injury done him:

Held, That the plaintiff was not entitled to recover.

In an action against a passenger railway company to recover damages for an injury occasioned by the kick of a vicious mare belonging to defendant, evidence is admissible in order to show that the company knew of the vicious character of the animal, that the defendant's stable boss was possessed of such information, and had had a conversation with the superintendent of the company relative to the sale of the mare.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by John Bresmer against the Green and Coates Street Passenger Railway Company to recover damages for an injury done the plaintiff by the kick of a vicious mare belonging to defendant.

On the trial before BIDDLE, J., the following facts appeared: Plaintiff was employed as an hostler by the company defendant. He had had for some time prior to the injury charge of a certain vicious mare, who was apt to kick. This fact was known to plaintiff and to other employés. While engaged in grooming her on December 9, 1878, as was his duty, plaintiff received a kick from the mare injuring him severely. He had once before been kicked by her, but had not complained or asked to have her removed from his care. At the time the injury occurred plaintiff had not tied up the mare as was his custom when grooming her, because, as he testified, he could not find his strap.

The plaintiff offered to show that the vicious character of the mare was known to the stable boss; also, that the stable boss had told the superintendent that the president of the defendant had ordered the horse to be sold, and that the superintendent had replied that he would like to see himself sell the horse, as five trips a day would not hurt her.

Objected to; objection overruled. Evidence admitted. Exception. (Eleventh and twelfth assignments of error.)

Defendant presented, *inter alia*, the following points:—

(4) That if the jury believe the plaintiff's statement that he had been previously kicked by the same horse complained of in this case, and that he still remained in the company's service, and in charge of the horse in question, he, thereby, assumed the risk of being kicked by it, and the verdict must be for the defendant. Refused. (Fifth assignment of error.)

(5) That if the jury believe from the evidence that the horse in question was accustomed to kick, and that the plaintiff knowing the fact remained in the service of the defendant as hostler, then even if the defendant were fully aware of the said propensity of the horse, the plaintiff cannot recover, but the verdict must be for the defendant.

(9) That the plaintiff can recover in this case only on the ground that the injury was caused by the negligence of the defendant, and if the jury find from the evidence that the defendant had in its possession a mare disposed to kick, which was placed in the care of the plaintiff, that he had knowledge of the disposition of the mare, and whilst in the performance of his duty as hostler of the defendant he received his injury from a kick of the mare, he cannot recover in this action, even if the jury believe that the defendant knew of the disposition of the horse.

(10) It was not negligence in the defendant to keep this mare, even if she was a kicker and the defendant knew it, if the plaintiff had knowledge of the fact and had been warned against her disposition.

These points the Court answered together, as follows: "If the servant, in obedience to the orders of the company, took charge of this horse, and, although he knew him to be dangerous, reasonably supposed that he could by unusual caution and skill escape injury, it would not relieve the defendant here, if, after taking such

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precaution, he was injured." (Sixth, seventh, eighth, and tenth assignments of error.)

Verdict and judgment for plaintiff. (Reported in the Court below, Bresmer *v.* Green and Coates Sts. Pass. R'y Co., 8 WEEKLY NOTES, 11.)

Defendant thereupon took this writ, assigning for error, *inter alia*, the admission of the evidence above adverted to, and the answer to defendant's points above cited.

Henry Budd, Jr. (with him *Geo. W. Thorn*), for plaintiff in error.

The plaintiff had engaged to run all the risks incident to his employment, and among other risks that of being kicked by a horse.

Whart. on Neg. § 199.
1 Addison on Torts, 569.

Even if the distinction taken by the Court below, that the risk of being kicked by a *vicious* horse is not one of the ordinary risks of the position of an hostler, be correct, still the plaintiff should not recover, because, after learning the character of the horse, he remained in the same employment without complaint. He thereby took upon himself the unusual risk of caring for a vicious horse.

Dynen *v.* Leach, 40 Eng. L. & E. R. 491.
Shipp *v.* Eastern Counties R. W. Co., 9 Ex. 223.
Assop *v.* Yates, 2 H. & N. 768.
Priestley *v.* Fowler, 3 M. & W. 1.
Greenleaf *v.* Ill. Cent. R. R. Co., 29 Iowa, 14.
Buzzell *v.* Laconia Manuf. Co., 48 Me. 113.
Mad River R. R. Co. *v.* Barber, 5 Ohio St. 541.
Hayden *v.* Smithville Co., 29 Conn. 548.
Sullivan *v.* India Manuf. Co., 113 Mass. 399.
Frazier *v.* Penna. R. R. Co., 2 Wr. 104.
Mansfield Coal & Coke Co. *v.* McEnery, 8 WEEKLY NOTES, 81.

The facts were different in Patterson *v.* R. R. Co. (26 Sm. 390), which was relied on by the Court below. There the plaintiff had complained of the danger, was promised that it should be remedied, and was requested meanwhile to continue his work. The plaintiff here was further guilty of contributory negligence in not tying up the leg of the horse, as was his custom. There was also error in allowing the knowledge of the "stable boss" to be regarded as that of the company. To affect a corporation with notice to its employés, it must be given to the head of the department having control of the matter, and being vested with discretionary powers therein. A stable boss has no such authority.

Gustavus Remak, for defendant in error, presented no paper-book, but relied on—

Patterson *v.* R. R. Co., 26 Smith, 390.
Oak Bridge Coal Co. *v.* Reed, 5 WEEKLY NOTES, 3.

May 2, 1881. THE COURT. This action was to recover damages for injuries which the defendant in error sustained by the kick of a horse owned by the company. He was in the employment of the latter as an hostler. As such he had charge of several horses, including the one which injured him.

A master does not warrant his servant's safety. He, however, is under an implied contract with those whom he employs to adopt and maintain suitable instruments and means with which to carry on the business in which he requires their services. This includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duties safely or without exposure to dangers that do not come within the reasonable scope of his employment. (Cayzer *v.* Taylor, 10 Gray, 274; Seaver *v.* Boston & Maine R. R., 14 Id. 466; Gilman *v.* Eastern R. R. Co., 10 Allen, 233; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572.) A servant, however, assumes the risk naturally and reasonably incident to his employment. He is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. (Hayden *v.* Smithville Manufac. Co., 29 Conn. 548; Mad River & Lake Erie R. R. Co. *supra;* Whart. on Neg. § 217.) Inasmuch as the relation of master and servant cannot imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself, he cannot complain if he is injured by exposure, after having the opportunity of becoming acquainted with the risks of his employment, and accepts them. (Id. §§ 214 and 217; 1 Addison on Torts, § 255.)

The undoubted evidence in this case shows the defendant in error had full knowledge of the vicious habits of the mare which kicked him. She had kicked others, and her reputation was well known to the persons employed in the stables, and they were warned to guard against being injured by her.

The defendant in error testified that she had kicked him before, yet he swears, "I never complained or asked to have my stock changed;" and still further, "I always strapped up the front legs, but on that morning I could not find my strap." Thus he not only had full knowledge of her practice and of the risk and danger he incurred when grooming her, yet he made no complaint, and was accustomed to protect himself by so securing a front leg as to prevent her kicking.

No duty was imposed on the company to inform him of what he so well knew, nor to forbid his grooming the mare. He voluntarily assumed the risk, and continued to expose himself to a well-known danger. He cannot now cast on his employer a liability for the injury which he thereby sustained. It matters not that the master did know the vicious habits of the mare. It is the knowledge of the servant which withholds from him a right of action. (Haskin *v.* N. Y.

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Central R. R. Co., 65 Barb. 129; Frazier *v.* Penna. R. R. Co., 2 Wright, 104.)

It follows, the learned Judge erred in not affirming the points covered by the fifth, sixth, seventh, eighth, and tenth assignments. We discover no error in the eleventh and twelfth assignments. In so far as the remaining assignments are in conflict with this opinion, they are sustained.

Judgment reversed.

Opinion by MERCUR, J.

July, '80, 115. January 25, 1881.

Jimison et al. v. Reifsnyder.

Distress—Remedy for excessive—Landlord and tenant—Liability of sub-tenant—Unrecognized sub-tenant has no right to compel landlord to sell goods of tenant first—Effect of stay of proceedings on replevy as against owner of goods not replevied.

Evidence of excessive distress is irrelevant in an action of replevin. The remedy for the wrong is by an action on the case founded on the Statute of Marlbridge.

Karns *v.* McKinney, 24 Sm. 387, followed.

A landlord having distrained on property found on the premises demised, a portion whereof belonged to an under-tenant of the lessee who was in without the landlord's consent, the under-tenant cannot compel the landlord to cause to be sold the goods of his lessee, before satisfying the rent out of his own.

This principle is not affected by the fact that the under-tenant may have paid his rent in full to *his* landlord, the lessee of the whole premises.

If the under-tenant replevy his property and enter security, the landlord is precluded from proceeding further against the goods replevied, and the exercise of his right to stay proceedings against the other goods distrained upon, does not render invalid any act of his prior to the execution of the writ of replevin, which was valid when performed.

Therefore the stay of proceedings is not such a release or discharge of the lessee as would relieve the under tenant from liability.

Error to the Common Pleas No. 2, of Philadelphia County.

Replevin, by J. P. Reifsnyder against Thomas H. Powers and William Weightman, trading as Powers & Weightman, and James K. Jimison. The latter was summoned and the property was delivered to the plaintiff upon his entry of security. *Nihil habent* was returned as to the other defendants.

The declaration in replevin alleged the taking and detention of the plaintiff's goods on the demised premises. The sheriff having returned *nihil habent*, as to Powers & Weightman, their bailiff, James K. Jimison, filed his cognizance, acknowledging the taking of the plaintiff's goods on the demised premises as a distress for rent then due and in arrears to Powers & Weightman.

The plaintiff filed three pleas. The first denied that Jimison was the bailiff of Powers & Weightman, and tendered issue. The second denied that any part of the rent mentioned in the cognizance was due and in arrears from Hall & Richardson, the lessees, to Powers & Weightman, and tendered issue. The third plea averred that at the same time the plaintiff's goods were distrained, the defendants also levied on the goods of Hall & Richardson, the lessees of Powers & Weightman, which were more than sufficient in value to pay the said rent; yet the defendants released and discharged the goods of Hall & Richardson from all liability for said rent, although requested by the plaintiff to proceed, in the first instance, to make the rent out of the goods of Hall & Richardson, which they refused to do.

The defendant, in his replication to the said third plea, traversed the alleged release and discharge of the goods of Hall & Richardson, from the said distress for the said rent so due and in arrears to Powers & Weightman, as in the said third plea set forth.

The facts, as they appeared upon the trial were as follows: On April 1, 1868, Powers & Weightman demised the premises in question to Hall & Richardson. Soon afterwards, in violation of the terms of the lease, Hall & Richardson sublet a portion of the premises to Reifsnyder, whose tenancy never was recognized by Powers & Weightman. Hall & Richardson being in arrears for rent, Powers & Weightman, by Jimison, their bailiff, distrained on the goods upon the premises upon April 20, 1878. The rent in arrear was $675. The distress was $5000 of the goods of Hall & Richardson, and $3000 of the goods of Reifsnyder. The different ownership was not known to the bailiff. After the levy, Reifsnyder asked Powers & Weightman to release his goods, telling them that they had sufficient of Hall & Richardson to satisfy the rent, and if not, they could sell his. This they refused to do. He also requested the bailiff to proceed in the first instance to sell the goods of Hall & Richardson; but the bailiff also declined to accede to this request, whereupon, on April 23, Reifsnyder replevied his goods, giving bond in the sum of $4000. Powers & Weightman then instructed their bailiff to stay proceedings against the goods of Hall & Richardson, which was accordingly done.

The defendant requested the Court (HARE, P. J.) to charge:—

(1) That on April 1, 1878, Hall & Richardson, lessees, being indebted to their landlords, Powers & Weightman, in the sum of $675 for

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rent of the demised premises, Sixth and Oxford Streets, Philadelphia, and then in arrear, they had the right, by their bailiff, the defendant, to distrain on the goods and property of the plaintiff, Reifsnyder, described in the writ of replevin, at that time found on the demised premises, in satisfaction of the said rent so in arrears.

(2) That even if there were *other* goods and property on the demised premises, at the time of the said distress, not embraced in the present replevin, *sufficient in value* to satisfy the said rent then in arrears, still the plaintiff's said goods, found on the demised premises at the time of the said distress, were liable for the said rent, and the said distress thereupon was proper and lawful.

The Court declined to charge as requested, and instructed the jury to find for the defendant on the issues joined on the first and second pleas, and left the issue joined on the replication to the third plea to the avowry (cognizance) to the jury, on the evidence.

Under the Court's instructions the jury found for the defendant on the issues joined on the first and second pleas, assessing the rent in arrears at $755, and finding the value of the goods distrained, $2000.

On the issue joined on the replication to the third plea, the jury found for the plaintiff.

A motion for judgment on the whole record, *non obstante veredicto*, was dismissed, the Court, per HARE, P. J., delivering the following opinion:—

"The question presented by the record is, Can a stranger to the lease, whose property had been taken under a distress made for the rent, require that the constable shall not offer his goods for sale until the tenant's goods have been sold and found insufficient to pay the debt? I state this as the question, because an under-tenant owes nothing to the landlord, and can claim no more from him than a stranger whose goods are accidentally on the premises at the time of the levy. The legal right of the landlord is absolute, and the point to be determined is, whether he should so exercise it as not to sacrifice the stranger's property unless such a course is requisite for his own protection. It is well settled under the authorities, that a creditor should not be delayed or hindered in the use of any remedy for the satisfaction of the debt, even when the effect of refusing the injunction will be to throw the burden on one who, like a surety, is not primarily or ultimately liable, and thus give rise to a circuity of action; but it is not less clear that when the fund or property in question is within the grasp of the law, and the question is merely as to the order in which it should be sold or appropriated, a chancellor may well direct that the principal debtor's goods shall be the first brought to the hammer, and the execution stayed if they produce enough to satisfy the claim. If such be the rule, it applies emphatically in the present instance, where the plaintiff's modest demand was not for the delay or omission of any step requisite to make the distress effectual, but that the landlord should, out of the whole mass of goods levied on, select those which belonged to the tenant, and dispose of them before proceeding to sell the plaintiff's goods for a debt which he did not owe. We have arrived at this conclusion with some diffidence, because the case appears to be one of the first impression, and we do not desire to complicate or embarrass a remedy which is not less valuable to the tenant by enabling him to obtain credit, than to the landlord as a security for the rent; but we do not perceive that any inconvenience can arise from requiring that when the goods of a tenant and of an under-lessee or stranger have both been distrained for rent arrear, the tenant's shall be first sold, as being the party who is really answerable.

"The landlord need not postpone the distress, the appraisement, or the sale, for an hour, nor is it incumbent on him to inquire whether the goods which the stranger or under-tenant claims as his, do or do not belong to him. The only restriction imposed is that the goods which are not so claimed shall be offered for sale in the first instance, and so much only of the residue disposed of as may be requisite to satisfy the arrears and costs.

"The plaintiff's equity is stronger in the present instance, because it appears from the pleadings and verdict, that he had paid his rent to Hall & Richardson, which, as KENNEDY, J., intimated in Quinn *v.* Wallace (6 Wharton, 452, 457), might well exempt his property from liability for the rent due from them, when the lessors actually held a sufficient amount of their property to pay the amount in full."

The defendant thereupon took this writ, assigning for error the refusal of the Court to charge as requested, and the refusal to enter judgment *non obstante veredicto*.

William Ernst (*R. J. C. Walker* with him), for the plaintiffs in error. The landlord was bound to deliver up the goods upon replevy, and to look to the bond for his security for the rent.

Baird *v.* Porter, 17 Sm. 105.

Cassidy *v.* Elias, 37 Leg. Int. 74, Feb. 13, 1880.

It then became the duty of the landlord to abandon all further proceedings.

The entry of the under-tenant was in violation of the lease, and his goods were subject to the distress. After the entry of security, the bailiff was not bound to proceed, under his warrant, against other goods not embraced in the replevin.

Karns *v.* McKinney, 24 Sm. 387.

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There was no evidence that the sub-tenant had paid his rent, nor was the fact material.

Murphy *v.* Borland, 37 Leg. Int. 94, Feb. 27, 1880.

The withdrawal of the bailiff after the entry of security did not have the effect of a release.

No law requires, and, in practice, it would be impossible, that the landlord should assume the delicate task of distinguishing between the goods of his tenant and of a sub-tenant, and of selling first those of the former.

L. N. Rich, for the defendant in error.

The law dislikes circuity of action, and the landlord has no right to put the under-tenant to an action against the lessee, when he has sufficient goods of the lessee to satisfy his rent.

Quinn *v.* Wallace, 6 Wh. 457.
Karns *v* McKinney, *supra.*

The under-tenant is to be regarded in the light of a surety.

Parker's Appeal, 8 W. & S. 454.
Talmage *v.* Burlingame, 9 B. 21.
Commonwealth *v.* Miller, 8 S. & R., 457.
Everly *v.* Rice, 8 H 297.
Bank *v.* Fordyce, 9 B. 275.

The abandonment of the lessee's goods was a release of the sub-tenant.

May 2, 1881. THE COURT. This complaint is against the plaintiff in error, as bailiff of Powers & Weightman. As such he distrained, for the non-payment of rent, goods on the premises demised by them to Hall & Richardson. The warrant issued and the distress was made on the 20th of April, 1878.

That rent was then due and unpaid is found as a fact. That the goods of the defendant in error found thereon were liable to distress for the rent, cannot, under numerous authorities, be questioned. (Karns *v.* McKinney, 24 P. F. Smith, 387.)

What, then, is the grievance of which the defendant in error complained, and which he sought to redress in this action? Without the consent of Powers & Weightman, he appears to have leased a portion of the demised premises of Hall & Richardson. Claiming the latter had goods on the premises of sufficient value to satisfy the rent, he demanded of Powers & Weightman that they should release his goods and first proceed against the goods of Hall & Richardson. He also requested the bailiff to proceed first against their goods. On their declining so to do, he, on the second day after the distress, brought this action of replevin for his goods, and gave bail to the sheriff. The latter made return that he had replevied as commanded; had duly summoned Jimison on the 24th of April, 1878, and delivered the property to Reifsneider, and *nihil habent* as to the other defendants.

The plaintiff in error made cognizance. The first plea thereto denied that he was bailiff, and the second that there was any rent in arrear. On both these pleas the jury found for the plaintiff in error. The third plea averred that, at the time of taking the goods of defendant in error, the bailiff also took in the same distress, goods of Hall & Richardson, of value more than sufficient to satisfy the rent, and afterwards, to wit, on the 23d of April, 1878, that said Powers & Weightman and said Jimison did release and discharge said last goods from said distraint, knowing the goods in said cognizance mentioned belonged to defendant in error. The replication denied all such release and discharge of said goods. Issue was joined on the pleas, and on this third plea the jury found in favor of the defendant in error. They also found the property distrained was of much greater value than the rent in arrear. The Court considered the distress excessive. It appears to have assumed that fact to be fatal to the right of the landlord to distrain, and thereupon entered judgment against the plaintiff in error.

The question of excessive distress was irrelevant in the action of replevin, and the evidence thereof inadmissible. (Karns *v.* McKinney, *supra.*) If, in fact, the distress was excessive, the proper remedy is by action on the case, founded on the Statute of Marlbridge. (3 Black. Comm. 12; Robert's Dig. 177; McKinney *v.* Reader, 6 Watts. 41; Karns *v.* McKinney, *supra.*)

All the facts necessary to give a right to distrain existed. It was exercised by making one distress on property found on the premises, a portion of which belonged to the under-tenant. One complaint now is, a refusal within two days after distress made, to release and discharge his goods from the distraint, or at least to agree to sell first the goods of Hall & Richardson; the other is that the said last goods were released and discharged from the levy. The evidence sustains the fact averred in the first complaint. No authority was cited showing such release to be demandable of right. None that it was error to refuse. The uncontradicted evidence is, that the bailiff made but one distress, and did not at that time know anything about the ownership of the goods distrained. There is no evidence that any of the goods of Hall & Richardson were released and discharged from the levy before the writ of replevin was executed. After its execution, the landlords told their bailiff to stop proceedings. Thereupon he did nothing further, but let them have them, and, as we have shown, the sheriff delivered the others to the defendant in error. This action was not for detaining the goods of the defendant in error after they were replevied, but for refusing to release them before they were replevied. There was really no evi-

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dence in support of the third plea to submit to the jury. But having been found, they were insufficient, in law, to support the judgment. It was assumed by the learned Judge that the defendant in error had paid his rent to Hall & Richardson. A careful examination fails to find any such averment in the pleadings, or in the evidence on the trial; nor is it found in the verdict as set forth in the paper-book. If, however, such was the fact, it in no wise changed the right of Powers & Weightman to distrain his goods. He was not their immediate tenant; they had not recognized his tenancy. He had not paid them, nor by their authority paid to any other person. (Quinn *v.* Wallace, 6 Whart. 452.) When his writ of replevin was executed, he gave security which was satisfactory to Powers & Weightman. The goods of the plaintiff in the writ were taken out of their hands. They had a right to rely on that security. They were precluded from then proceeding further against the goods thus replevied, and had an undoubted right to stay proceedings against the other goods distrained. In so doing, after the writ of replevin was executed, they did not in the least render invalid any act of theirs prior to its execution, which was valid when performed.

The Court therefore erred in not entering judgment in favor of the defendant below, on the whole record, notwithstanding the verdict on the third plea. This view of the case makes any more specific answers to the assignments unnecessary.

Judgment reversed, and judgment in favor of the plaintiff in error, *non obstante veredicto.*

Opinion by MERCUR, J.

July, '79, 92. January 18, 1881.

In re Thirty-ninth Street.

Road law—Damages and benefits for taking land—Actual taking of land the ultimate basis.

Under the Acts of April 21, 1855 (P. L. 264), and April 1, 1864 (P. L. 20), allowing damages and benefits to landowners for the opening and widening streets, the actual taking of land is the ultimate basis of the right to have damages; hence where the opening of the street is not a legal possibility, there can be no recovery.

A petition was filed, setting forth that the petitioners were the owners of a lot of land, and that the commissioners had notified them that a street would be opened through their ground, and prayed that a jury be appointed; a jury having been appointed, reported that the petitioners would be damaged to an amount therein specified, and assessed the damages on surrounding property, but no where reported that the street had been opened:

Held (reversing the judgment of the Court below), that the petition and report were defective.

In re Plan No. 166, 9 WEEKLY NOTES, 43, commented on by GREEN, J.

Certiorari to the Quarter Sessions of Philadelphia County.

The trustees of the estate of Joseph K. Eyre presented a petition to the Court of Quarter Sessions, setting forth that they were the owners of a lot of ground in the neighborhood of Fortieth and Pine streets; that a large part of the above-described lot or piece of ground is now included within the lines and limits of the said Thirty-ninth Street, as confirmed upon the plans of the city of Philadelphia. That the petitioners received notice on the 25th day of May, 1871, from the Chief Commissioner of Highways that at the expiration of three months from the date of the said notice, the said Thirty-ninth Street would be opened from Robin Street to Baltimore Avenue for public use, and over ground owned by the petitioners as above set forth. That by such opening for public use much the greater part of the said lot of ground, and all now in their possession, will be taken by the city for public use, to the great damage of the petitioners.

They therefore prayed the Court to appoint the proper persons, designated by Act of Assembly, to view, review, and assess damages caused by the opening of the said Thirty-ninth Street for public use.

The jury having been duly appointed, reported "that the estate of Joseph K. Eyre is damaged to the extent of nine thousand five hundred dollars, which amount we award to H. G. Clay, Esq., of counsel for Harry G. Clay and Edward H. Eyre, trustees of the estate of Joseph K. Eyre, as and for the damages sustained by the said estate; and that the West Philadelphia Industrial Scool is damaged to the extent of one thousand five hundred dollars, which amount we award to John B. Colahan, Esq., of counsel thereof, as and for the damages by it sustained.

"And we do further find and report that properties in the vicinity are benefited to the extent of four thousand eight hundred and seventy-three dollars and ninety-one cents ($4873.91), which sum we assess as benefits upon the properties marked upon the plans Nos. 1 and 2, hereto attached, as follows: the sum set opposite each lot being the proportionate part thereof, which, in our opinion, represents the increase in value imparted to it by the said opening, that is to say:" . . . .

These benefits were assessed upon a large number of properties.

Numerous exceptions were filed, among which were the following by the Woodland Cemetery Company:—

(4) Because the change of plan (made by special Act of Assembly, after the Court of Quarter Sessions had refused to confirm it) called in this proceeding "the opening and widening of Thirty-ninth Street from Talbot Place to

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Woodlands Avenue," for which the jury in this proceeding was appointed to assess damages, leaves an open space nearly 200 feet in width as a park or plaza, not necessary nor proper for a street or avenue for travel only, and the said assessment of benefit upon the said company exceptants being made for alleged advantanges to them by reason of said plaza, as an ornament or park in front of their entrance, and not as affording any additional facilities for travel, and that therefore the said assessment is illegal.

(5) Because the Board of Surveyors of the city of Philadelphia, since the appointment of the jury in this matter, have by resolution, under the power vested in them by law, finally confirmed Plan No. 166, of said city, altering the west line of said Thirty-ninth Street from Talbot place to Woodlands Avenue, restoring the street between the said points to its former width of sixty feet, thus making unnecessary the payment of any damages or the assessment of any sum either upon the city of Philadelphia or upon surrounding owners.

These exceptions were subsequently dismissed, and the report confirmed, whereupon the exceptants appealed, assigning for error the action of the Court.

Joseph B. Townsend, for appellants.

The only possible object of making the west line of Thirty-ninth street straight, was to give the general traveling public a straight roadway down Thirty-ninth Street to Baltimore Avenue; and the only possible object of leaving this great plaza was for some imagined future public use, for a fountain, with a small grass plot around it, or as a paved open space for the assembly of meetings, or as a hack stand. That it affords no needed highway facilities to the *surrounding* owners is also shown by the numerous streets of good width meeting in the vicinity.

That such a tax is unconstitutional see—

Hammett *v.* Phila., 15 Sm. 151.
Washington Ave., 19 Id. 359.
Rutherford's Case, 22 P. F. Sm. 82.
Reed *v.* Erie, 29 Ib. 346.
Wistar *v.* Phila., 30 Ib. 505.
Seely *v.* Pittsburgh, 1 N. 364.

At the time that this report was confirmed, the plaza in question was not in existence, either on the plan of the city or on the ground.

The Board of Surveyors who, under the Act of June 6, 1871 (P. L. 1353) had final and exclusive jurisdiction to "examine and finally confirm or reject all plans of surveys or revisions of plans of the city of Philadelphia," had vacated the west line of Thirty-ninth Street from Robin Street to Baltimore Avenue, and had fixed the said line parallel with the east line, and 60 feet therefrom, thus taking no ground at all, but fixing the street as, it is admitted by the other side, it existed prior to the Act of 1862.

This question has been finally settled by this Court (In re Plan 166, 9 WEEKLY NOTES, 43), and the result of confirming the action of the Court will be that $11,000 will be paid for ground never taken.

D. W. Sellers, for appellees.

The objection of the appellant that action of the Board of Surveyors rendered the taking of the property in question impossible is not founded on any fact appearing on the record, but in any case that action has been reversed.

Esling's Appeal, 7 WEEKLY NOTES, 76.

February 21, 1881. THE COURT. It is claimed by the petitioners that the legislation under which the present proceeding is instituted is found in the seventh section of the Act of April 21, 1855 (P. L. 264). That section provides "that whenever Councils shall deem it public exigency to demand it, they may order by ordinance, any street laid upon any of the public plans of the city to be opened, giving three months' notice thereof to the owner, whereupon any of the owners, whose ground *will be taken by such street*, may forthwith petition the Court of Quarter Sessions for viewers to assess the damages which such owner may sustain by the *opening of said street*." In the case, In re Opening of Jackson Street (2 Nor. 328), we held that proceedings for the opening of a street located upon the plans of the Board of Survey of the city of Philadelphia, must be in pursuance of the provisions of the Act of 21st April, 1855, and it is the seventh section of that Act which provides for the assessment of damages. It is also claimed, that the assessment of damages, and their apportionment, are governed by the Act of April 1, 1864 (P. L. 206). Section 1 of that Act is in the following words: "That when any street in the city of Philadelphia is ordered to be opened in accordance with law, the jury appointed to assess the damages for *the said opening*, after having determined the amount of said damages, and to whom they shall be paid, shall also make inquiry as to the advantages of *opening said street* to property in the immediate vicinity of the same, and said jury shall determine what amount, if any, shall be paid by the city, and what amount, if any, shall be paid by the *property owners benfited*."

Conceding, as we must, the correctness of the contentions of the petitioners that the foregoing Act constitutes the authority for this proceeding to assess and apportion the damages, it must also be admitted that the ultimate basis of the right to have damages at all, is the *actual taking* of the ground of an owner. Such actual taking need not transpire before the proceedings to assess damages are had (City *v.* Dickson, 2 Wr. 247), but it must nevertheless be legally possible.

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It is equally certain that the right to apportion the payment of damages upon adjacent owners is also dependent upon the fact of opening, because it is "the advantages of *opening said street* to property in the immediate vicinity," which are to be paid for by the owners of that property. If the opening of the street is a legal, and therefore an actual impossibility, there can never be any "advantages" to be paid for.

Now an inspection of the report of the viewers in the present case discloses that it nowhere states for what cause damages are assessed, nor how or in what manner or by what consideration properties in the vicinity are or can be benefited. It simply states "that the trust estate of Joseph K. Eyre is damaged to the extent of nine thousand five hundred dollars;" and "that the West Philadelphia Industrial School is damaged to the extent of one thousand five hundred dollars," and "that properties in the vicinity are benefited to the extent of four thousand eight hundred and seventy-three dollars and ninety-one cents, which sum we assess as benefits upon properties marked upon the plans Nos. 1 and 2, hereto annexed." The report adds that the sum set opposite each lot in the plans, represents "the increase in value imparted to it by the said opening," but as no opening of any street over any property is previously described in the report, the lack of certainty in these respects is not supplied by the use of these words. Nor are we helped by a reference to the petition, as to these deficiencies. Neither the petition nor the supplemental petition contains the slightest reference to the property of the West Philadelphia Industrial School; nor do they describe the land to be taken of the estate of Joseph K. Eyre, except by saying that a large part of a certain described lot of the estate "is now included within the lines and limits of the said Thirty-ninth Street, as confirmed upon the plans of the city of Philadelphia." The petition subsequently states that much the greater part of the said lot will be taken, without describing it and without annexing any plan or draft showing what will be taken. The report of the viewers contains no allegation that Thirty-ninth Street has been opened or is about to be opened over any land, either of the estate of Joseph K. Eyre, or of the West Philadelphia Industrial School, or that those owners or either of them have suffered, or are likely or about to suffer any damages from any *specified* cause whatevever. In this condition of the record, we do not feel that we have the right to make intendments in its favor.

It is alleged in one of the exceptions that the Board of Surveyors, since the appointment of the jury, finally confirmed Plan No. 166, altering the west line of Thirty-ninth Street, and restoring it to its original width of sixty feet, and that, therefore, no damages can be sustained by the petitioners. It is alleged further, that on certiorari to the Court of Quarter Sessions of Philadelphia, from this Court, the action of the Board of Surveyors in confirming Plan 166, was declared to be final, and it is therefore contended that the land of the petitioners cannot be taken for this street, and hence no damages can be sustained by them. The case referred to is reported in 9 WEEKLY NOTES, 43, and it does decide as claimed by the exceptants. It is true that the facts in relation to the action of the Board of Surveyors in confirming Plan 166, do not appear upon this record. One reason for that probably is, that the case was pending in this Court at the time the exceptions were filed and acted upon in the Court below. But we cannot shut our eyes to that fact, that this decision has been made, and to the further fact that great injustice may be done to the city, and the property-owners if they are denied all opportunity to bring these matters to the attention of the Court below, and get them upon the record of this cause. As the record now stands, they will be obliged to pay eleven thousand dollars for an indefinite something, not described in the report which sentences them to pay this money, and which is only claimed to be for land which has never yet been, and may never be taken. In other words, the petitioners may keep their land, and yet compel the city and the property owners to pay them eleven thousand dollars upon the theory that it has been taken from them. We do not feel obliged to sanction such a result as this. We will therefore remand these proceedings to the Court below, in order that the petitioners may, if they see fit, take measures to correct the defects in their petition and report if such corrections can be made: and to enable the exceptants to bring before the Court in such manner as they may be advised the action of the Board of Surveyors in reference to Plan No. 166.

Record remitted accordingly.

Opinion by GREEN, J.

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Common Pleas—Law.

C. P. of Chester Co.

Windle v. Moore.

Equitable set-off—One judgment set off against another—When not allowed—Equitable jurisdiction of Court over its judgments—Practice.

Rule to set off a judgment in case against a judgment in trover.

The following facts appeared in the opinion of the Court:—

"Oliver F. Windle and Thomas R. Windle gave their promissory note to Furlong, dated Aug. 11, 1877, for $312.00 payable in ninety days. On April 12, 1879, this note having been dishonored came into possession of Moore, by assignment, who subsequently purchased from Oliver F. Windle a horse and carriage, intending to pay for them with the note to the extent of the purchase. He did not, however, inform Windle of this intention, or that he held the note; but purchased the property in the ordinary way, and requested them sent to his place where, as Windle understood, he would be paid for them; Moore saying that the expression he used was that he would "hand over a document." Windle, in pursuance of this arrangement, took the horse and carriage to the residence of Moore, who took charge of them, and the parties went into the house to settle. Moore, however, instead of paying for the articles in cash as Windle had expected, handed to him the note referred to, saying that though it was more than the price he would take his (Windle's) note for the balance. Windle at once refused to receive the note and demanded the cash or return of the property."

This demand Moore refused.

Windle then brought an action of trover and conversion against Moore and obtained a verdict for $233.46. Moore also brought suit against Windle on the note, and having obtained judgment thereon for $354.98, took this rule (in Windle's suit against him) to allow this judgment to be set off against Windle's judgment.

Monaghan & Brother, for the rule.

After judgment both parties are actors and Windle's judgment is but a debt; the judgment may be set off.

Green *v.* Farmier, 4 Burr. 2221.
Collins *v.* Collins, 2 Id. 826.
Mitchell *v.* Oldfield, 4 D. & E. 123.
Bouvier Law Dict., title set-off.
1 Chitty's Plead. *569, *et seq.*
Best *v.* Lawson, 1 Miles, 11.
Ramsey's Appeal, 2 Watts, 230.
Coates's Appeal, 7 W. & S. 102.
Dunkin *v.* Calbraith, 1 Browne, 49.
Jennings *v.* McKay, 4 WEEKLY NOTES, 422.

Hays, contra.

Moore's judgment is on a note. Windle's judgment is for damages arising out of a tort. Under these circumstances, one judgment cannot be set off against another.

June 14, 1880. THE COURT. The power to set off one judgment against another has long been exercised by the Courts. The practice to allow such set-off is upon the equitable principle that in conscience and morality all that the party really owes is the difference between the two judgments, and that the Court will not suffer its process to be used for the collection of a debt when the creditor owes his debtor a like greater or less sum, evidenced also by the records of the Court.

It is, however, a discretionary power. Its exercise is not demandable of right, and the justice and propriety of it must be determined by the facts and circumstances of each particular case. (Wellock *v.* Cowan, 16 S. & R. 318; Ramsey's Appeal, 2 Watts, 230; Burns *v.* Thornburgh, 3 Watts, 78; Best *v.* Lawson, 1 Miles, 11; Prouty *v.* Hudson, 5 Clarke, 311; Ryan *v.* Casey, 1 Pearson's Cases, 153.)

We must then inquire whether this is a case calling for the exercise of the equitable jurisdiction of the Court. [Here followed a statement of the facts already set out.] Now it is very evident, as we had occasion to observe on the motion for a new trial in Windle *v.* Moore, that the whole transaction on the part of Moore was a scheme to get the horse and carriage into his possession and power without letting Windle know his purpose, and then refuse to pay for them except in the manner referred to. It was a fraud on Windle, who had a right as soon as he discovered it to demand the return of his property.

Windle, on the refusal of Moore to let him take the property, brought an action of trover and conversion against him and obtained judgment for their value. Moore then brought suit against Windle on the note and obtained judgment thereon, and now asks the Court to allow this judgment to be set off against the judgment obtained by Windle against him in the action of trover and conversion.

We cannot do so. It is not a case which calls for the exercise of the equitable power of the Court; on the contrary, it would be against equity and good conscience to allow what is asked to be done. The property of Windle was taken and retained from him in disregard of his rights, and it would be a mockery of justice to allow him to recover a judgment in trover and conversion against Moore for its value and then

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deprive him of its fruits by handing it over to Moore, in payment of the very claim with which he sought to make payment for the property when taken and retained. Besides a party might by the process here invoked by Moore be deprived of the benefit of the exemption laws. We do not think, however, that Windle is called upon to show that such would be the case. Moore having obtained judgment against Windle on the note in question is entitled to the process given by the laws for its collection, but we cannot aid him by turning over to him the judgment obtained against him by Windle.

The rule must therefore be discharged.

Opinion by FUTHEY, P. J.

[*Cf.* Russell *et al.*, *v.* Spear, 4 WEEKLY NOTES, 476; Stout *v.* Moore, 7 Ibid. 456.]

C. P. of Chester Co.

Quigley v. Quigley.

Justices of peace—Jurisdiction—Where principal of claim is less than $100, plaintiff may relinquish interest in excess of $100—If not formally relinquished, the justice has no jurisdiction—Appeal from justice's judgment over $100—Practice—Rule to dismiss case.

Rule to strike off a rule to plead, and to dismiss case.

The record showed a judgment obtained against defendant "for $85, with interest $21.02, and costs $2.91; total $108.93." From this judgment, defendant (after offering to confess judgment of $25) appealed; and in the Common Pleas, plaintiff filed a narr. with common counts claiming one hundred dollars thereunder, and ruled defendant to plead. Defendant then took this rule.

H. Pleasants, Jr., for the rule.

The civil jurisdiction of justices being in derogation of right of trial by jury and of the common law, must be strictly confined to statutory limits, and any act in excess of that limit is a nullity and all subsequent proceedings void.

Geyger *v.* Stoy, 1 Dall. 146.

Collins *v.* Collins, 1 Wr. 387, and cases cited.

It is the amount of the demand adjudicated and not merely the judgment or the claim that regulates the jurisdiction.

Prestly *v.* Ross, 1 Jones, 411.

Collins *v.* Collins, *supra.*

The rule here taken is the proper remedy, and is preferred to certiorari as not jeoparding the right to appeal.

Collins *v.* Collins, *supra.*

Kennedy *v.* Hughey, 3 W. 265.

W. B. Waddell, contra.

Here the claim was within the jurisdiction of the justice; the record does not show any claim for interest.

The defendant's remedy, if any, should have been by certiorari; by appealing he waives the question of jurisdiction.

March 17, 1879. THE COURT. The claim of the plaintiff as stated by the justice was for money lent the defendant, $85, and the judgment is for the said sum of $85, and interest thereon $21.02, making a total of $106.02. The motion is to dismiss the case for lack of jurisdiction of the justice. The Act of Assembly gives justices jurisdiction of all cases of debt where the claim of the plaintiff, or rather the amount due him, does not exceed $100, and all the later decisions rule that the plaintiff cannot give the justice jurisdiction by relinquishing part of the principal of his claim. He may, however, if the principal does not exceed $100, remit the interest, or so much of it as will bring the total claim below or to that amount. Interest is simply an incident of debt overdue, which a person may claim or not at his pleasure. Had the plaintiff in this case relinquished a part of the interest the question now presented would not have arisen. He did not so far as the transcript shows do so, and the judgment is consequently for a sum beyond the jurisdiction of the justice. It is said on behalf of the plaintiff that the transcript shows his claim to have been for $85, and that the adding of interest is the act of the justice, not asked for by the plaintiff, and that his rights are not to be prejudiced thereby.

We cannot agree that this is a correct view of the proceedings. There is nothing to show that the interest was relinquished; it was as much a part of the amount due the plaintiff, until relinquished, as the principal; the justice added it and the plaintiff is affected with knowledge of his action in the premises. The transcript also shows that the defendant afterwards and before taking an appeal offered to confess judgment for a less amount, which the plaintiff refused. The legitimate conclusion is that the plaintiff claimed interest and that the justice supposed as the principal was below one hundred dollars that he had jurisdiction of the whole claim, even although the interest added made the claim exceed that amount. In this he erred. The remission or non-claim of interest to bring a cause of action within the jurisdiction of a justice must be made before the justice, and cannot be made for the first time after the case reaches the Common Pleas. If the justice had no jurisdiction by reason of the claim before him exceeding $100, it cannot afterwards be given in the Common Pleas by relinquishing the interest there.

Entertaining these views the rule must be made absolute.

Opinion by FUTHEY, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, SEPT. 22, 1881.* [No. 23.

Supreme Court.

Jan. '80, 33 & 88½. February 1, 1881.

Dovey's Appeal.
Moodie's Appeal.

Lis pendens—True doctrine of—Pledgor and pledgee—Who is purchaser for value.

The doctrine of *lis pendens* affects a purchaser from a party to a suit not, as was formerly considered, on the ground of notice, but because the law does not allow a litigant to give to others, pending the litigation, rights to the property in dispute to the prejudice of the opposite party.

This is a rule of public policy, and the effect thereof is that no change of ownership during a suit will prevent the execution of a decree, as it could and would have been executed had there been no change.

A *lis* in order to affect a person's power of alienation must be a *lis* in which a decree could be entered against him as to the property which is the subject matter of the contention.

While it is true that taking a security as collateral for an antecedent debt does not make the creditor a holder for value so as to give him the rights of a *bona fide* purchaser, yet the rule is otherwise where it is taken in payment or extinguishment of the debt.

Where a person purchased stock *bona fide* from an agent of the owner who sold it fraudulently, paying therefor $3700 in cash, and surrendering a check of the vendor for $2500, and giving him a receipt for merchandise for $250.83:

Held, that he was a purchaser for value of the stock, and could hold it as against the real owner.

Appeals from the Court of Common Pleas No. 4, of Philadelphia County.

Bill in equity, by Charles E. Morris, assignee of Henry G. Morris, against John J. Dovey and Moodie, Gross & Co.

The bill set out that the complainant was assignee for benefit of creditors of Henry G. Morris; that at the time of the assignment Henry G. Morris was the owner of seventy shares of the stock of the Seventh National Bank, and that one Ervin, a confidential agent of the said Morris, without the latter's knowledge or consent, delivered the certificate, with a power of attorney to transfer, to Moodie, Gross & Co., receiving therefor $3700 in cash, an overdue check of his own (Ervin's) for $2500, and a receipted coal bill for $250.83. Ervin converted the cash to his own use. That in September, 1875, Moodie, Gross & Co. filed a bill against the bank and against Morris to compel a transfer of the stock; the Court, however, made a decree directing Moodie, Gross & Co. (the complainants) to deliver up the stock upon payment to them by Morris's assignee of $3700 with interest, and directing the bank (one of the defendants) to transfer the stock thereupon to Morris (the other defendant). This decree was, however, subsequently vacated, and a decree entered dismissing the bill, it having been shown to the Court that as no cross bill was filed by Morris against Moodie and the bank, the decree was irregular.

During the pendency of this suit, Dovey having advanced money to Moodie, Gross & Co., became possessed of the certificate, and sued the bank for refusing to transfer to him, and on April 17, 1877, obtained a judgment for $5962.25, which was paid, and the certificate surrendered to the bank.

The bill in the present proceeding charged Dovey with notice of the pendency of these proceedings, and claimed the amount received by him beyond the sum of $3700 with interest, to which extent the title of Moodie, Gross & Co. was admitted, and prayed an account and a declaration of trust.

Moodie, Gross & Co. by their answer asserted a purchase from Ervin, and payment of the price without notice of Morris's title. They also averred that the decree set forth in the bill had been vacated and a decree entered April 28, 1876, dismissing the bill, and reciting that the decree previously entered was erroneous, as there had been no cross-bill filed. They also averred they had pledged the stock to Dovey for a loan of $5000 in May, 1876, believing they owned it. Dovey's answer was similar as to the decree. He denied notice either of the suit or of the claim of title, and averred that he had paid $5000 for the shares by discounting Moodie, Gross & Co.'s note, and receiving the certificate and power as collateral security.

The Master reported a decree in favor of the complainants. Exceptions were filed, and subsequently dismissed by the Court, THAYER, P. J., saying, *inter alia*:—

"It was strenuously urged by the defendant's counsel that *lis pendens* binds only the right of a *defendant* against whom a plaintiff is proceeding for the establishment of his rights, and that a plaintiff who simply fails in establishing his title and compelling a conveyance is not bound, but may transfer to a *bona fide* purchaser without notice a better title than he had himself. In this opinion it is impossible for us to concur. The rule of *lis pendens* is a rule which affects both parties alike. It prevents either party from making a transfer of the property, pending the litigation, which will put

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his adversary in a worse position than he occupied before, or which will deprive him of the benefit of the decision reached by the Court. The cases cited by the counsel for the present defendant do not maintain the position assumed, that *lis pendens* binds a defendant only, and not a plaintiff. . . . The substance of the decree was a finding that the plaintiffs had not the title to the stock which they then had set up in their bill, but that it belonged to the assignee of Henry G. Morris, subject to the plaintiffs' lien for the cash actually advanced, and therefore the relief prayed for by the plaintiffs was denied, and their bill dismissed with costs. That was the point determined, and the plain meaning of the decree. By that determination the present defendant is bound, because he came in *pendente lite* and purchased a title which was then in litigation, and which in the course of that litigation was determined to extend to only a portion of the property which was the subject of the dispute. That portion the present defendant has already received. To allow him now to claim the whole would enable him to deprive the present plaintiff of the fruit of his former litigation, and in effect to subvert the decision of the Court."

Thereupon defendants took these appeals, assigning for error the decree of the Court. The fourth and fifth assignments of error in Dovey's appeal alleged that the Court erred in entertaining the bill, on the ground that there was an adequate remedy at law.

R. C. McMurtrie, for Dovey's executors.

The cause of action of the complainants was simply for money had and received, and the remedy is at law only.

Grubb *v.* Grubb, 7 WEEKLY NOTES, 349.

If the Court below meant that because the decision in the case of Moodie *v.* Morris determined the fact of ownership as between Moodie and Morris as of the day the bill was filed, *therefore* it barred Dovey as a privy, this may be admitted. But the only consequence is to make the judgment evidence of a fact not now disputed by us. Dovey's title does not depend on the fact of title in his vendor, but on the fact that he was the purchaser from one having the *indicia* of ownership. Such a consequence as has been drawn by the Court is not the doctrine of *lis pendens*, and has no relation to that doctrine.

It has been held that the doctrine of *lis pendens* does not apply to stocks.

Leitch *v.* Wells, 48 N. Y. 586.
County of Warren *v.* Marcy, 7 Otto, 96.
Murray *v.* Lylburn, 2 Johns. Ch. 444.
City *v.* Butler, 14 Wal. 283–285.

But conceding the doctrine to apply, the theory that it rested upon the ground of notice has been long since exploded.

Bellamy *v.* Sabine, 1 De G. & Jones, 582.

The true statement of the rule is, that no change of ownership during a suit will prevent the execution of a decree as it could have been executed if there had been no change. It is perfectly immaterial whether a plaintiff or defendant sells. The point of the rule is, the decree must be executed.

It is not a rule that makes a decision on a question of fact or law conclusive, but it is a rule that the decree must be complied with.

Newman *v.* Chapman, 2 Randolph, 93.
Bellamy *v.* Sabine, *supra*.
Eades *v.* Harris, 1 Y. & Coll. Ch. 230.
Sawyer *v.* Phaley, 33 Vt. 69.

It will be seen that the rule thus stated has no application to the facts in hand; the purchaser, pending the suit between Moodie and Morris, was a purchaser from the complainant, against whom a decree could not have been made, hence in no sense could the execution of the decree have been affected by the change of ownership.

Samuel Gustine Thompson, for Moodie, Gross & Co.

It is well settled that one purchasing stock from a person possessed of the certificate with a power to transfer, is a *bona fide* purchaser as against one who claims that the person so selling was not the rightful owner.

Turnpike *v.* Ferree, 2 C. E. Green, 117.
Currie *v.* Misa, 10 L. R. Exch. 153.
Walker *v.* Geisse, 4 Whart. 252.
McNeill *v.* Bank, 46 N. Y. 325
Garrard *v.* Haddan, 17 Sm. 82.

While it is the rule that one who takes a security as collateral for an antecedent debt is not a holder for value, yet it is equally well settled that where a security is taken as an *extinguishment* of an antecedent debt, the rule is different.

Sinclair *v.* Healy, 4 Wr. 417.
Swift *v.* Tyson, 16 Peters, 19
Shufield *v.* Reek, 16 Wis. 659.
Saunders *v.* Day, 31 N. Y. 313.
Bank *v.* Babcock, 21 Wend. 500.
Burns *v.* Rowland, 40 Barb. 374.

Lewis Waln Smith and *William A. Porter*, for appellees.

The objection that the remedy of the appellees was by action at law, should have been raised by demurrer; the Master and the Court below having considered the case as presented to them, this Court will not now hear the objection.

The authorities seem to lay down two rules upon which the doctrine of *lis pendens* is based, either of which is applicable to the purposes of this case, viz.:—

(1) That a purchaser from a party to a pending suit takes the property with constructive notice of the pending suit, and is affected with constructive knowledge of the pleadings.

Murray *v.* Ballou, 1 Johns. Ch. 566.
Murray *v.* Lylburn, 2 Id. 441.
Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. *35 and notes.
Diamond *v.* Lawrence Co., 1 Wr. 353.

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(2) The later English decisions seem to place the rule of *lis pendens* upon the rule of public policy, that, pending litigation, the object of which is to determine a right of property, neither party shall have it in his power to defeat the ends of justice, and to render the decision of the Court nugatory by an alienation of the thing in dispute.

Bellamy *v.* Sabine, *supra.*

The principle earnestly contended for by the appellant, that a different rule applies to purchasers from a plaintiff than from a defendant, is so completely answered in the opinion of the Court below, as to need no further reply.

A person who receives goods from a debtor for a pre-existing debt, which goods were fraudulently obtained by the debtor, is not such a purchaser for value as would be protected against the true owner.

Root *v.* French, 13 Wend. 570.

February 21, 1881. THE COURT. The doctrine of *lis pendens* has been essentially modified by the later decisions. In the earlier cases, both in England and this country, it was held that *lis pendens* was notice to all the world, with the same effect as the registration of a deed under the recording acts as to constructive notice of the conveyance. More recent cases, however, place the doctrine upon another and, we think, a sounder basis. In the leading case of Bellamy *v.* Sabine (1 DeG. & J. 580), it was said by Lord Chancellor CRANWORTH: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. The doctrine of *lis pendens*, says Mr. Adams, in his work on Equity, "has been recently considered and decided not to stand on the ground of notice, express or implied, but to follow from the general rule that, pending litigation, neither party can be permitted to alienate the contested property, so as to affect the right of the other." This is a rule of public policy, and the object of it is to prevent the parties from making a conveyance *pendente lite* of the property or thing which is the subject-matter of the controversy, and thus to defeat the execution of the decree of the Court. The effect of it is to impose a disability to convey from the time of the service of the subpœna upon the defendant. The Court, in the execution of its decree, pays no regard even to a *bona fide* purchaser. In other words, no change of ownership during a suit will prevent the execution of a decree, as it could and would have been executed had there been no change.

So far, we are in entire accord with the views of the law as expressed by the learned and able Judge of the Court below. It is in the application of the law to the facts of this particular case that we think he has erred.

It is conceded that Moodie pledged the shares of stock in question to Dovey in June, 1876, and that the present bill was filed on May 6, 1877. To this state of facts the doctrine of *lis pendens* certainly cannot apply. It was urged, however, and the Court below adopted this view, that as the bill filed by Moodie on October 14, 1875, to compel a transfer by the bank, was pending and undetermined when he pledged the stock to Dovey, that the said bill was a *lis pendens*, and avoided the pledge. But that bill came to nothing; it was dismissed, and that is the only decree in the cause. It could not affect this case unless we hold the dangerous, if not absurd, doctrine that *lis pendens* is to apply to every suit, even where the cause of action is purely imaginary. The consequence of such a rule would be that any man's property could be tied up and alienation prevented by the filing of a bill setting forth a claim which had no foundation whatever.

The decree upon Moodie's bill decided nothing but that he was not entitled to the relief he asked. Had there been a cross-bill filed by the assignee of Henry G. Morris, and a decree that the plaintiff in Moodie's bill had not the title to the stock, but that it belonged to the assigned estate of Henry G. Morris, subject to the plaintiff's lien for the cash actually advanced, and therefore the relief prayed for by the plaintiffs was denied, and their bill dismissed, we would have had a different question before us. But we are unable to see how that abortive proceeding can be tacked to the present bill so as to produce a *lis pendens*.

As the record stands, the most that can be urged for Moodie's bill is, that it was constructive notice to Dovey. But under the modern doctrine of *lis pendens*, constructive notice amounts to nothing, and we are of opinion that a *lis* to affect the party and destroy his power of alienation, must be a *lis* in which a decree could be entered against him as to the property which is the subject-matter of the contention. He may not convey *pendente lite*, for the reason that such transfer would defeat the execution of the decree. But if the proceeding is such that no decree can be entered, why may he not convey? The true rule would seem to be that a purchaser is affected by the decision upon any claim to the property purchased, if there be a litigation pending in which that question is decided. (Newman *v.* Chapman, 2 Randolph, 93.)

It was said in Murray *v.* Lylburn (2 John. Ch. 444), that the doctrine of *lis pendens* may not apply to movable personal property on the ground

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of the necessities of commerce; in the County of Warren *v.* Marcy (7 Otto, 96), that it does not apply to negotiable securities; and in Leitch *v.* Wells (48 New York, 586), that it does not apply to stocks. We neither affirm nor deny the latter proposition, but decide this case upon other grounds.

The jurisdiction is doubtful. The proceeding is an action for money had and received under the disguise of a bill in equity. But as the point was not made below, either by demurrer to the bill or exceptions to the Master's report, we have considered the case upon its merits.

It remains but to say a few words in regard to Moodie's Appeal. The only prayer in the bill as to Moodie, Gross & Co. was that they be restrained and precluded from claiming the fund or any part thereof, from the said Dovey or from the plaintiff. There was no decree against them, except as they may be incidentally affected by the award of the fund to the assigned estate of Henry G. Morris.

The position of the appellants is this: They bought the stock of Ervin for the sum of $6450.83, and afterwards pledged it to Dovey for $5000 cash borrowed. Under the principles indicated in Dovey's Appeal, his executors are entitled to payment in full of the sum borrowed, and for which the stock was pledged. The balance, if any, would belong to Moodie, Gross & Co., provided their title is good. It was conceded in the Court below, and here, that they had title to the extent of the $3700 paid in cash for the stock. But it was contended, and so held by the Court below, that as to the $2500 check, and the coal bill of $250.83, the said Moodie, Gross & Co. were not holders for value, for the reason that both the latter sums represented antecedent debts. It is true the taking of a security as collateral for an antecedent debt, does not make the creditor a holder for value, so as to give him the rights of a *bona fide* purchaser, but the rule is otherwise where it is taken in payment or extinguishment of the debt. In such case the contract is executed, and the debtor released. Not so, where the creditor has taken something as collateral. In such case the contract is executory; the creditor has parted with nothing, and still holds his grip upon his debtor. Here Moodie paid Ervin $3700 in cash; surrendered to him his (Ervin's) check for $2500, and receipted Ervin's coal bill for $250.83. That this constituted a valuable consideration is sustained by a number of authorities, among which may be mentioned Sinclair *v.* Healy (4 Wright, 417); Shufeldt *v.* Pease (16 Wis. 659), where it was held that "a purchaser of goods from a fraudulent vendee, whose title is voidable on the ground of fraud, who takes them in payment of a pre-existing debt, against said fraudulent vendee, is a purchaser *bona fide*, and as such is protected in his purchase against a claim to the property made by the party defrauded." Barnett *v.* White (34 Miss. 57), where it was held that "when the antecedent debt was extinguished, it was a good consideration." (Paddon *v.* Taylor, 44 N. Y. 371; Pratt *v.* Coman, 37 N. Y. 441; Brown *v.* Leavitt, 31 N. Y. 113; Bank *v.* Babcock, 21 Wend. 500; Burns *v.* Rowland, 40 Barb. 374.)

It followed that after Dovey's claim is paid in full, the surplus, if any there be after the payment of the expenses of the reference as specified in the decree below, will belong to the appellants in this appeal.

Decree reversed, and appeal dismissed at the costs of the appellees.

Opinion by PAXSON, J.

GREEN, J., being a stockholder in a corporation which was a creditor of the assigned estate of Henry G. Morris, did not sit.

Jan. '79, 259. February 21, 1881.

Commonwealth to use v. Haines et al.

Judicial officers—Notary public—False certificate of acknowledgment—Judicial acts—Liability therefor—Negligence—Presumption—Burden of proof.

The taking of an acknowledgment by a notary public under the law of this State is a judicial act, and his liability for issuing an erroneous or false certificate is only that of any officer performing a judicial act.

The presumption is always in favor of the regularity and correctness of a judicial act, and the burden of proving negligence is on him who asserts it.

A., the purchaser of a mortgage of a certain lot of land, brought suit against B., a notary public, to recover damages for having issued a false certificate of acknowledgment of the signature to the mortgage by C., the owner of the premises, who, as the evidence disclosed, had in point of fact been impersonated, and had neither made the mortgage nor appeared before B. The defendant, who was called by the plaintiff, testified that he was at the time satisfied as to the identity of the person who appeared before him, but he could not say what means he had taken to identify him. There being no further proof of negligence:

Held, that judgment of nonsuit had been properly entered.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt on official bond, by the Commonwealth of Pennsylvania to the use of Stephen S. Price against H. Clay Haines, Josiah Haines, and Clayton Haines. The narr. alleged that the defendant, H. Clay Haines, was commissioned a notary public for the Commonwealth of Pennsylvania, on February 1st, 1874, and on Febru-

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ary 27th following filed his bond to the Commonwealth for $10,000, with the other two defendants as sureties, containing the condition, *inter alia*, that if the said H. Clay Haines, appointed and commissioned notary public as aforesaid, shall and does well and truly and faithfully in all things, execute and perform the duties of said office of notary public according to the several Acts of Assembly relating thereto, etc., the said bond to be void. The narr. further alleged "that as such notary public it was his duty to take the acknowledgment of deeds and mortgages by grantors and mortgagors, and to conduct himself in said office truly and faithfully, and to take and certify any such acknowledgments with due care and diligence. Nevertheless, the plaintiff in fact says that the said Henry C. Haines did not well and truly in all things execute and perform the duties of said office of notary public according to the several Acts of Assembly relating thereto, but that he did certify over his hand and notarial seal on the 30th day of April, 1875, that on that day one Abram P. Beecher, which said Abram P. Beecher was the owner of the premises following [here follows description], did on that day personally appear before him the said Henry C. Haines, notary public, and in due form of law acknowledge a certain indenture of mortgage, which purported to be an indenture of mortgage being that day executed and delivered by the said Abram P. Beecher to one Thomas Clark of the premises above described to secure the payment of a certain writing obligatory by the said Abram P. Beecher, whereby on that day he, the said Abram P. Beecher, became bound unto the said Clark in the sum of five thousand six hundred dollars lawful money of the United States of America, conditioned for the payment of the just sum of two thousand dollars, etc., to be his act and deed, which he desired might be recorded as such; whereas, in fact, the person who so appeared before the said Henry C. Haines and acknowledged the said indenture of mortgage was not Abram P. Beecher, and was not known to be Abram P. Beecher by the said Henry C. Haines, and his certificate was given without his either knowing or having taken the slightest trouble to know the truth of the fact to which he thus certified. And the said Stephen S. Price further says, that afterwards, to wit, on the 10th day of May, 1875, he, the said Stephen S. Price, relying upon the faith of the said certificate, purchased the said indenture of mortgage from the said Thomas Clark, and paid him therefor a large sum of money, to wit, the sum of twenty-eight hundred dollars."

There had been a previous verdict for the Commonwealth to the use of the plaintiff for $3119.74 but a new trial had been granted.

On the second trial the defendant, H. Clay Haines, was called by the plaintiff and testified: "The signature and notarial seal to the acknowledgment to this (paper the mortgage) are mine. At the time of putting my hand and seal to this acknowledgment, I didn't know Abram P. Beecher. I never remember seeing him before I saw him when the deposition was taken. Before taking this acknowledgment I never had seen or heard of Abram P. Beecher; I do not remember whether I knew the man who made the acknowledgment. I have no knowledge of this matter except what appears on the acknowledgment; very frequently some one whom I know brings in the person and introduces them. I was satisfied at the time I took the acknowledgment that it was all right. I do not know what took place before me. I don't remember that I did, or did not, take any precaution to identify the person making the acknowledgment, but I know I must have been satisfied at the time."

The certificate attached to the mortgage was as follows:—

"On the 30th day of April, A. D. 1875, before me, the subscriber, a notary public of the Commonwealth of Pennsylvania, residing in the city of Philadelphia, personally appeared the above-named Abram P. Beecher, and in due form of law acknowledged the above indenture of mortgage to be his act and deed, and desired the same might be recorded as such. Witness my hand and notarial seal the day and year aforesaid.

[SEAL] HENRY C. HAINES,
Notary Public."

The plaintiff also proved the purchase of the mortgage through his attorney, and that Abram P. Beecher, the real owner of the property, had never made the mortgage nor appeared before the defendant.

Judgment of nonsuit was entered by the Court, and a motion to take off the nonsuit was dismissed. The plaintiff took this writ of error, assigning for error the entering of judgment of nonsuit, and the refusal to take it off.

John G. Johnson, for plaintiff in error.

The defendant was guilty of negligence; there is no evidence that he took any precaution to have the alleged mortgagor identified. When we had proved as a fact that the man he certified to having appeared before him, had neither signed the paper nor appeared before him, it surely put him to proof at least of not having negligently made his certificate. The notary's certificate is not, like the recorder's, meant for the person who pays for it, it is intended as notice to the world, and in the discharge of a ministerial duty he is liable for negligence.

Wharton on Negligence, 2d ed. § 284.
Shearman and Redfield on Negligence, ed. 1874, §§ 163-68.

Jos. M. Pile and *R. C. McMurtrie*, contra.

The duty performed by the defendant was a judicial one.

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Act March 5, 1791, 3 Sm. L. 6, Purdon's Dig. 1094 pl. 1.
Act Dec. 14, 1854, P. L. 724, Purdon's Dig. 1096, pl. 12.
Act Aug. 10, 1864, P. L. 962, Purdon's Dig. 1097, pl. 17.
Jamison *v.* Jamison, 3 Wh. 457.
Withers *v.* Baird, 7 W. 227.
Hornbeck *v.* Loan Ass., 36 Leg. Int. 321.

The legal presumption is that he has done all that was required of him.

Lloyd *v.* McGarr, 3 B. 474.
Hamsher *v.* Kline, 7 Sm. 397.

If the relation between the defendant and the *mortgagee* was a contractual one, how can the *plaintiff* recover on that contract?

Comm. *v.* Harmer, 6 Ph. 90.
Siewers *v.* Comm., 35 Leg. Int. 314.
Houseman *v.* Girard Ass., 31 Sm. 256.

Johnson, in reply.

The issuing of the certificate was not a judicial act. The cases cited were not cases against the officer taking acknowledgment. But if it were so, this case could not have been such, because the alleged grantor not having really appeared before the defendant, he acted without jurisdiction and therefore is not protected.

Shearman and Redfield on Negligence, § 161.

The negligence complained of was in the giving the certificate; this was a ministerial act, whatever the mere act of taking the acknowledgment may be.

May 2, 1881. THE COURT. This action was against a notary public and his sureties on his official bond. The complaint is, that he certified to one Abram P. Beecher having personally appeared before him and in due form of law acknowledged a certain indenture of mortgage to be his act and deed, when in fact the person who appeared before him and made the acknowledgment was not Abram P. Beecher, whereby said plaintiff was injured.

The plaintiff called Abram P. Beecher, who owned the lot described in the mortgage on which the notary made the certificate. He testified that this mortgage was not executed by him, nor by his authority, and that he never made any acknowledgment thereof, or of any mortgage on that property, before the notary, or before any person. The plaintiff testified that, relying on the supposed validity of the mortgage and the record thereof, he bought and paid for the mortgage.

The question to be considered is, What proof is necessary to make the notary legally liable to one injured by the making of such certificate untrue in fact?

It is well settled that the certificate of a Judge or a justice of the peace, of the acknowledgment of a deed or mortgage, is a judicial act. (Withers *v.* Baird, 7 Watts, 227; Jamison *v.* Jamison, 3 Whart. 457; Heeter *v.* Glasgow, 29 P. F. Smith, 79; Singer Manufacturing Co. *v.* Rook, 3 Norris, 442.)

Conceding such to be the effect of a certificate of a Judge or justice, yet it was contended on the argument, that like effect should not be given to the certificate of a notary. Why not? He is a public officer commissioned by the Governor. He is acting under oath, like other officials in the performance of judicial duties, to "well and faithfully perform the duties of his office." The second section of the Act of 10th August, 1864 (Pur. Dig. 1097), expressly gives power to "each notary public of this Commonwealth," *inter alia*, "to take and receive the acknowledgment or proof of all deeds, conveyances, mortgages, or other instruments of writing, touching or concerning any lands, tenements, or hereditaments, situate, lying, and being in any part of this State, ... as fully, to all intents and purposes whatsoever, as any Judge of the Supreme Court, or President, or Associate Judge of any of the Courts of Common Pleas, or any alderman, or justice of the peace, within this Commonwealth." As, then, a notary is authorized to take the acknowledgment as fully, to all intents and purposes, as a magistrate can do, it follows the same effect should be given to his certificate of acknowledgment. It was so held in Hornbeck v. Building Association (7 Norris, 64). Whatever officer is authorized to take the acknowledgment, to him is given a judicial duty, and when he performs it, it becomes a judicial act, and has the effect of a record.

This action then is to recover damages flowing from the incorrect manner in which the defendant performed a judicial act. The rule as to the liability of an officer performing a ministerial duty, does not apply.

The plaintiff also called and examined the defendant notary. He testified that at the time of putting his hand and seal to the acknowledgment he did not know Abram P. Beecher, did not remember that he had ever seen or heard of him before; had no knowledge of the matter, except what appears on the acknowledgment; frequently some one whom he knew brought in the person and introduced him; he was satisfied at the time it was all right, but does not remember what took place. He added, "the paper was undoubtedly signed before me. I don't remember that I did or did not take any precaution to identify the person making the acknowledgment, but I know I must have been satisfied at the time." The substance of his evidence, therefore, is that while he does not recollect what inquiries or statements were made, yet he knows he must have been satisfied as to the identity of the person, and that it was all right at the

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time the acknowledgment was taken. No evidence was given conflicting with or impairing this evidence of the defendant. The legal presumption is, he acted on reasonable information, and did his full duty. His absence of memory as to the details of what occurred, does not destroy that presumption. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty. This is neither proved nor averred. A mere mistaken conclusion imposes no legal liability on the defendant. The learned Judge was clearly right in ordering a compulsory nonsuit and in refusing to take it off.

Judgment affirmed.

Opinion by MERCUR, J.

Jan. '80, 161. March 14, 1881.

Guldin's Administrator v. Guldin's Administrator.

Evidence—Witnesses—Competency of—Interest—Preponderance of—Acts of March 27, 1865.

Where one called as a witness is interested on both sides of the issue, but his interest clearly preponderates in favor of one side, he is incompetent to testify at the call of that side, if the case is not within the enabling clause of the Act of April 15, 1869.

The Act of March 27, 1865 (P. L. 38), does not permit one who is party to a suit in a representative capacity, but personally interested on the side of his adversary to be called by him.

A suit was brought by the administrator of A. against B. and C., administrators of D., to recover the amount of a fund alleged to have been held in trust by D. for A. B. was entitled, as distributee, to one-third of A.'s estate and to one-sixth of D.'s:

Held (reversing the judgment of the Court below), that B. was incompetent to testify at the call of the plaintiff.

Semble, per TRUNKEY, J. The Act of March 27, 1865, enabling a party to a suit to compel "any adverse party to the record" to testify, does not enable him to call "one who sues or is sued as the representative merely."

Error to the Common Pleas of Schuylkill County.

Assumpsit, by Francis A. Mortimer, administrator of Hannah Guldin, deceased, against Benjamin H. Guldin and John S. Rick, administrators of William C. Guldin, deceased.

Hannah Guldin, a widow, died intestate prior to the year 1874, leaving to survive her three children, William C. Guldin, Benjamin H. Guldin, and Catharine S. Conrad. Francis A. Mortimer took out letters of administration upon her estate. In 1874, William C. Guldin died intestate, leaving a widow but no children. Letters of administration upon his estate were taken out by his brother, Benjamin H. Guldin, and John S. Rick. In 1875, the administrator of Hannah Guldin brought this suit against the administrators of William C. Guldin.

At the trial, before WALKER, A. J., the plaintiff called Benjamin H. Guldin, who was sworn upon his *voir dire*. Plaintiff offered to prove by this witness, "first, that in 1858, he assigned to William C. Guldin five bonds, each for $350, in payment of a debt due by Benjamin H. Guldin to his mother, Hannah Guldin, in payment of money held in trust by him for Hannah Guldin; second, that on the day before the death of William C. Guldin, William C. Guldin acknowledged to this witness that he owed his mother the $1600 received from the witness in 1858." Counsel for defendants objected, because, "first, the witness offered is the assignor of the subject of the controversy, and that the assignee is dead; second, that William C. Guldin, one of the parties, being dead, and the witness being interested in the estate of Hannah Guldin, he is not competent to testify, being an interested party." Objection overruled, and exception granted to defendants.

The witness then testified that for a number of years he held $1600 in trust for his mother, invested in the bonds referred to, which amounted to $1750; that in 1858, he transferred these bonds to his brother, the defendants' intestate, who assumed the trust for the $1600, the balance of $150 being set off in another account between them. On the day before his death, the witness said to his brother, "You have $1600 of mother's money, that you are in her debt still," to which he replied, "Yes, I have still got mother's money, and I still owe mother that money." Another witness testified to having been present at the conversation, but he could not recollect that any amount had been specified.

Verdict for plaintiff for $3332.58, and judgment thereon. Defendants took this writ of error, assigning for error, *inter alia*, the admission of Benjamin H. Guldin as a witness.

J. W. and *Jas. Ryon* (with whom was *D. B. Green*), for plaintiffs in error.

The witness was unquestionably interested in having the plaintiff recover the fund in dispute in this case. William C. Guldin having died intestate, his widow is entitled to one-half of the fund, and the witness to one-third of the remaining half, if it is retained in the estate, but in the event of its recovery by the plaintiff, the witness would be entitled to one-third of the whole. The Act of March 27, 1865, permitting administrators to testify, merely removed that disqualification arising from that fact alone, but interest arising from other causes still remained a disqualification. The other act of the same date does not empower a party to call his adversary, except where his adversary is a party in his own interest, and where he is merely a representative it has no application. This case is expressly

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excluded from the operation of the Act of 1869, because it is an action against an executor as well as one in which the assignor of the thing or contract in action is dead.

Karns *v.* Tanner, 16 Sm. 297.
Gyger's Appeal, 24 Sm. 48.
Pattison *v.* Armstrong, 24 Sm. 476.

F. G. Farquhar (with whom was *Francis A. Mortimer*), contra.

Benjamin H. Guldin came literally within the Act of March 27, 1865, permitting "any adverse party" to be compelled to testify. This Act was intended to give one the right to take the chances of his adversary's testimony; if he should happen to be equally interested on both sides of the question, so much the better for the party calling him, there is not a word in the Act limiting the right to call him on that account.

In this case the witness's interest was divided; he was interested in either event, and while, apart from the Act, he could not have been compelled to testify, he might waive his privilege, and his interest, tending in both directions, was equalized, and therefore could not disqualify. The Court will not determine on which side the interest preponderates.

Porter *v.* Baird, 4 W. 15.
Finney's Appeal, 9 Sm. 398.

He would have been competent before the Act of 1869, and it has certainly not rendered him less so.

Ryon, in reply.

In the cases referred to, it was impossible to measure the preponderance of interest, but here it can be mathematically demonstrated.

March 28, 1881. THE COURT. This action is by the administrator of Hannah Guldin, deceased, against the administrators of William C. Guldin, deceased. In the trial the Act of April 15, 1869 (P. L. 30), by its express terms had no application.

Two Acts were passed on March 27, 1865 (P. L. 38), relating to witnesses and evidence. One was entitled "An Act relating to the admission of parties to judicial proceedings, as witnesses in certain cases," and provided that in all trials and judicial proceedings, an administrator or other person acting in a fiduciary or representative capacity, although a party to the proceeding, not having an interest in the subject matter of the controversy, may be examined as a witness. Hence, in suits, by or against administrators, when they are not interested otherwise than their right to compensation out of the estate for their services, they are as competent witnesses as strangers to the record and subject of controversy. The other is entitled, "An Act amending the law of evidence in Pennsylvania," and enables any party to compel any adverse party, or person for whose immediate and adverse benefit the action is prosecuted or defended, to testify in his behalf. Obviously this applies to a real party, and not to one who sues or is sued as the representative merely. These Acts are to be construed together. Their titles are to be considered, being a part thereof under the constitutional amendment of 1864. One applies to a party who is a representative; the other to a party in interest. Under the law of evidence, a necessary party to the record, because of his trust relation, could not be a witness in behalf of the beneficiary or trust estate; and the statute makes him competent. Any person not a party, although interested, could be called to testify against his interest; and the statute puts a party on the same footing. The intendment of these statutes is, to enable one party to call the opposite party to testify against his interest, and to make any uninterested fiduciary party a competent witness in the cause. They make no interested person a party competent to testify in his own behalf.

Is a person sued as administrator of an estate, who is directly interested in the plaintiff's recovery, a competent witness for the plaintiff? A. sues B., and C. being interested in A.'s recovery, is incompetent as a witness for A. Pending the suit B. dies and C. takes out letters of administration and is substituted as party defendant. Nothing but perversion of the statutes will enable A. to call C. to testify. And if the suit were not commenced until after B.'s death and C.'s appointment as administrator, he, continuing to be interested against the estate, would be as clearly incompetent for the plaintiff.

Hannah Guldin died intestate, leaving children, of whom were William C. Guldin and Benjamin H. Guldin. Afterwards, William C. died, leaving a widow but no children. Benjamin H. Guldin, one of the administrators of William C., is interested in both estates represented in this action; he is entitled to a distributive share in half his brother's personal estate, and in the whole of his mother's.

A witness whose interest is equal between the parties is competent. If it be doubtful whether it preponderates in favor of the party calling him, the Court should permit him to testify, and instruct the jury, if they found his interest in favor of the party calling him was greater than he had in favor of the other, they should reject his testimony. (Rees *v.* Livingston, 5 Wr. 113.) Benjamin H. Guldin had a certain and preponderating interest in favor of the plaintiff, and he was incompetent to testify on that side. (1 Greenl. Ev. § 391; Keymborg & Co. *v.* Burridge & Co., 1 Jones, 535.)

The charge of the Court was upon the evi-

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dence received, and no other question raised by the assignments requires notice.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

Jan. '80, 305. March 1, 1881.

Meck's Appeal.

Bill, quia timet—When such bill will not lie—Agreement to sell with certain covenants to be performed by vendee and vendor's executors after the latter's death—When not testamentary.

A bill, *quia timet*, to set aside an agreement concerning lands on the ground that the same is a cloud upon complainant's title, will not lie where there is no allegation of fraud, accident, or mistake.

A contract for the sale and purchase of land at a price agreed upon, the purchase-money to be paid after the death of the vendor, and the title to be made by his executors, in the mean time the vendee to occupy the premises at a stipulated rent, is not testamentary, and hence not revocable.

By articles of agreement under the hands and seals of S. and I., S. covenanted that his executors should, immediately after his death, execute a proper conveyance to I. for a certain farm; and I. covenanted thereupon to pay the purchase-money. It was further agreed that I. should occupy and farm the premises during S.'s lifetime for a stipulated rent. I. entered into possession immediately; he afterwards died in the lifetime of S., and his widow and children remained in possession. S. thereupon filed a bill against the widow and children, alleging that the agreement was testamentary and had been revoked by him, that it was a cloud upon his title, and praying that it be cancelled:

Held (reversing the judgment of the Court below), that there being no allegation of fraud, accident, or mistake in the execution of the agreement, the bill would not lie.

Held further, that the paper was a contract to convey lands, passing a present interest, and was not testamentary in its character.

Held further, that the defendants, having entered into possession under the agreement, were entitled to have their title passed upon by a jury in a common law proceeding.

Turner *v.* Scott, 1 Sm. 126, distinguished.

Appeal from Common Pleas of Berks County.

Bill in equity, by Samuel Meck, against the widow and children of Isaiah Meck, alleging that on December 10, 1863, the plaintiff and his son executed the following instrument of writing:—

Articles of agreement, made and entered into the tenth day of December, Anno Domini one thousand eight hundred and sixty-three, between Samuel Meck, of District Township, in the county of Berks and State of Pennsylvania, of the one part, and Isaiah Meck (son of mine), of Rockland Township, county and State aforesaid, of the other part, as follows, to wit: The said Samuel Meck, for the consideration hereinafter mentioned, doth for himself, his heirs, executors, and administrators, covenant, promise, grant, and agree to and with the said Isaiah Meck, his heirs and assigns, by these presents, that he, the said Samuel Meck, agrees and directs that his executors, or some one of them, shall and will immediately after the death of himself and his wife, both of them, at the proper costs and charges of said Isaiah Meck, his heirs and assigns, by good and lawful deed or deeds, well and sufficiently grant, convey and assure unto the said Isaiah Meck, his heirs and assigns, in fee simple, clear of all incumbrances, all that certain messuage, tenement, and tract of land, situate in said District Township, county and State aforesaid, bounded and limited as follows, to wit: namely, by lands of John Rohrbach, George and Benjamin Carl, William Trexler, Daniel Moyer, John Mull, Henry M. Fox, William Reinert, and Jacob Schoch, containing one hundred and eight acres and twenty perches. In consideration whereof, the said Isaiah Meck, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said Samuel Meck, his heirs and assigns, by these presents, that he, the said Isaiah Meck, his heirs, executors, and administrators, or some one of them, shall and will, on the execution and delivery of the said deed as aforesaid, well and truly pay or cause to be paid unto the said executors or some one of them, the sum of five thousand dollars in manner following, to wit: Five hundred dollars shall be paid one year after the death of said Samuel Meck and his wife Anna (no payment can be required until one year after they are both dead), and then five hundred dollars, every year, until the whole amount of five thousand dollars is paid, making in all ten yearly payments. And for said unpaid amounts the said Isaiah Meck must pay four per cent. interest until paid, commencing one year after the death as aforesaid. And it is further agreed by both parties, that the said Isaiah Meck shall farm and possess the said tract of land before mentioned during the natural lifetime of said Samuel Meck and his wife Anna, under the following condition and terms: To commence on the first day of April, Anno Domini one thousand eight hundred and sixty-four. The said Isaiah Meck must, for the consideration as the yearly rent, give to the said Samuel Meck, or to his wife Anna Meck, one-half of all the winter grain and one-half of the corn, and one-third of the oats and buckwheat; and the said Isaiah Meck must pay all the road tax, but Samuel Meck must pay the county and State tax; hay and straw, manure, and all the grain in the ground must remain on the premises after the death as aforesaid. The said Isaiah Meck must keep three cows on the premises for said Samuel Meck; he must pasture and feed them. The said Samuel Meck must give two mowers and two rakers during hay making. The said Isaiah Meck must pasture one horse for Samuel Meck. The said Isaiah Meck agrees to take the grain to the mill and back for said Samuel Meck, and also haul the fire wood for said Samuel Meck. No wood can be sold off from the said premises by none of the said parties; all the loose boards must remain on the premises. The said Samuel Meck must do all the repairing of said premises. Samuel Meck agrees to buy four hundred bushels of lime to be put on the land every year; Isaiah must haul said lime free of charges. The said Isaiah Meck must plough in and out the potatoes as many as the said Samuel Meck needs. The said Samuel Meck reserves all the apples on the side where the house is erected, one-half of the pears, and also reserves the right to live on the said premises for himself and his wife during their lifetime. It is also agreed by Samuel Meck that if any iron ore is found on said premises the said Isaiah Meck shall be entitled to one-half of the income thereof.

In witness whereof, the said parties to these presents

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have hereunto set their hands and seals, this tenth day of December, A. D. 1863.

his
SAMUEL X MECK. [L. S.]
mark.
ISAIAH MECK. [L. S.]

Sealed and delivered in the presence of us,
JONAS MINER,
BENJAMIN E. DRY.

(Duly acknowledged by both parties, and recorded in the "Miscellaneous" book in the Recorder's office.)

The bill further alleged that the said writing was "in the nature of a testamentary disposition" of the tract of land recited in it; that the said Isaiah entered into possession of the lands a short time after its execution, and continued to farm them until his death in November, 1865; that since his death his widow and the guardian of his minor children, after continuing the farming for a year or two, sold at public auction the farming stock and implements, and ceased farming the land; that since they so ceased, the plaintiff has, by himself and his tenants, been in the occupancy and enjoyment of the lands.

The bill then alleged:—

"6. That in his lifetime, the said Isaiah Meck, against the wish and contrary to the express prohibition, objection, and remonstrance of Samuel Meck, the plaintiff, built upon the said premises a residence for himself, taking the materials from the premises without permission or authority, except the pine boards, shingles, hardware, and lime necessary to the building, which were supplied by said Isaiah Meck; and that the said residence is still occupied by the said Catharine Meck, widow of the said Isaiah Meck, and the children aforesaid.

"7. That the plaintiff, Samuel Meck, since the date of the instrument of writing before referred to, executed a last will and testament, therein and thereby revoking, cancelling, and annulling any and every disposition of property by him made in said instrument of December 10, 1863, and in any other instrument of writing in nature of last will and testament by him theretofore made.

"8. That said instrument of December 10, 1863, has become null, void, extinguished, and inoperative by the death of said Isaiah Meck, by the abandonment as aforesaid and the disposition of the lands covered thereby in Samuel Meck, the plaintiff's, last will and testament, and the revocation therein contained.

"9. That the plaintiff, Samuel Meck, because he fears that the existence of said instrument in the hands of said defendants may be a cloud upon his title and possession, and subject him and his estate to future litigation and a multiplicity of suits, when the facts are no longer capable of complete proof or have become involved in the obscurity of time, therefore prays —

"That the said instrument of writing of December 10, 1863, signed by Samuel Meck, the plaintiff, and the said Isaiah Meck, since deceased, and duly recorded, may be delivered up to the plaintiff to be cancelled, and that the decree made may be recorded according to law; and that an injunction be issued to restrain and forever enjoin the defendants and each of them from using and setting up said instrument against him, the said Samuel Meck, plaintiff, his heirs or estate, and from instituting any suit or suits upon the same against him, his heirs, estate, or against any disposition he hath made or may make of said lands by deed, will, or otherwise; and general relief."

The answer denied that the writing in question was testamentary, and alleged that it was an executed contract for the sale of land accompanied by possession; it further denied that possession had been abandoned by the defendants, and averred that they continued living in the house built by Isaiah on the premises, and had continued to farm until 1872, when a son of the complainant "intruded himself on the place, and has kept a disputed possession."

It further averred that the plaintiff has a possession, but only under and according to his reservation mentioned in the said instrument of writing, but everything beyond that they deny, that is, that he has farmed, used, and rented out said land either by himself or his tenants, unless it be in collusion with the said intruder.

The testimony before the examiner as to how the parties themselves regarded the agreement was very conflicting.

The master (Wm. M. Goodman, Esq.) was of opinion that . . . . "the instrument of December 10, 1863, under consideration now, does not expressly nor by implication import on its face a grant. It is therefore not a disposition of the property in the sense of a devise or bequest: on the contrary, it is an agreement to sell, or in other words, it is an executory contract, mutually entered into and agreed upon, by Samuel Meck, of the one part, and his son Isaiah of the other part, stipulating the terms and conditions upon which, if complied with by Isaiah Meck, his heirs and assigns, Samuel Meck agreed to direct his executors, in other words, his legal representatives, immediately after the death of himself and his wife, by good and lawful deed or deeds, well and sufficiently to grant, convey, and assure unto the said Isaiah Meck, his heirs and assigns, in fee simple, clear of all incumbrances, the land in dispute, containing one hundred and eight acres and twenty perches. In no sense, under the circumstances of the case, in the opinion of the master, is the instrument of December 10, 1863, a cloud upon the title entitling the plaintiffs to relief on the principle of *quia timet*, as contended

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for by them. On the contrary the rights of the parties to the contract are mutual, and clearly determinable by another proceeding, and ought to be determined in another Court." . . .

He therefore reported a decree dismissing the bill.

Plaintiff thereupon filed exceptions, which were sustained by the Court in the following opinion: . . . Whilst from all the evidence in the cause we consider the instrument of December 10, 1863, of a twofold character, the first portion a testamentary disposition of property, and the other portion a lease, we also think that the instrument upon the face indicates that this conclusion is right. It contains no language in it indicating that it was intended to operate, and have the form and effect of a deed conveying and passing a present interest or title to the lands in dispute, nor is there any present consideration passing between the parties. On the contrary, Isaiah Meck, upon its face, obtains possession under a lease as tenant not as owner, and by the very fact of holding as tenant paying the yearly rent, and agreeing to the covenants and reservation expressed therein, admits the title to be in Samuel Meck.

The character of an instrument must not be determined by what the parties may have called it but by its legal effect. All parties must be judged by the legal meaning of their words. (Ashhurst's Appeal, 10 P. F. S. 321; Turner *v.* Scott, 1 P. F. S. 134.) Isaiah Meck entered under and by virtue of the lease contained in the latter part of this instrument of writing. The other portion has reference to a future disposition of property, a future interest in the disposition, and the parties thereto have used language which the law holds testamentary in its character: "A last will and testament is the dispositition of one's property after death;" a just sentence of our will touching that we would have done after death. (Redfield on Wills, 4.)

"Whatever the form of the instrument," if it vest no present interest, but only appoints what is to be done after the maker's death, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words. (Turner *v.* Scott, 1 P. F. S. 134.) The instrument of writing now in question contains all the essentials of a will. It is a direction to his executors to dispose of the real estate after his death according to testator's wishes. It is the just sentence of Samuel Meck's will touching what he would have done after death.

The Court made a decree in accordance with the prayer of the bill.

Thereupon defendants appealed, assigning for error the decree of the Court.

J. S. Livingood (*H. Malzberger* with him), for appellants.

Under the agreement the vendee took an immediate equitable interest.

Vincent *v.* Huff, 8 S. & R. 381.
Mack's Appeal, 18 Sm. 231.
Greenfield's Est., 2 H. 489

The case is easily distinguishable from Turner *v.* Scott (1 Sm. 126), and Frederick's Appeal (2 Id. 338).

Daniel and *James N. Ermentrout*, for appellees.

It signifies nothing what the parties intended by their agreement; if it passed a future estate after the death of one of them it was a will.

Turner *v.* Scott, *supra.*
Frederick's App., *supra.*

May 2, 1881. THE COURT. This case comes under no recognized head of equity jurisdiction. It is not alleged that there was either fraud, accident, or mistake in connection with the written instrument executed by Samuel Meck and Isaiah Meck, and bearing date the 10th of December, 1863. It is not denied that Isaiah Meck entered into possession of the farm specified in said agreement and in pursuance thereof, and that Catharine Meck, his widow, and his minor children are in exclusive possession of a part of the premises, and a disputed or concurrent possession of the remainder. The plaintiff seeks, and the Court below ordered, that the agreement referred to be delivered up to be cancelled upon the ground that it is a blot upon the plaintiff's title. That it is such blot may be conceded without admitting plaintiff's right to have it removed in this summary manner.

The object of the proceeding is patent. With the agreement destroyed by a decree in equity, the road will be open for a recovery of possession by an action of ejectment. The defendants could not then use it as a shield to defend their possession. In other words, this bill is a mere tender to a writ of ejectment.

We are of opinion that it cannot be so used. The attempt to convert the deed into a last will and testament does not help the matter. The question may well be asked, whose will? It is a contract *inter partes*, and in this respect differs from Turner *v.* Scott (1 P. F. S. 126), and other cases in which a conveyance of land intended to take effect after the death of the grantor was held to be a testamentary disposition of the property. Here the contract was expressly stated to be for the sale and purchase of the farm for a price agreed upon; the purchase-money to be paid after the death of the vendor, and the title to be made by his executors and administrators; in the mean time the vendee to occupy the prem-

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ises under a stipulated rent. We will not anticipate questions that may hereafter arise by now passing upon the legal effect of this paper, and it is referred to as showing that the defendants having entered into possession under such an agreement without either fraud, accident, or mistake, have at least the right to have their case passed upon by a jury in a common law proceeding.

The decree is reversed, and the bill dismissed with costs.

Opinion by PAXSON, J.

July '80, 81. Feb. 14, 1881.

Commonwealth ex rel. Sellers Hoffman v. Philada. and Chester County R. R. Co.

Corporation — Railroad — Quo warranto — When not issuable at the suit of a private relator.

The writ of quo warranto is not issuable upon the suggestion of a private relator where the question involves the existence of the corporation.

Murphy *v.* Farmers' Bank of Schuylkill Co., 8 Harris, 415, followed.

Error to the Common Pleas No. 2, of Philadelphia County.

Quo warranto, by the Commonwealth *ex relatione* Sellers Hoffman against Thomas S. Cox, president of the Phila. & Chester Co. R. R. Co., J. Clemson Sharpless, David J. Stevenson, John T. Williams, Rowland D. Allen, A. W. Stevenson, and Dr. J. G. Allen, directors, and Dr. J. G. Allen, secretary, to show by what authority they exercised the powers, privileges, and franchises of the Philada. & Chester County R. R. Co. The relator, in his suggestion for a rule to show cause, alleged that the Philada. & Chester County R. R. Co. was incorporated by Act of March 17th, 1871, under the title of the Philada., Delaware & Chester Central R. R. Co., "with the right to construct a railroad of not less than two and a half feet nor nor more than four feet eight and one-half inches guage, beginning at the city of Philadelphia, and terminating at some point on the Penna. Central Railroad east of Downingtown, in the county of Chester, in such manner as to connect with the Penna. R. R.," "the said railroad to be commenced within three years, and completed within ten years from the time of passage of this Act;" that by a supplement to the above Act, dated April 9, 1872, the name of the corporation was changed to that of the Philada. & Chester Co. R. R. Co.; that the said corporation then proceeded to survey and lay down a route not in accordance with the terms of their charter, and not connecting with the Penna. Central Railroad, but on the contrary running nearly due west through Newtown to West Chester; that the said corporation became insolvent January 1st, 1874, a few miles of grading and cutting having been done upon the land of one of the corporators near Newtown; that the said railroad was not "commenced" within the true meaning of the Act; that on January 1, 1874, a *bona fide* organization of the corporation had not taken place; that on April 19, 1876, Barton D. Evans obtained a judgment against the corporation of $12,000 in C. P. No. 3, of Philada. Co., Mch. T. 1876, No. 866, under which, on Aug. 6, 1877, the real, mixed and personal property, rights and franchises of the road were sold to Dr. J. G. Allen; that the latter, upon the assertion, without foundation in law, that he had purchased a railroad within the meaning of the Act of April 8, 1861, called a meeting of the purchasers for the purpose of reorganizing the corporation, when by resolution of the board of directors they adopted the aforesaid route as the route of the railroad, and are now having the damages of property owners, through whose land the railroad is laid out, assessed by juries of viewers; that the relator is the owner of a tract of land in the city and county of Philadelphia, upon part of which the unlawful line of the respondents' railroad has been surveyed and located; that the respondents have procured a jury of viewers to assess the relator's damages, and are now about to build their road upon his land to his great injury; that the acts of the so-called directors are without authority of law, and their attempted exercise of the franchises of the road a usurpation upon the Commonwealth in prejudice of law; that the said corporation have forfeited their corporate rights and franchises by non-user and mis-user and by locating their road beyond their chartered authority. Wherefore the relator prayed for due process of law against the corporation to answer to the Commonwealth by what warrant they claim to have and enjoy their franchises.

The respondents, in their answer, averred that in the survey and location of their road they proceeded strictly in accordance with the provisions of the Act of March 17, 1871; that on January 7, 1874, over $40,000 had been paid in cash on the subscribers' stock, which was wholly expended upon the construction of the road; that the right of way was obtained for about twenty miles between Philadelphia and West Chester; that a *bona fide* organization had taken place, which continued in active operation up to the time of the sale of the road, and that there was at no time an abandonment of the

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franchises of the road. They denied that there would be any injury to the land of the relator by building the road; on the contrary they averred that he would be vastly benefited thereby in the appreciation of his land. They alleged that their acts had been in strict conformity with law, and concluded with a prayer that the writ might not be allowed.

The Court discharged the rule to show cause why the writ should not issue. (No opinion filed.) The relator took this writ, assigning for error the said action of the Court.

Nathan H. Sharpless, for the relator.

By the Act of June 14, 1836, writs of quo warranto may issue "in case any association . . . shall exercise any of the franchises or privileges of a corporation . . . without lawful authority; or in case any corporation shall forfeit by mis-user or non-user its corporate rights, privileges, or franchises. *And in such* cases the writ may be issued upon the suggestion of the attorney-general, or his deputy, or of any person or persons desiring to prosecute the same." The only limitation of the right of the citizen to the writ is that he shall have some particular interest in the question outside of that which he holds in common with the public.

Com. *v.* Cluley, 6 Sm, 270.

J. Levering Jones and *Thomas J. Ashton*, for the respondents.

A private relator, whether having an interest to be affected or not, is not entitled of his own motion to the writ of quo warranto for the specific purpose of determining the existence or non-existence of a corporation.

Murphy *v.* Bank, 8 Harris, 415.
Com. *v.* Burrell, 7 Barr, 34.

The law does not contemplate the use of the writ by an individual to redress the wrongs of the State.

Com. *v.* R. R. Co., 8 Harris, 518.

In questions involving merely the *administration* of corporate functions, as the election of officers, etc., the writ is issuable at the suit of a private individual, but when the question involves the existence of corporate franchises the writ is not issuable at the instance of a private relator.

Farnham *v.* Canal Co., 11 Sm. 271.

The writ is not issuable where, as here, there is a remedy at common law.

People *v.* Turnpike Co., 2 Johns. 190.

A writ of error does not lie from the exercise of a judicial discretion.

Laird *v.* McCarter, 2 WEEKLY NOTES, 213.
Breden *v.* Gilliland, 17 Sm. 34.

February 28, 1881. THE COURT. Conceding that a writ of error lies to the order made below, we think it very clear that this case falls within the principle established in Murphy *v.* The Farmers' Bank of Schuylkill Co. (8 Harris, 415), and that a quo warranto did not lie at the suggestion of a private relator.

Judgment affirmed.

PER CURIAM.

[See next case.]

July '80, 82. Feb. 14, 1881.

Hoffman's Appeal.

Railroad—Unfinished road—Sale of franchises—Practice—Preliminary injunction—Appeal from.

On an appeal from a decree in a suit in equity refusing to grant a preliminary injunction, it is a general rule of the Court to express no opinion upon the merits.

The Phila. and Chester Co. R. R. Co. were incorporated in 1871, with the right to build a railroad from some point in or near the city of Philadelphia, and to connect with the P. R. R. Co. at some point east of Downingtown. By the terms of the charter they were required to commence within three years. After grading about four miles of the road, and upon securing the right of way for about twenty miles, they became insolvent in 1874, and work was discontinued. In 1879 the franchises of the road were sold under a judgment, and the road was then reorganized under a new direction. In a bill in equity filed by a land owner, through whose property the road was surveyed, for a preliminary injunction to restrain the defendants from building their road through his land, on the ground of forfeiture of charter for non-user and mis-user, for want of title in the purchase of the franchise, and for non-compliance with the charter, the Court below refused the injunction:

Held (affirming the decree of the Court below), that the discretion of the Count was rightly exercised.

Appeal from the Common Pleas No. 2, of Philadelphia County.

Bill in equity, filed Dec. 20, 1879, by Sellers Hoffman against the Philadelphia and Chester Co. R. R. Co., Thomas S. Cox, president, J. Clemson Sharpless, David J. Stevenson, John T. Williams, Rowland D. Allen, A. W. Stevenson, and Dr. J. G. Allen, directors, praying for (1) an injunction presently until final hearing and perpetually thereafter, to restrain the defendants from locating, building, and constructing their road upon the complainant's land, and (2) that the defendants might be restrained pending proceedings in quo warranto against the corporation defendant. The facts as set forth in the bill, answer, and proofs are substantially the same as those contained in the suggestion for the quo warranto. (See preceding case.)

Injunction refused.

The complainant took this appeal, assigning for error the refusal of the injunction.

Nathan H. Sharpless, for the appellant.

The respondents are not entitled to exercise the franchises of the road, because (1) the

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franchises have fallen into abeyance. For the road was not "commenced" within the true intent of the Act of March 17, 1871, within three years from the passage of the Act. The language of the charter, "commenced within three years from date of this Act," means much more than that at the expiration of that time a few spadesful of earth should be thrown up as an alleged commencement. On the contrary, the plain intention was that that period should be devoted to procuring subscriptions to the stock in a manner adequate to the end in view, to procuring letters patent, and in making contracts for construction. In this case, for a work costing $35,000 per mile, they were able to raise but $40,000 in all. They stopped work July 1, 1874, which was not resumed until five years later. It is submitted that this amounted to non-user within the Act of March 22, 1871. (2) The respondents failed to show title in themselves to the road. The sale to Allen was invalid because it was not in compliance with the Act of April 7, 1870. The sheriff made no return of a levy upon anything or anywhere. A levy should have been made in each county. A valid levy must precede a sheriff's sale.

Duncan's Appeal, 1 Wr. 500.

What did the sheriff convey to Allen? Granting, for the sake of argument, that a railroad was conveyed, Allen then took a road thirty miles in length, four miles of which only were graded, without fixed termini, without rail or cross-tie, and without money to get them. But by the term railroad is meant a completed road.

Ward *v.* Bedford and Bridgeport R. W., 8 Phila. 94.

(3) The franchise was forfeited for mis-user.

The right granted was to build a road beginning at the city of Philadelphia and terminating at some point on the Pennsylvania Railroad east of Downingtown, so as to connect with the Penna. R. R. When the road was sold it was described as "the right of way from Philadelphia to West Chester, via Covington, Newtown, Sugartown, and Goshenville." It is clear, therefore, that the original company was perverting its franchises to a very different purpose from that for which it was granted. The new company proceeded to survey an extension of their line from West Chester to the southwest fork of the Brandywine. This change of route worked a forfeiture for mis-user, for a corporation is strictly confined within the limitation of its granted powers.

Diligent Fire Co. *v.* Com , 25 Sm. 291.
Com. *v.* Commercial Bank, 4 Casey, 383.

J. Levering Jones and *Thomas J. Ashton*, for appellees.

Prior to the Act of June 19, 1871, the validity of a charter could not be attacked in a collateral suit. That question was to be determined by a scire facias, or by a quo warranto at the suit of the State.

Turnpike Co. *v.* McConahy, 16 S. & R. 145.

A very similar case was tried under the Act of June 19, 1871.

Lejee *v.* Passenger R. W. Co., 10 Phila. 363.

But even under the most liberal construction of that Act there has been no forfeiture of franchises.

It cannot be denied that on Jan. 1, 1874, four to five miles of grading had been finished, $84,000 had been subscribed to the stock, twenty miles of right of way had been obtained, and $50,000 in cash had been paid in. Can it be contended that the work had not been commenced in good faith, and that a *bona fide* organization had not taken place.

Caley *v.* Phila. and Chester Co. R. R. Co., 30 Sm. 364.

The sale to Allen was in entire conformity with law. An entire road running the length of the State may be sold without notice in each county.

Phila. and Balt. Central R. R. Co. *v.* McCulloch, 20 Sm. 355.
Bayard's Appeal, 22 Id. 453.

The franchise of a railroad may be sold on a fi. fa. under the Act of 1870 without a return of *nulla bona*.

Williams *v.* Lawrenceville R. R. Co., 21 Pittsburgh, L. J. 187.

A sheriff's return indicates a levy. Unless the contrary appears a sufficient levy will be presumed in support of the sheriff's deed.

Hartwell *v.* Root, 19 Johns. 347.

The title of a purchaser not himself in fault cannot be impaired at law or in equity by any mere clerical error or irregularity in the proceedings.

Donaldson *v.* Bank of Danville, 8 Harris, 245.

There was a strict compliance on the part of the defendants with the Act of April 8, 1861, which vested in the new purchaser all the power of the old corporation.

Com. *v.* Passenger R. W., 2 Sm. 506.

There was no mis-user here, for the corporation, the company, were given a discretionary power in the selection of the route of the road in their charter.

New Castle and Richmond R. R. *v.* Peru and Indianapolis R. R., 3 Indiana, 467.

Pending proceedings against a railroad by a quo warranto to procure its demolition do not afford any ground for an injunction.

Aurora *v.* C. R. R. Co., 56 Ind. 80.

The plaintiff has an adequate remedy at common law in an action for damages.

February 28, 1881. THE COURT. As this is an appeal from a decree refusing to grant a preliminary injunction, we see no reason to depart from our general rule in such cases, and

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expressing no opinion upon the merits, content ourselves with saying that we think that the discretion of the Court was rightly exercised. Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

[See preceding case.]

Common Pleas—Law.

C. P. No. 4. March 26, 1881.

Fischer v. Dandistel, defendant, and The Red Star Line, Garnishee.

Foreign attachment—Right of creditor to attach goods on arrival from foreign port before duties are paid—Defense that goods are in the custody of the United States will not avail garnishee in attachment, who, before seizure by the government, had the possession of the goods.

Rule to quash an attachment.

A writ of foreign attachment was issued at the suit of Frederick Fischer against Philipe Dandistel, defendant, and the "Red Star Line," garnishee. Under the writ, the sheriff seized upon fourteen casks of wine consigned to the defendant at Chicago, upon their arrival at Philadelphia from Antwerp. The wine was shipped on a through bill of lading from Antwerp to Chicago, the duties to be paid at the latter place. After the seizure by the sheriff, the collector of the port of Philadelphia took possession of the wine and stored it in a bonded warehouse. The plaintiff thereupon tendered the amount of duties due upon the wine to the collector, but he refused to receive them from any one but the defendant or his duly authorized agent. Upon the garnishee learning this he obtained this rule.

H. G. Ward, for the rule.

The garnishee has contracted to deliver this merchandise to defendant in Chicago, and is liable if it fails so to do. The goods are in the custody and control of the United States. They are not subject to any attachment under process of this Court, and the attachment is therefore void.

Harris *v.* Dennie, 3 Peters, 292.

Lewin W. Barringer, contra.

The right of the United States is simply that of a lien for duties. These we have tendered, and our right to receive them from the collector will be determined at the proper time. The actual possession in point of law is in the garnishee, and hence subject to our attachment. The case of Harris *v.* Dennie (*supra*), so far as the controversy here is concerned, was overruled by Conard *v.* Ins. Co (6. Pet. 271).

The title to the property was in the consignees.

Conard *v.* Ins. Co., 1 Pet. 441.

Tracey *et al. v.* Swartwout, 10 Pet. 95.

The duties are a debt due the government, but this defence cannot be set up by the garnishee.

U. S. *v.* Lyman, 1 Mason, 499.

U. S. *v.* Case of Silk, 13 Int. Rev. Rec. 58.

Howland *v.* Harris, 4 Mason, 497.

THE COURT. Rule discharged.

[NOTE.—The Collector of Customs having been made a party to the record, this case was removed to the United States Circuit Court, under § 643, Revised Statutes, where, after argument, the attachment was quashed, April 16, 1881, on the authority of Harris *v.* Dennie, 3 Pet. 292, and Taylor *v.* Carryl, 20 How. 596.]

U. S. District Court—Law.

Feb. 2, 1881.

Schreiber & Sons, who sue as well for the United States as for themselves, v. Sharpless & Sons.

Copyright—Revised Statutes, § 4965—Violation of by Agent—Does not render principal liable to penalty inflicted by the Act—Remedial and penal statutes distinguished.

Rule for a new trial.

This was a *qui tam* action under § 4965 of the Revised Statutes of the United States, to recover from defendants the sum of $15,000 penalty for copying and publishing a photograph, copyrighted by Schreiber & Sons, without their consent.

On the trial the following facts appeared: The plaintiffs, Schreiber & Sons, some time after the birth of the baby elephant "Americus," took a photograph of the mother and her infant, which they caused to be duly copyrighted, and printed a notice of the copyright on every copy sold by them. Mr. Thornton, the superintendent of the domestic department of defendants' store, acting in his capacity of manager, and without instructions from defendants, purchased one of said photographs, took it to an engraver, whom he directed to have 15,000 labels with parti-colored

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borders copied from it. Of these copies 5000 were sent to a dyer, a quantity of pieces of cambric goods were ticketed with this label, and together with the balance of the copies were sent to defendants' store, where the goods so labelled were exposed to sale. Before any sales had taken place, however, Mr. Thornton took a piece of the goods so labelled, and the card containing the copyrighted photograph to Charles Sharpless, the senior member of defendants' firm, who, upon examination, approved of the label, and instructed Mr. Thornton to place the goods upon the market. Some 200 pieces of the goods so labelled were sold, and the balance found at defendants' store.

BUTLER, J., before whom the case was tried gave the jury binding instructions to find for defendants. The verdict was rendered accordingly, and this rule for a new trial was taken.

H. P. Brown, Assistant District Attorney, and *John K. Valentine*, District Attorney, representing the United States, and *F. C. Brewster*, representing Schreiber & Sons, for the rule.

Any notification in printing to the public is a publishing.

Marsh *v.* Warren, 14 Blatch. 263.

It is no defence to say that a printed work is not offered for sale itself, but merely used to promote the sale of an article to which it is attached.

Hotten *v.* Arthur, 1 H. & M. 603; 32 L. J. Ch. 771.

The maxim, *Qui facit per alium facit per se*, is binding as well in criminal as in civil actions.

Am. Fur Co. *v.* U. S., 2 Peters, 358.
Cliquot Champagne, 3 Wall. 114.
U. S. *v.* Gooding, 12 Wheaton, 460.
Stockwell *v.* U. S., 13 Wall. 548.
U. S. *v.* Voss, 1 Cranch C. C. 101.
U. S. *v.* Conner, 1 Cranch C. C. 102.

Ratification of acts of agents, and a subsequent assent, is equivalent to an original authority and direction.

Drakely *v.* Gregg, 8 Wall. 242.
Clark's Ex'rs. *v.* Van Riemsdyk, 9 Cr. 153.
U. S. *v.* 278 Bbls. Distilled Spirits, 11 Wall. 356.

A principal is liable for the torts of an agent.

Del. Col. *v.* Arnold, 3 Dall. 333.
R. R. Co. *v.* Hanning, 15 Wall. 649.

E. Hunn, Jr., contra, was not called upon. His paper-book contained the following authorities:—

The statute under which this suit is brought being a penal statute must be construed strictly, and in such cases the principal is not bound by the acts of his agent.

U. S. *v.* Sheldon, 2 Wheaton, 119.
Myers *v.* Foster, 6 Cowan, 567.
Cone *v.* Bowles, 1 Salk. 205.
Lamb *v.* Palk, 9 C. & P. 629.
Reed *v.* Allegheny, 79 Penna. 300.
Wray *v.* Evans, 80 Penna. 102.
Wharton on Agency, § 482.
Ewell's Evans on Agency, *620, § 3, 482 *et seq.*

C. A. V.

Feb. 7, 1881. THE COURT. On the trial, the Court, after referring to the fact that the suit is against the firm of Charles Sharpless & Sons, charged that the claim of the plaintiffs is twofold: first, for copying the picture, and second, for publishing the copies; that as respects the first, the evidence shows the copying to have been done by the firm's employé, Mr. Thornton, without its assent or knowledge, and that it was not, therefore, responsible for his act; that the suit being brought to recover a penalty, the doctrines of principal and agent which prevail in civil transactions, are inapplicable. That as respects the claim for publishing, if it be admitted that the term "publish" as employed in the statute, has reference to pictures, there is no evidence that the defendant published the copies procured by Mr. Thornton; that, as the evidence shows, a number of the copies were taken to the store by Mr. Thornton, and others sent to the dyer's, where they were affixed to goods, which were subsequently taken to the defendants' store; that Charles Sharpless first saw the copies when the goods arrived, and was then informed of Mr. Thornton's acts in procuring them; that a part of the goods were subsequently sold, with the labels attached; that the publication of the copies had been made by Mr. Thornton and the dyer, before the attention of Mr. Sharpless was called to the subject; and that the other members of the firm never had any knowledge respecting it. The jury was, therefore, instructed that the evidence did not warrant a recovery, and to render a verdict for the defendants.

The only question presented on the trial, and the only question now presented, is, can the defendant be held responsible, under the statute, for what was done by its agent or agents, in pursuance of their employment, without its knowledge. On the trial I believed it could not; and after hearing the plaintiff's counsel on this motion for a new trial, I believe so still. The case of Stockwell *v.* U. S. (13 Wallace, 548), draws a distinction between remedial, or compensatory statutes, and penal statutes. That the statute here involved is penal, is not open to doubt.

If the suit might be regarded as against the several members of the firm individually, and a recovery be sustained against Charles Sharpless alone, for publishing, a question might possibly arise whether the case should have gone to the jury, as upon a suit against him only. No such claim having been made, however, at the trial, this aspect of the case was not considered. As the record stands, I incline to believe the claim, if made, must have been denied.

The rule, therefore, is discharged.

Opinion by BUTLER, Dist. J. MCKENNAN, Cir. J., concurred.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, SEPT. 29, 1881.* [NO. 24.

Supreme Court.

May, '81, 172. May 19 & 20, 1881.

Commonwealth v. Texas & Pacific Railway Company.

Taxation—Corporations—Constitutional law—What is a "foreign corporation" under sect. 16, Act of 7 June, 1879—Construction of proviso of said Act.

A corporation chartered by the Congress of the United States, doing business in Pennsylvania, is not a "foreign corporation" under the 16th section of the Act of 7 June, 1879 (P. L. 120), and hence is not liable to pay a license tax.

The general government in its relation to that of the several States cannot be considered a foreign government in the ordinary acceptation of that term. Within the sphere of its delegated powers its authority extends over all the States of which it is composed, and to that extent it may be said to be identified with the government of each. Hence a corporation created by the government of the United States cannot with propriety be called a foreign corporation.

The phrase in the proviso to Sect. 16, Act 7 June, 1879, "or whose capital stock or a majority thereof," etc., refers to the capital stock actually issued, and not to capital stock merely authorized.

Error to the Common Pleas of Dauphin Co.

This was, in the Court below, an appeal of the Texas & Pacific Railway Company from the settlement of an account against them by the accounting officers of the Commonwealth, for office license, under section 16, of the Act of 7th of June, 1879 (P. L. 120), which is as follows:—

"SECTION 16. That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth for the use of its officers, stockholders, agents, or employés, unless it shall first have obtained from the Auditor-General an annual license so to do, and for said license every such corporation shall pay into the State treasury, for the use of the Commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the Auditor General shall not issue a license to any corporation until said license fee shall have been paid. The Auditor-General and State Treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this Act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this State which does pay a tax under any previous section of this Act."

Under the terms of the above section the Auditor-General and State Treasurer, upon the 21st day of October, 1880, settled an account against the Texas and Pacific Railway Co., for office license, upon the authorized capital stock of the company, which is $50,000,000. The tax being at the rate of one-fourth mill for each dollar of that capital, amounted to $12,500 with interest from 21st October, 1880.

The company thereupon filed an appeal from the settlement so made against it, their specification of objections being as follows: (1) The Texas & Pacific Railway Co. has by reason of its charter granted by the Congress of the United States a legal existence in Pennsylvania, and not being a foreign corporation, is not subject to the provisions of the sixteenth section of the Act of June 7, 1879. (2) The said settlement is erroneous and illegal, because if the sixteenth section of the Act of June 7, 1879, requires a license to be obtained by the Texas & Pacific Railway Co., from the Auditor-General of Pennsylvania, then the said section is in conflict with the Act of Congress, entitled, "An Act to incorporate the Texas & Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871; the Act of Congress, supplementary thereto, approved May 2, 1872, and the Constitution of the United States, either or all of them, and is therefore void. (3) The Texas & Pacific Railway Company is not bound to pay the sum wherewith it is charged, or any part thereof, because a majority of the capital stock of said company was, during the whole of the period covered by the aforesaid settlement, owned or controlled by a corporation of the State of Pennsylvania, paying a tax under the fourth section of the Act of June 7, 1879.

The case was tried before PEARSON, J., by agreement of counsel dispensing with trial by jury as provided by the Act of April 22, 1874 (Purd. Dig., Supplement, p. 1939).

The authorized capital stock of the company was $50,000,000, of which it had issued $7,902,500. Of this latter amount all except a few shares were held by the California & Texas Railway Construction Company, a corporation of this State, which at that time had a capital stock of $8,221,250, but which was valued in the tax returns of their company at only $100,000.

The following facts were found by the Court: The defendant company was incorporated by the Congress of the United States, by an Act approved May 2, 1872, to construct a railway, from Marshall, in the State of Texas, to

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San Diego Bay, in the State of California, and authorized to have a capital stock in a sum not exceeding fifty million of dollars, as should be fixed by the directors. The company was regularly formed, and by its by-laws fixed that sum as the amount of its capital. The company rented an office in the city of Philadelphia, No. 275 S. Fourth Street, prior to the year 1879, and still has its occupancy for the use of its officers, stockholders, agents, or employés, in which that part of its business done in Pennsylvania is transacted. It also, in the year 1874, made an arrangement with the "California & Texas Railway Construction Company" (a corporation created by the State of Pennsylvania, and having its capital and transacting its business therein), to raise capital and carry on the construction of its road, and the same was done under the arrangements, and on the terms of the contracts executed between the companies. The said construction company paid a tax on its capital stock into the treasury of the State of Pennsylvania. On the 21st day of October, 1880, the Auditor-General and State Treasurer settled a license tax against "The Texas & Pacific Railway Company" of $12,500, on account of its having an office in this Commonwealth for the use of its officers, etc., and for the transaction of its business, without having obtained a license from the Auditor-General so to do, or having invested and used its capital stock in this Commonwealth, from which settlement the said company has, in due form of law, taken an appeal.

The decision of the Court, upon the above facts, was as follows: This case presents two prominent points: *First.* Is the defendant a foreign corporation? To constitute it such it must be set up or created by a foreign government. This corporation is created by the United States. Is that a foreign government to the State of Pennsylvania? It is not a sovereignty outside of Pennsylvania, but within it, spreading all over it, a superior government embracing it; the citizens of the United States constituting citizens of Pennsylvania, and the citizens of Pennsylvania being citizens of the United States; the laws of the United States governing and controlling Pennsylvania; the same Courts having jurisdiction over each, dispensing justice alike for each. The neighboring States have no such authority within this State, nor over them. If the Legislature intended to exclude the United States from having power to create corporations within Pennsylvania, it certainly did not use very apt words to express the intention in speaking of *foreign corporations*. It is as much a domestic corporation as if created by a law of this State. It emanates from a power within this State. No permission would have to be asked by the government of the United States to take possession of any part of our soil required for a public purpose, within the State, as for a fort, a post-office, or a custom-house. Each year is proving more and more that the jurisdiction of the Courts created by the laws of both governments are concurrent —they run together. There are not many decisions of the Courts of superior jurisdiction showing that the United States is not a foreign sovereignty to the State of Pennsylvania, but the same sovereignty, but there are a few to be found. In Chaflin *v.* Houseman, assignee (3 Otto, 136), Justice BRADLEY says: "The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State." In Ordway *v.* The Central National Bank of Baltimore, Mr. Justice ALVEY announces a similar doctrine. He says, at page 566 of Thompson's National Bank Cases: "The laws of the United States are laws in the several States, and just as much binding on the citizens and Courts thereof as the State laws are. The United States is not a *foreign sovereignty* as regards the several States, but it is a concurrent and, within its jurisdiction, a paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties having concurrent jurisdiction in the State—concurrent as to place or person, though distinct as to subject matter." Again, he says: "The two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as Courts of the same country."

There is no doubt of the power of the State to impose a tax on the corporation created and placed in its midst by the United States, unless for national purposes, but it must clearly describe it as it is, and *exclude* or *tax* it in express words, not as a foreign corporation. The United States could also force it on the State, but must do it by apt words, and for good and proper reasons, showing or avering the necessity.

Second. The evidence shows that a connection was formed between the Texas and Pacific Railway Company, and the "California and Texas Railway Construction Company," to carry on the work. This, as found, was a corporation created by, and existing in Pennsylvania, and subject to taxation under her laws. This company had a nominal capital of ten millions of dollars, one subscribed of $8,221,250 and actually paid in of $7,902,500, all of which, so far as we can collect, was expended in building the Texas and Pacific Railway. Yet its capital stock was owned and controlled by a corporation of this State, and pays a tax into its treasury under this Act. By the end of the year 1880, its stock was reduced to $100,000, on which it paid tax that year, yet probably during the year 1879

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it held a much larger capital. Its stock was actually taxed and paid to the amount of $299.35 as per receipt. The question is, does that exonerate the defendant company? It is very probable that the construction company would have been taxed to a much larger amount under our laws. Its tax from 1874 down to 1879 would have been much higher, but that is not an important point. This was not a settlement for taxes on the capital stock of the "Construction Company," but for a license tax against the Texas and Pacific Company. If that company was not subject to such a tax, this amount as settled cannot be sustained. The evidence clearly shows that it was connected with a Pennsylvania corporation, which was subject to taxation; therefore, by the very terms of the Act, the Texas and Pacific Company could not be called on to pay a license tax; such appears to be the words of the Act, apparently introduced for the express purpose of exonerating this company. So far as we can see this charge of tax is illegal.

Here our action might stop, as we can predicate nothing on the objection that the Act of Assembly, on which this tax is founded, is in conflict with the Constitution of Pennsylvania. In what particular do they conflict? The Act of 1811 requires that the person appealing shall in his appeal specify the particular in which he objects. There is no specification of objections here; merely saying that the statute is in conflict with the Constitution is too general; it cannot be called a specification. It should certainly be sufficiently minute to direct the public officers to the objection. We cannot tell whether the objection is to the title, or the subject matter of the tax, because it is not uniform, or imposed on improper objects. This Court can never travel out of the specifications; it is confined to them. . . . . For reasons already given we are of the opinion that this license tax cannot be sustained. We, therefore, give judgment in favor of the defendant, and that the Commonwealth has no cause of action.

To this decision the Commonwealth filed the following exceptions:—

(1) The Court erred in deciding as follows: "There is no doubt of the power of the State to impose a tax on the corporation created and placed in its midst by the United States, unless for national purposes, and it must clearly describe it as it is, and exclude or tax it in express words, not as a foreign corporation."

(2) The Court erred in deciding as follows: "The evidence clearly showed that it ('The Texas and Pacific Railway Company') was connected with a Pennsylvania corporation, which was subject to taxation; therefore, by the very terms of the Act, the Texas and Pacific Company could not be called upon to pay a license tax, such appears to be the words of the Act, apparently introduced for the express purpose of exonerating this company."

(3) The Court erred in entering judgment in favor of the company and against the Commonwealth.

The Court overruled the exceptions, and entered judgment for the defendant, whereupon the Commonwealth took this appeal, and assigned this action as error.

Lyman D. Gilbert, Deputy Attorney-General, and *Henry W. Palmer*, Attorney-General, for the Commonwealth.

Does the control by a Pennsylvania corporation of less than $8,000,000 of a capital stock of a corporation whose authorized capital is $50,000,000 exempt it from the payment of this license fee? The Legislature in enacting section 16 of the Act of June 7, 1879, found that many corporations, created by other sovereignties, came into this State and here made their permanent home, without bringing any taxable property, and thus were in many instances enabled to transact business upon terms of equality with domestic corporations, without bearing any of their burdens. To remedy this, the Legislature determined that all corporations of alien birth should pay a license tax, or retire from our jurisdiction unless the majority of their stock was "owned or controlled" by one of our tax-paying corporations. The reason for the license tax ceased when the property of the alien corporation was brought within our taxing power and bore its proportion of the public burdens.

The "ownership" that excuses the payment of a license tax is an ownership that subjects the majority of the capital stock to taxation. The "control" must be such a control as makes the capital stock an object of taxation. An alien corporation does not make a sufficient defence to a demand for this tax by replying that a majority of its stock is owned or controlled by a domestic corporation. It must also show that the corporation owning or controlling the majority of its stock pays taxes to the State under the revenue law of 1879. It must be an ownership or control that subjects the property to corporate taxation.

Upon what amount of capital stock is the tax to be computed? The section says the tax shall be upon "each dollar of capital stock which said company is authorized to have." Hence when an alien company claims exemption upon this ground, it must show that a majority of the authorized capital stock of the company is owned or controlled by a domestic corporation which is a tax-payer. Since the Texas and Pacific Railway Company has not shown this, it is liable to this license tax.

Did the Legislature by the words "foreign

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corporation," intend to tax a corporation having a congressional charter? The whole object and purpose of the section is taxation and revenue. If a corporation had a grant from any other sovereignty, but no property within our State, prior to the passage of this Act it could not be taxed for State purposes, even if its most valuable business was done within our limits and under our protection. Hence the proper construction of the law is that the word "foreign" corporation means a corporation not created by our sovereignty, and full effect will be given to the spirit and letter of the section only by declaring that the Legislature intended to tax the defendant corporation, because it did not owe its existence to a grant from the Commonwealth of Pennsylvania. The words "other governments" in the Act of April 29, 1844, includes the United States.

Mintzer *v.* County of Montgomery, 4 Sm. 139.

M. E. Olmsted, for the defendant in error.

The Texas and Pacific Railway Company is a corporation created by the Congress of the United States, and hence is not a foreign corporation. Under its charter it is empowered "to sue and be sued, plead and be impleaded, in all courts of law and equity within the United States." A corporation created by the United States has a legal existence everywhere within the United States.

Eby *v.* Northern Pacific Railroad, 6 WEEKLY NOTES, 385.

A corporation has a legal existence anywhere within the limits of the sovereignty from which its corporate existence is derived, and cannot be said to be foreign to a jurisdiction which constitutes a part of that sovereignty.

Eby *v.* Northern Pacific Railroad, 7 WEEKLY NOTES, 145.

Corporations created by Act of Congress can be legally established within the State without the consent of the State Legislature.

Stetson *v.* City of Bangor, 56 Maine, 288.
Casey *v.* Galli, U. S. Sup. Ct. 1876; Thompson's Nat. Bank Cases, 142.
City of Pittsburg *v.* First National Bank, 5 P. F. Smith, 45.

Though the government of the United States is an "other" government as distinguished from the State government, it is nevertheless not a foreign government.

Mintzer *v.* County of Montgomery, 4 P. F. Smith, 139.

As a conclusive authority upon this subject we rely upon the case cited in the opinion of the Court below.

Claflin *v.* Houseman, 3 Otto, 130.

For cases showing the rights of States over corporations of other States, see—

Bank of Augusta *v.* Earle, 13 Peters, 519.
Paul *v.* Virginia, 8 Wallace, 168.

The Commonwealth's second assignment of error is the finding of the Court below—that the capital stock of the Texas and Pacific Railway Company "was owned and controlled by a corporation of this State, which pays a tax into its treasury, under the Act . . . therefore, by the very terms of the Act, the Texas and Pacific Railway Company could not be called upon to pay a license tax." The proviso exempts every corporation "whose *capital stock*, or a majority thereof, is owned and controlled," etc. It does not contain the word "authorized"—hence the argument of the Commonwealth falls. This finding of the Court below is a finding of fact, behind which this Court will not inquire.

Act of April 22, 1874, Purd. Dig. Supplement, 1939.
Jamison *v.* Collins, 2 Norris, 359.
Lee *v.* Keys, 7 Norris, 175.
Commonwealth *v.* Lehigh Valley R. R. Co., May Term, 1880, No. 217; not reported.

June 13, 1881. THE COURT. The sixteenth section of the Revenue Act of June 7, 1879, provides that no foreign corporation, except foreign insurance companies, etc., shall have an office in this Commonwealth, for the use of its officers, stockholders, agents, or employés, without first having obtained from the Auditor-General a license to do so; for which license every such corporation shall pay "annually one-fourth of a mill on each dollar of the capital stock which said company is authorized to have" . . .; "Provided that no license shall be necessary for any corporation paying a tax under any previous section of this Act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this State which does pay a tax under any previous section of this Act."

It is admitted that the defendant company was incorporated by Act of Congress for the purpose of constructing and operating a railroad from a point in the State of Texas to San Diego, California, with an authorized capital not exceeding fifty millions of dollars, less than one-sixth of which was issued, and that the company has not invested or used its capital in this Commonwealth, except in the purchase of rails and other railroad materials and supplies; but, during the year ending July 1, 1880, it kept and maintained for the use of its officers, stockholders, agents, and employés, in the transaction of their business, an office in the city of Philadelphia without having obtained a license from the Auditor-General. The company having thus failed to procure a license, the Auditor-General and State Treasurer, in pursuance of the provisions of the Act, settled an account against it for $12,500, with interest from October 21, 1880.

From this settlement an appeal was taken by the company, and the Court of Common Pleas, in a clear and able opinion, held that it was not liable, for the reasons that it is not a foreign cor-

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poration, within the meaning of the Act, and that nearly all its capital stock, actually issued, was held and controlled by the California and Texas Construction Company, a corporation of this State, which was liable to pay and did pay a tax under a previous section of the Act, and hence the defendant was within the protection of the proviso above quoted. These are controlling points in the case, and if either of them be correct the judgment must be affirmed.

The general government, in its relations to that of the several States, cannot be considered a foreign government in the ordinary acceptation of that term. Within the sphere of its delegated powers its authority extends over all the States of which it is composed, and to that extent it may be said to be identified with the government of each. Hence, a corporation created by the government of the United States cannot with propriety be called a foreign corporation. It is contended, however, that in a more comprehensive sense all corporations not created directly by State authority may be classed as foreign in contradistinction to those of exclusively State origin; and that such was intended to be the meaning of the word "foreign," as used in the Act. This might be so, if there was anything in the Act itself indicative of an intent to use the word in that sense; but there is not. On the contrary, in the fifth section which imposes a tax on limited partnerships, etc., they are described as "partnerships organized under or pursuant to the laws of this State, or of any other State or territory, or of the United States, or under the laws of any foreign State, kingdom, or government;" thus clearly showing that when the Legislature intended to tax associations created by the general government they used apt words of description for that purpose. The same distinction is observed in other portions of the Act, especially in the sixth section. The construction adopted by the learned President of the Common Pleas is so fully sustained on principle, as well as authority, that it is unnecessary to add anything to what is so well said in his opinion.

But, assuming that the sixteenth section of the Act should be so construed as to embrace corporations created by Act of Congress, the judgment is still clearly right on the other ground, viz., that the defendant is within the protection of the proviso. The fact was conclusively established that nearly all of its actual capital stock was held and controlled by the California and Texas Construction Company, a Pennsylvania corporation, which paid a tax under a prior provision of the Act; thus bringing the defendant directly within the terms of the proviso. In answer to this position, it is suggested that the phrase, "capital stock or a majority thereof" refers to the authorized or *nominal*, and not to the actual capital of the company. Such a construction of the proviso is unreasonable and wholly unwarranted by anything contained in the Act. When authorized or nominal capital, in contradistinction to actual capital, is intended to form the basis of taxation, it is so designated as to leave no room for doubt as to what was meant. In a case like the present, in which less than one-sixth of the capital stock, which the company is authorized to have, has actually been issued, the proviso would be inoperative, if it means authorized capital. In the very nature of things capital stock authorized, but not issued, could not be owned or controlled by another corporation. We have no doubt the words of the proviso refer to capital stock actually issued, and not to capital merely authorized.

In any view that can reasonably be taken of the case the judgment is correct.

Judgment affirmed.

Opinion by STERRETT, J.

Jan. '80, 280. February 8, 1881.

Appeal of Stang et al.

Equity—Contribution—Corporation—Distribution of assets among stockholders without paying debts—Consequent liability of stockholders—How the liability is to be enforced.

The capital of a corporation is a trust fund for the payment of creditors; stockholders who diminish that fund by distribution among themselves, without first providing for the payment of all indebtedness, receive it impressed with the trust, which a court of equity will enforce.

This principle depends upon the receipt of the funds; hence a stockholder who has not shared in the distribution, is not subject to its application.

The trust is enforceable in favor of a creditor whose claim was not liquidated, nor even in suit, at the time when the distribution among the stockholders was made.

Although all of the stockholders, who have shared in the distribution of funds impressed with the trust for creditors, are liable to contribute their proportion eventually to the payment of the demand of the complaining creditor, yet each stockholder is bound to restore his part *in toto*, and, the equity of the creditor being superior to the equity of the stockholders sued for contribution from those not sued, it is not necessary that all the stockholders should be joined in the suit. A creditor is entitled to a decree against the stockholders sued for the full amount of the shares respectively received by them.

Appeal from the Common Pleas No. 2, of Philadelphia County.

Appeals of Peter Stang and others from the decree dismissing their exceptions, and confirming the report of the Master in a suit in equity wherein Henry Bickley was complainant, and A. B. Paul, Peter Stang *et al.* (stockholders in

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the Western Market Company) and the Pennsylvania Railroad Company were defendants.

After the sustaining of a demurrer on the ground that the market company had not been joined, the complainant amended his bill by an averment that the corporation had ceased to act as such, and prayed that as its former officers were parties defendant, the service which had been upon them individually should be decreed a service upon the corporation. Upon this prayer, no order of the Court appears of record.

Upon the answers of such of the defendants as were served, the cause was referred to W. Wynne Wister, Jr., as Examiner and Master. The facts, as found by him, and his opinion of the law thereon, are as follows:—

The Western Market Company was incorporated by an Act of the Legislature of February 4, 1859, with a capital of $250,000, divided into 500 shares of the par value of $500 per share. By a subsequent Act, the capital was divided into 2000 shares of the par value of $50 per share.

After its incorporation, the company purchased a lot of ground at the northeast corner of Sixteenth and Market streets, and erected thereon a brick market-house. Some time in December, 1870, the company determined to sell the lot then owned and occupied by it, to the Pennsylvania Railroad Company, one of the defendants, and to procure another site for the erection of a new market-house. In accordance with this determination, it agreed to purchase certain property belonging to the present complainant, Henry Bickley, and about the same time contracted with John Rice, acting on behalf of the Pennsylvania Railroad, to sell the latter the house and lot at Sixteenth and Market streets. By the terms of this contract, which was dated December 31, 1870, the consideration to be paid was $78,612, in cash, and 1113 shares of the capital stock of the market company, to be transferred to it on delivery of the deed.

Mr. Rice, as agent for the railroad company, prior to January 6, 1871, had purchased, and at that date held 1113 shares of the market company's stock, which he afterwards surrendered to the company in accordance with the contract of sale, paid the $78,612 in cash, and received a deed for the lot, dated February 7, 1871.

On February 8, 1871, the persons who were then stockholders in the market company passed a resolution refusing to comply with their previous agreement to purchase complainant's property, and duly notified him to that effect. After receiving the purchase-money from the Pennsylvania Railroad Company, they divided it among them in proportion to the number of shares each held, ceased to exercise any of their corporate franchises, and, to all intents and purposes, virtually dissolved the corporation.

Mr. Bickley then brought suit against the company for breach of contract, recovered damages, entered judgment, and issued an execution thereon, but the company having no longer any existence, and all the assets, which consisted of the proceeds arising from the sale of their market-house and lot, having been divided among the stockholders, the writ was returned *nulla bona*. He thereupon filed the present bill against some of the stockholders who shared in the distribution of the assets, in order to recover his claim.

The right of the complainant to the equitable relief he seeks, however it may have been considered at one time, can scarcely any longer be deemed a doubtful question. The capital of a corporation is a fund to which the creditors legitimately, and necessarily, look for the payment of their claims, and the stockholders who diminish that fund by dividing any part of it among themselves, without first providing for the payment of all indebtedness, only receive it upon an implied trust to pay the liabilities, and this trust a court of equity will, undoubtedly, enforce.

This is a well-established principle of equity jurisprudence, and one that has been so frequently recognized, that even if questioned, could not, in view of the authorities, be successfully combated. (Story's Equity Jurisprudence, vol. 2, §§ 1251–1252, etc.; Thompson on the Liability of Stockholders, §§ 7, 8, 10–18; Wood *v.* Dummer, 3 Mason, 308; Gratz *v.* Redd, 4 B. Mon. 178; Norris *v.* Johnson, 34 Md. 485; Marsh *v.* Burroughs, 1 Woods, 463.)

And a creditor of a corporation who has exhausted his remedy at law, is clearly entitled to the assistance of equity to aid him in obtaining satisfaction of his claim, out of the assets in the hands of the stockholders who possess them. (Wood *v.* Dummer; Marsh *v.* Burroughs, *supra;* Reid *v.* Eatonton Manufacturing Co., 40 Ga. 98.)

So far then as the complainant's right is concerned the case is clear, but the question as to the liability of the Pennsylvania Railroad Company as a party defendant, and the proper form of decree still require consideration.

It cannot be doubted that the railroad company was a stockholder in the Western Market Company some time previous to the purchase of the market house and lot, for although the 1113 shares, surrendered in part payment, were not standing in the name of the railroad company, they had been paid for by money obtained from it, and Mr. Rice, who bought them, in his testimony expressly says, that he did so at the instance of the president, J. Edgar Thomson, not only for the purpose of furnishing a part of the consideration named in the agreement of sale, but also that he might have control of the necessary number of votes to have the sale approved; and

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this stock, so held by him was subsequently voted in the interest of the railroad company. The latter was, therefore, the real owner of the stock, without reference to the name in which it stood. If Mr. Rice held it, he only did so in trust for the company, and subject to its order and disposal.

On the other hand, it is equally clear of doubt, that the Pennsylvania Railroad, neither itself nor through others, received any part of the assets distributed by the stockholders of the market company among themselves. It never, in any way, shared in such distribution; and if the principle which holds that the stockholder who has taken the assets of a corporation is liable, in equity, to a creditor thereof, depends—as it unquestionably does—upon the *receipt* of funds, which are impressed with a trust for that purpose, then it is manifestly evident that the railroad company, not having the assets which create the obligation, cannot be held to be within the principle.

The Master has not overlooked the argument, that even if the railroad company cannot be shown to have *actually* shared in the distribution, it must be held accountable as having *virtually* done so, inasmuch as it received a credit for the shares surrendered in settlement, equal in amount to what those shares would have been entitled to had the entire consideration been paid in cash, and the division then made as to all the shares of stock. The answer, however, is that the railroad company had already paid for the stock purchased, in fulfilment of its agreement, the same sum per share as it afterwards received a credit for in the settlement; and if held liable for any further amount, would be paying just that much more than the market company stipulated for, and in aid, too, of the very stockholders who made the contract. Unless there is an undoubted right on the part of the complainant—certainly none has been shown—to compel this, it would be inequitable in the extreme.

Had the market company purchased in good faith, and cancelled 1113 shares of its stock, it cannot be questioned that the prior holders would not be liable in a suit like the present, unless perhaps, upon a subsequent deficiency of assets there was cause to doubt the *bona fides* of the transaction. This, in reality, was what the market company did when it is agreed to receive the shares in part payment. (Barton *v.* The Plank Road Co., 17 Barbour, 397. Bank of Columbus *v.* Bruce, 17 N. Y. 507.)

This might be considered conclusive of the question, but in addition thereto is another reason for holding the railroad company exempt from liability. The stock it had owned had actually been surrendered and transferred to the market company prior to the time when this liability was incurred. That is, the resolution adopted by the stockholders of the latter company, refusing to comply with their contract to purchase complainant's property, was not passed until the stock owned by the railroad company had passed beyond its control.

This stock could not have been voted by the latter company at the meeting at which the resolution was adopted, it was beyond its power to have used it to prevent the very action for which it is now sought to hold it responsible.

For this, therefore, if for no other reason, it would seem that the railroad company ought not to be held accountable. When the stockholders of the market company contracted with the agent of the Pennsylvania Railroad Company, for the delivery of a certain number of shares of the former's stock, in part payment of the consideration, and further resolved that the stock, when delivered, should be held in trust for the benefit of the company, if any advantage was to result therefrom, they intended to reap the benefit themselves, and for all subsequent liability, they should be responsible.

It might have presented a different question, if the rights of the complainant had been, in any wise, impaired by such an agreement of the stockholders, but as no such result is pretended, it is unnecessary to consider it.

For these reasons the Master thinks that the liability of the Pennsylvania Railroad Company, as a party defendant, has not been established, and as to such defendant, that the bill must be dismissed.

As to the defendants, P. Lowry, Sr., Nathan Wallwork, Robert M. Wiley, George Kalbach, Jacob Rexstine, and Isaac Killian, there being no proof that they received any share of the assets of the Western Market Company—the bill, as to them, must likewise be dismissed.

The remaining question is: The liability of the other defendants being established, what is the proper decree to be made against them? The complainant asks for a decree, that each refund as much as he received in distribution, or so much thereof as will pay complainant's debt, interests and costs, while the defendants insist that they are severally liable only for such proportion of said debt, interest and costs as the sum received by each, bears to the amount received by all, and that the decree must be so moulded as to effect this; in other words, they contend that the Court must determine the rate of contribution of all who are liable. The effect of which, would be to limit the recovery of the complainant to a portion only of his claim, and for the balance compel him to proceed against other parties.

Ordinarily, perhaps, a court of equity, with a

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view to avoid a multiplicity of suits, and administer entire relief in one, works out the existing equities of all the parties before it, or compels those who should be parties, to be brought in, and then determines the proportion in which all the defendants who are jointly liable shall contribute towards the payment of the complainant's demand.

This right of compelling contribution, which is the foundation in some cases of the Court's jurisdiction, and in others is resorted to from motives of expediency, is not, however, to be invoked when it would be the cause of injustice to the complainant, or when the necessity of the case does not imperatively demand it.

The right of the complainant to immediate and entire relief when established, is not to be delayed from any questions of expediency, or of the ultimate rights of the defendants to contribution.

It may be true, that as amongst themselves, the stockholders of the Western Market Company will finally be responsible only in proportion to the amount that each received of the assets, but it by no means follows, that this complainant is, therefore, only entitled to a decree against each for such proportion, and if that fails to satisfy his claim, must resort to another suit against such of the stockholders as he did not, or could not, make parties in this. Nor that, if it be shown, that the present defendants have received more than sufficient to pay him in full, of funds primarily liable for his debt, he must be delayed until the equities existing among all of the stockholders can be adjusted. (Ogilvie *v.* The Knox Insurance Co., 22 Howard, 380; Pierce *v.* The Milwaukee Construction Co., 38 Wis. 253.)

The complainant's right to recovery is based on the fact that the defendants are in possession of funds which are impressed with a trust for the payment of his debt, and as a chancellor does not hesitate to afford relief to a *cestui que trust*, when a trustee, who has misapplied the trust property and is responsible, is within his power, simply because there may be other trustees equally liable, there seems no sufficient reason why it should be done here.

All those who shared in the distribution of the assets of the Western Market Company are not parties to the present suit, nor have the defendants endeavored to have them brought in; yet it is clear, on the principle contended for, that if some must, all must, eventually contribute their proportion to the payment of the complainant's demand. Any scheme of contribution that falls short of this would be imperfect; it would be useless, therefore, to attempt contribution from the present defendants alone, and the duty of bringing in the others must rest with them. Unless it is absolutely obligatory upon a court of equity to deny its aid in every case until it can compel contribution from all who may ultimately be liable, there is no ground for doing so in this.

When the stockholders divided the capital of the market company amongst them, they did so with a full knowledge of the present liability, and without making any provision for its settlement, and as that capital, consisting as it did of the entire assets, was a trust fund for the payment of all indebtedness, each stockholder took his part subject to the equities attached to it. They were *privies* to the trust, and took their shares *cum onere*. There can be no hardship, then, in holding that each is bound to restore his part *in toto*. (Bigelow *v.* The Congregational Society, 11 Vermont, 283; Gratz *v.* Redd, 4 B. Mon. 178.)

The decisions on this point are not entirely uniform, many of the cases depending on statutory regulations defining the liability of stockholders, and on special considerations which do not apply to this. Several, however, indicate, with tolerable clearness, the general principles upon which the courts have proceeded, when unaffected by enactments, and the reasons that have governed them in maintaining those principles. Thus in Ogilvie *v.* The Insurance Co. (22 Howard, 380), where some of the creditors of a corporation having a judgment against it, and being unable to obtain satisfaction in consequence of its insolvency, filed a bill against several of the stockholders who were indebted for unpaid subscriptions. The objection was made of want of parties, and it was argued that as all the stockholders were bound to contribute proportionately, and as all were not parties, there could not be a proper decree. Mr. Justice GRIER, however, in delivering the opinion, disposes of this in a summary way. He says: "The bill is filed to compel these stockholders, or debtors to the corporation, to pay the amount of their debts, in order that the plaintiffs may obtain satisfaction. As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the several amounts due by each. As to them this bill is in the nature of an attachment in which they are called on to answer as garnishees of the principal debtor. The objection for want of parties is untenable. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle the affairs of the corporation and the equities between the various stockholders."

This decision is directly in favor of the complainant's right to relief, without reference to that of the defendants to contribution; and al-

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though the point arose upon a question of want of parties, the same principle was involved.

So in Marsh *v.* Burroughs (1 Woods, 463), a case similar in all respects to Ogilvie *v.* The Insurance Co., Mr. Justice BRADLEY, in passing upon the question as to whether all the parties who are liable must be defendants, in order to work out the equities amongst them, says: "A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust, or demand of his debtor, and if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defence to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportional share of the liability, he might never get his money." (Briggs *v.* Penniman, 8 Cowan, 386; Gratz *v.* Redd, 4 B. Mon. 178; Norris *v.* Johnson, 34 Md. 485.)

In both Ogilvie *v.* The Insurance Co. and Marsh *v.* Burroughs the decrees made were, that each defendant should pay the full amount due by him to the corporation in satisfaction of the plaintiff's demand, and the cases, if not absolutely ruling the present, show very clearly the light in which the Court viewed the question of contribution.

In Gratz *v.* Redd (4 B. Monroe, 178) the suit was against a single stockholder, who was also a director, to recover a debt out of dividends improperly declared, and Judge MARSHALL, in a concurring opinion granting relief, says: "The defendant is liable as a trustee who has received the benefit of a misapplication of a trust fund in which he concurred, and he may be made liable to that extent on these grounds in a suit against him alone."

In Wood *v.* Dummer (3 Mason, 308), an earlier case than Marsh *v.* Burroughs, where the stockholders of a bank which proved to be insolvent had divided the capital of the bank amongst themselves without leaving sufficient funds for the payment of its note holders, it was held, on a bill filed by certain parties who possessed some of the notes against two of the stockholders that participated in the division, that the decree should only be for a *pro rata* payment of the plaintiff's claim in the proportion that the amount of stock owned by the defendants bore to the entire capital stock of the bank. But in this case, in addition to the plaintiffs there were numerous other unpaid note holders, and it was more than questionable whether if the entire fund distributed could be got in and administered, it would be adequate to pay them all.

That this consideration, of there being other creditors, was the main, if not the only, reason for the decree entered, is very clearly shown in the opinion of Mr. Justice STORY who decided it. He says: "The bill does not state what the amount of the other debts due by the bank are. It would have been desirable that all the other creditors having a common interest had been brought before the Court. The Court, therefore, in proceeding to do equity to those before it must take care that it is not the instrument of injustice to others; *non constat* if the whole fund is taken from the defendants in favor of the plaintiffs that there will remain any solvent stockholders from whom the other creditors can claim any share. Taking into consideration the manifest defects in this bill, the long delay, and probable insolvency of some of the stockholders, and the injustice which may result to the other creditors of the bank, I have come to the conclusion that our duty is best performed by holding the plaintiffs entitled to a decree, that defendants pay out of the dividends of the capital stock received by them so much of the debts due plaintiffs as the number of shares held by them bears to the whole number of shares in the capital stock."

So far as the question of contribution among the stockholders was concerned it does not appear to have had any weight in the decision, certainly it had no controlling influence; the case rested solely on the ground of protecting the interests of the other creditors not before the Court.

It was on precisely similar grounds that relief was denied to a single creditor in Wright *v.* McCormack (17 Ohio St. 86), the Court stating that the action should be for the benefit of all the creditors.

No such reasons exist in the present case; it is not even pretended that there are any other creditors, and if the complainant is not entitled to a decree that will satisfy his entire claim, it must be solely because the equity of the defendants to contribution is superior to that of the complainant for adequate relief, and on this point the case of Wood *v.* Dummer is no authority.

As the capital of a corporation is a trust fund for the payment of creditors, and as they must be provided for before a stockholder can legally claim any share therein, it would seem beyond question that a stockholder who wilfully infringes this fundamental principle, can have no equity that entitles him to consideration, in comparison with a creditor who has been injured by such infraction of his undoubted right.

If the doctrine laid down in Ogilvie *v.* The Insurance Co., and Marsh *v.* Burroughs, is a sound one when applied to those cases in which the stockholder has not divided the capital, but has only failed to make good the amount of his

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subscription, it must be still more so in those where, as here, he actually withdraws the fund legally pledged for the payment of creditors, and if in the former he has no claim to delay the creditor by demanding contribution, much less has he in the latter.

Certainly the views expressed by the Judges in those cases seem both sound and reasonable, as well as consistent with the truest principles of equity, for in the absence of controlling circumstances, the equity of the creditor to speedy relief rises superior to that of the debtor, whose only ground for delay is the mitigation of his own burden, and a contrary doctrine would imply that it is the duty of the Court rather to consult the interest and convenience of the stockholder than to afford an efficient remedy to the creditor.

It may be safely asserted that no case has ever gone to the extent of holding that where a single creditor of an insolvent or dissolved corporation has traced sufficient of the funds of such corporation to satisfy his demand, into the hands of one or more stockholders who unjustly hold them, he shall be denied the right of collecting his entire claim from them, on the ground that there are others equally liable.

After a careful analysis of the cases, and taking into consideration the facts of this, the Master is of the opinion that it will interfere with no inflexible rule governing a court of equity, nor be subversive of any established principle, to grant the complainant the relief he asks.

The amount of his claim with interest to this date is $5,032.21. It follows then, if the Master is correct in his conclusions, that the decree must be against each defendant who has been served (other than the Pennsylvania Railroad Company, P. Lowry, Sr., Nathan Wallwork, R. M. Wiley, G. Kalbach, Jacob Rexstine, and Isaac Killam), for this sum with costs, or for so much thereof as he may have received assets of the Western Market Company sufficient to satisfy it, and he respectfully submits a decree to this effect.

The defendants against whom the decree was recommended filed exceptions to the report which were dismissed by the Court, and the decree entered; whereupon they took this appeal, assigning for error the dismissal of the bill as to the Pennsylvania Railroad Co.; the holding that the complainant had no adequate remedy at law, and was entitled to relief without making the market company a co-defendant; and the decree against them without joining as co-defendants all of the stockholders who shared in the distribution of assets according to the Master's report.

Henry M. Dechert, for the appellant.

All the parties whose interests are to be affected by a decree, must be brought in, else the bill must be dismissed.

Petitt *v.* Baird, 30 Leg. Int. 208.
Gloninger *v* Hazard, 6 Wr. 389.

The market company should have been made a co-defendant.

Patterson *v.* Wyomissing Manf'g Co., 4 Wr. 123.
Hoard *v.* Wilcox, 11 Id. 51.
Chambersburg Woolen Co. *v.* Chambersburg Manuf'g & Bldg. Assoc'n, 31 Leg. Int. 357.

The market company had not been dissolved. Its franchises still existed, and should have been sold under the Act of 7 April, 1870 (Purd. Dig. 291, § 52).

The Pennsylvania Railroad Co. should have been liable under the Act of 16 June, 1836, § 10 (Purd. Dig. 594).

Wayne Mac Veagh, for the Pennsylvania R. R. Co., appellee.

The sale was *bona fide*, and simply an exchange of assets, the debts of the corporation did not follow its land into the hands of the purchaser. Nor is this altered by the fact that the stock was taken in part payment.

Bank of Columbus *v.* Bruce, 17 N. Y. 507.

The purchaser had parted with its shares before the cause of action arose. In any event, no liability could exist to the stockholders, and the creditor does not complain.

David W. Sellers (*R. C. McMurtrie*, with him), for Bickley, appellee.

The return of the fi. fa. is conclusive as to the right to equitable remedy. The right of contribution arises subsequently, and does not operate against the complainant's present right to a decree.

February 21, 1881. THE COURT. We think in a proceeding of this nature, it was not necessary that all the stockholders should be made parties, and as to the market company, the not making it a party is sufficiently excused by the amendment. If the appellants were not satisfied with that excuse, they should have demurred to the bill. We affirm this decree upon the report of the learned Master in the Court below.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

July, '80, 95. March 29, 1881.

Watkins v. The Workingmen's Building and Loan Association.

Building associations—Pledgor and pledgee—Right of stockholder of building association to apply his stock in payment of a debt due by him to the association—Value of the stock for such purpose, how ascertained.

In a feigned issue to determine the amount due upon a judgment confessed by a borrowing stockholder to a build-

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ing association, under a plea of "payment," the burden of proof of the maturity of the stock is upon the defendant.

The officers of a building association passed a resolution to the effect that borrowing stockholders would be permitted to cancel their obligations by paying all arrears and their monthly dues as many months in advance as would be sufficient to make the duration of the society one hundred months. In a subsequent controversy between the association and a stockholder, who had not at the time made the payments required by the resolution:

Held, that he could not avail himself of its privileges.

Held further, that the resolution furnished no evidence of an intention to change the value of the stock.

A borrowing stockholder of a building association may apply his stock to the payment of his loan, and the value of the stock for this purpose is the amount of the payments thereon.

In estimating the value of building association stock during the running of the association, the Court will not take into consideration the value of the stock "to wind up," nor its value as affected by the forfeiture of stock of other stockholders.

SHARSWOOD, C. J., GORDON and TRUNKEY, JJ., dissent.

Error to the Common Pleas of Lackawanna County.

On June 25, 1869, judgment was entered on a judgment note for $800 in favor of the Workingmen's Building and Loan Association of Hyde Park, and against Thomas T. Watkins. On September 25, 1878, after a scire facias to revive had issued, a rule was granted to show cause why the judgment should not be opened, etc. This rule was subsequently made absolute and an issue was framed. Plea, "Nil debet, payment with leave, etc."

On the trial, before HAND, A. L. J., it appeared that Watkins was the owner of four shares of stock in the Workingmen's Building and Loan Association, the par value of which at maturity was $200 per share. On June 24, 1869, he borrowed from the association $800, bidding 52 per cent. premium therefor. Upon this loan he received $384, which, with the premium of $416, amounted to $800.

The judgment in controversy was given to secure the repayment of the loan, and, as additional security, Watkins assigned his stock to the association.

Watkins paid dues and interest regularly for 87 months, his payments aggregating $724. Just previous to the trial the defendant sent to the plaintiff the following notice:—

"To the Workingmen's Building and Loan Association of Hyde Park: I hereby notify you that I desire you to apply the payments made by me upon four shares of stock of your association, assigned by me to you as collateral security for the loan for which the note in the above case was given, to the payment of said note, and upon your so applying them, you may cancel said stock.

THOMAS T. WATKINS."

In the spring of 1875 the stockholders duly passed the following resolution:—

"Resolved, That parties who have taken out loans are permitted to cancel their obligations to the association by paying their monthly dues, as many months in advance as is sufficient to make the duration of the society 100 months. All arrears to be paid in addition."

There was some not very distinct testimony that this time was extended to 103 months.

It seemed that, on account of supposed irregularities in the charter of the company, many members ceased paying dues for a considerable period, and until the Supreme Court had affirmed the validity of the charter. (See Workingmen's B. & L. Association *v.* Coleman, 8 Norris, 428.)

The by-law of the company in relation to non-payment of dues is as follows:—

SECTION 3. Stockholders not having taken a loan who shall neglect or refuse to pay their monthly dues or fines upon their stock for six months shall cease to be members of the association, but upon giving one month's notice to the board of directors shall be entitled to receive the amount paid in by them less the amount of all fines and forfeitures incurred, and their portion of losses sustained, provided that such application be made within six months from the time he or she cease to be a member, as above specified, otherwise such stock to be forfeited to the association.

On the trial the counsel for the defendant asked the secretary of the company: "Upon how many shares of stock unincumbered in your association have the stockholders neglected or refused to pay dues for more than a year last past? Offered for the purpose of computing how many shares of stock there are at present in the plaintiff association, for the purpose of computing the worth of the stock per share, the defendant having given notice that he desires the worth of the stock assigned as collateral security to be applied to the payment of this note."

The evidence was objected to; objection sustained. (Eighth assignment of error.)

The defendant requested the Court to charge:—

(1) If the jury believe from the evidence that the note in this case was given for the sum of $800, being $200 per share upon the four shares of stock upon which loans were made by the defendant, because that was the par value of the stock per share, and that afterwards the plaintiff duly changed the par value of the stock per share, the principal of the note must be changed proportionately. *Answer*. [We answer this point in the negative. We qualify it as follows: The $800 note is given not solely because that was the par value of the stock, but because the defendant proposed to borrow $800 from the association. We say to you that the resolution in evidence passed by the plaintiff, did not change the par value, but was based upon the supposition that the value of the stock would reach $200, in either 100 or 103 months, as the resolution con-

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templates, and if it had, and this defendant had availed himself of the provision granted by that resolution and paid in advance, he would only have to pay to 100 or 103 months, to which the resolution fixed it. He would have had the benefit of that resolution under his connection with the association.] There is no evidence that he did that; the evidence is that he did not do it. This resolution was a very unwise one in our estimation for a regulation governing this association; but with that we have nothing to do in this case. (Third assignment of error.)

(3) The jury must deduct from the note the worth of the stock assigned to the plaintiff as collateral security for the payment of the same. *Answer*. We have already answered this, gentlemen. It is a proper point provided the facts of the case warrant it, but there is no evidence in the case as to what the value of the stock is, consequently the point is not pertinent to the case. (Fourth assignment of error.)

(4) In computing the worth of the stock assigned as collateral security for the loan for which the note in this case was given, the collectable assets of the association must be divided among the stock of the association. *Answer*. As a rule this is correct law. There are no facts in this case from which you can make this division. The evidence does not show it. The defendant should have been prepared to show it in order to apply the rule. He has not done so. We cannot apply the rule. (Fifth assignment of error.)

(5) Stockholders not having taken a loan, who have neglected or refused to pay their monthly dues or fines upon their stock for six months, cease to be members of the association, and if they have not made application to the association for the amount paid in by them upon the stock, less fines and forfeitures incurred within six months after they cease to be members, their stock is forfeited to the association. They are therefore not entitled to any share in the distribution of the assets of the association. *Answer*. We answer in the negative. If by the by-laws of the association parties fail to pay for a certain length of time, they forfeit their stock, and if the association act upon it and forfeit the stock, or recognize it as forfeited by an act, then it is forfeited, but if they do not it does not, without other evidence, become forfeited. (Sixth assignment of error.)

The plaintiff requested the Court to charge:—

(2) That the burden of proof of the maturity of the association—as in other cases where the defence is payment—is upon the defendant. Affirmed. (First assignment.)

(3) That the defendant cannot avail himself, at this time, of the benefit of the resolution passed by the association to accept advance payments up to 100 or 103 months, since the defendant did not accept or act under them. Affirmed. (Second assignment.)

In the general charge his Honor said, *inter alia*: . . . .

We are, therefore, disposed to say to you that this defendant can apply the amount he has paid on his stock to this debt. The question of the value of the stock here does not come into account, because there is no evidence here upon which you can estimate the value of this stock at the present time. It may be worth less than he has paid upon it, and it may be worth more. If it was worth more, it was incumbent on the defendant to show what it was worth, in order to apply the value of the stock upon this debt. (Sixth assignment of error.)

If it was worth less, it was incumbent upon the association to show what it was worth, in order that no more than he has paid may be applied. The stock is worth what was paid in upon it. [We, therefore, say to you in order to do exact equity between these parties as we understand the law, you will take this note, the amount of this note as of the 24th of June, 1869, which was $800, then you will calculate the interest for eighty-seven months on that amount, add the interest to the amount of the note. You will then deduct $348, interest which was paid by the defendant, and strike a balance. You will then calculate the interest on the balance down to to-day, the 10th of June, 1880, and from that total, principal and interest, you will deduct the $376 paid by the defendant on the stock; the balance will be the amount which the plaintiff is entitled to recover under the facts and the law of this case as we understand them.] (Seventh assignment.)

The jury found a verdict in the following form: "We find for the plaintiff for $518.84, provided the defendant's four shares of stock in the association (less $376 here credited) is not forfeited.

Subsequently, upon consideration of a rule *nisi* for a new trial, his Honor said:—

We consider that the real verdict in the case, and the only one, is for the plaintiff for $518.84, and is the proper verdict under the law and evidence of the case. But that defendant's counsel may have the full benefit of the technicality raised, we will pass upon the whole matter read at his request.

In view of the testimony adduced by the defendant himself, we consider under the authority of Cavene *v.* McMichael (8 S. & R. 441); Fisher *v.* Kean (1 W. 259); Bickham *v.* Smith (12 S. 45), that the proviso may be treated as surplusage. It shows the ground of the verdict, viz., the allowance of $376, asked by the defendant to be applied to the debt (under his notice) as payment on stock.

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The rule for a new trial was thereupon discharged, and judgment entered upon the verdict for $518.84. (To this action an assignment of error was, by permission, filed at the bar of the Supreme Court.) Defendant thereupon took this writ, assigning for error the rejection of testimony, the answers to plaintiff's and defendant's points, and the portion of his Honor's charge above inclosed in brackets.

Lemuel Amerman and *Henry E. Hess*, for plaintiff in error.

The value of stock assigned as collateral security must be applied to the payment of a judgment for the principal debt.

Early and Lane's Appeal, 7 WEEKLY NOTES, 184.

The burden of proof as to the value of the stock is upon the association.

1 Whart. on Evidence, § 367.

In any aspect of the case the method of calculation submitted by the Court was erroneous in view of the testimony.

C. R. Pitcher, *S. B. Price*, and *E. B. Sturges*, for defendant in error.

The actual value of building association stock can only be determined by winding up the association, and converting the real estate and liens into cash; the Act of Assembly of course does not contemplate such a proceeding; the value of stock when a borrower wishes to use it in payment of his loan is the amount of payments on it—no more and no less.

Building Association *v.* Sutton, 11 C. 463.
Early and Lane's Appeal, *supra*.

If there was any irregularity in the proposition to the borrowers to permit them to pay one hundred and three months' dues in advance in settlement of their debts, the plaintiff might have taken the necessary proceedings against the directors; but it is difficult to see how it injures him, or how he can hope to avail himself now of the privilege thereby accorded to him.

The method of calculation adopted by the Court below gave the association the amount of the loan with interest, less the payments on the stock; this is in exact accord with the Act of April 12, 1859 (P. L. 544), and the decisions construing it.

May 2, 1881. THE COURT. The plaintiff below was a building association. The defendant was a member, and had subscribed to four shares of its stock. The par value of said stock was $200 per share. By the law of the association each member was entitled to borrow $200 for each share of the stock so held by him. The defendant obtained a loan of $800, for which he was to pay a premium of 52 per cent. He received for said loan the sum of $384 in cash, the balance, $416, was the premium at which he bought the loan. To secure the money so borrowed he gave a judgment in the sum of $800, and also as a further security transferred his four shares of stock to the association as collateral. He then continued his payments to the association as required by its charter until he had paid $348 as interest on the loan, and the further sum of $376 on account of his stock, when his payments ceased, and the association issued an execution to collect the amount of the judgment. Upon the application of the defendant the Court below opened the judgment, and an issue was framed to ascertain the amount due.

This writ of error was taken to review the rulings of the Court below upon the trial of said issue. A number of assignments of error have been filed by the defendant, which will be considered in their order.

1. The Court instructed the jury in answer to the plaintiff's second point that the burden of proof of the maturity of the association, as in other cases where the defence is payment, is upon the defendant. We are unable to perceive any error in this ruling. The defendant had no reason to complain of it in any event, as there was neither allegation nor proof that his stock had matured.

2. Nor was there error in affirming the plaintiff's third point. It was no defence to the judgment that the association passed a resolution to accept advance payments up to one hundred and three months, as it was not alleged the defendant ever availed himself of the privilege. Had he accepted the offer and made the advance payments required, he would have brought his stock to par, and thus paid his loan. Instead of doing this, he defaulted in his payments, and his rights must be measured from that standpoint.

3. The answer of the learned Judge to the defendant's first point was entirely accurate. There was no evidence of a change of the par value of the stock. That remained at $200 per share. The resolution which was referred to as effecting this change, as correctly stated by the Court below, was based upon the supposition that the value of the stock would reach $200 in either 100 or 103 months, and it was for this reason the privilege was given to pay up in advance to that time. If the defendant had accepted the offer, the par of his stock would not have been changed, it would have been paid up.

4, 5, and 6. These assignments may be considered together. They raise the really important question of the case, viz., was the defendant entitled to deduct from the judgment the value of the stock assigned by him to the association as collateral security, and if so, how was its value to be ascertained? The learned Judge conceded the right of the defendant to have the value of the stock deducted, but held that inasmuch as there was no evidence in the case of the

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value of the stock, the point as presented was not pertinent. The defendant further contended that certain shares of stock held by non-borrowers were forfeited for non-payment of dues by the rules of the association, and that the value of this stock should be taken into the estimate of the value of the remainder of the shares. The Court negatived this claim in its answer to defendant's fifth point.

These rulings, if not strictly accurate, were more favorable to the defendant than he was entitled to. All that he had a right to claim was allowed by the Court. Upon the trial below, the defendant offered in evidence the following notice:—

"To the Workingmen's Building and Loan Association of Hyde Park. I hereby notify you that I desire you to apply the payments made by me upon four shares of stock of your association, assigned by me to you as collateral security for the loan for which the note in the above case was given, to the payment of said note, and upon your so applying them, you may cancel said stock. (Signed) THOMAS T. WATKINS."

That the defendant had the right so to apply his stock was settled by Early and Lane's Appeal (8 Norris, 411). Nor did the Court below deny him this right. Evidence was received showing the extent of his payments, and the precise amount, $376, under the charge of the Court was allowed by the jury as payment, *pro tanto*, of the judgment. The defendant was not satisfied with this. He attempted to prove by the secretary of the association the actual value of the stock, *i. e.*, how much it would be worth to wind up. This information the secretary could not give; he said he did not know the value of the stock, it would depend entirely upon what could be collected upon the judgments held by the association. The failure of this attempt was natural. The secretary had not been notified that such an inquiry would be made, and had not therefore examined his books with reference thereto, while the notice given by the defendant to the company of his intention to apply the stock refers only to the payments thereon.

It needs but a moment's reflection to see that the question of the value of the stock was irrelevant. Its value for the purposes of this case was just what the defendant had paid on account thereof. This was all the defendant claimed to apply on the judgment by his notice, before referred to, and it was all the law gave him the right to apply. The value of the stock beyond this consisted mainly of the profits, in which a defaulting borrower has no right to participate. This arises from two causes: 1st, The peculiar nature of the contract between building associations and their members; and 2d, The difficulty, if not absolute impossibility of ascertaining the profits until the association is ready to wind up. A venture in a building association is a peculiar investment. It is much to be feared that many persons of slender means embark in such enterprises without a clear understanding of their practical working. The present case furnishes an apt illustration of the results in one class of cases. The defendant received but $384 in cash on his loan. At the end of eighty-seven months, a little over seven years, he had paid into the treasury the sum of $794. He now has a judgment against him, in addition, for the sum of $518.84. This disastrous result is a legitimate outgrowth of our building association laws. Yet it is not worse than many other ventures in partnership, and other transactions where persons embark in enterprises beyond their means. The loss is not necessarily the fault or result of the law, but of the inability of the defendant to keep his contract with the association. Such investments are profitable or otherwise, according to circumstances. Where the association is prudently managed, and is wound up within the prescribed period, it is always profitable to the non-borrowing members. They participate in the premiums which they do not pay. If the association were composed exclusively of non-borrowers, there would be no profits. They would get back what they put in with whatever interest had been earned, less the expenses of the management. If, on the other hand, it were composed exclusively of borrowers, the gain of the individual member would depend upon the amount of his premium. If he had paid less than the average, there would be a profit; if he had paid more, there would be a loss. Where the association is composed of both classes of members, the result to the borrowing member must depend to a great extent upon the relative proportion of the two classes and upon the amount of premium which he has paid. There are, of course, other matters which, in a minor degree, affect the result, but the foregoing are the two cardinal principles which underlie the whole matter. And it is further to be observed that the profits are reserved for those members who continue to the end. For borrowing members who drop out by the way, there is nothing but disaster.

The defendant dropped out by the way. There is nothing in the charter of the association nor in his contract to entitle him at this stage to a share of the profits. The law provides for but one such case, and that is a withdrawing member. The Act of 12th April, 1859 (P. L. 544), declares that a withdrawing member, after having given thirty days' notice of such intention,

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"shall be entitled to receive the amount paid in by him or her, and such proportion of the profits as the by-laws may determine, less all fines and other charges: provided, that at no time shall more than one-half of the funds in the treasury of the corporation be applicable to the demands of the withdrawing stockholders without the consent of the board of directors, and that no stockholder shall be entitled to withdraw whose stock is held in pledge for security; upon the death of a stockholder, his or her legal representatives shall be entitled to receive the full amount paid in by him or her, and legal interest thereon, first deducting all charges that may be due on the stock." The provisions of the Act of 29 April, 1874 (P. L. 96), as to associations incorporated under said Act, are not essentially different, excepting that there is no provision that withdrawing stockholders shall be entitled to a share of the profits.

The defendant was not a withdrawing stockholder, nor could he have been so long as his stock was held in pledge. He is not entitled to the rights which the law confers upon such stockholders. Yet his claim far exceeds what the Act of Assembly gives to them. Withdrawing stockholders can only claim of the profits such proportion as may be fixed by the by-laws. Such proportion might readily be fixed by a by-law, so as not to work injustice to remaining stockholders. At most it would be an approximation. Here the defendant claims an absolute right to participate in the entire profits up to the hour of the trial of his case. Such right is nowhere to be found. And, if it existed, how can it be ascertained with accuracy at this stage of the association's business? Its assets consist chiefly of judgments for money loaned, including some houses, which were evidently bought in upon executions. The exact value of the houses can be ascertained only by a sale, and the judgments are worth only what can be realized therefrom. As such loans are made usually upon small margins, they cannot be regarded as securities having a fixed value. In view of the fact shown by the evidence, that a large number of members had ceased paying up their dues, by reason of a supposed defect in the charter of the association, the difficulties of realizing the face of the judgments may be readily appreciated. The ascertainment of the real value of the stock can only be arrived at by closing up the affairs of the corporation. This the defendant has no right to demand. If, as was contended, he was entitled to it in this proceeding, the most that could be done would be to approximate it. The jury, and even the officers of the company, might place a much higher value upon the securities than could be realized therefrom. In such case, the defaulting member would receive more than the members who paid up to the end. Besides, the profits are composed chiefly of the premiums. They are made up in part of the premium which the defendant agreed to pay. I say agreed to pay, for it is a mistake to suppose, as was claimed by the defendant, that he has paid the premium. He only promised to pay it; it was inserted in the judgment note, and is now being collected. The Building Association Law expressly authorizes the plaintiff to recover the premium from a defaulting borrower. Yet the defendant's position, if sustained, would defeat this right in part.

We are of opinion that the right to apply the stock in such a case as this means only the right to apply the payments made thereon. This is all that was decided in Early and Lane's Appeal.

7. We see no error in the portion of the charge referred to in this assignment. It was an instruction to the jury as to the method of arriving at their verdict upon the undisputed facts of the case. The ruling was fully warranted.

8. This assignment is practically covered by what has been already said. It was not error to reject the evidence for the reason that the inquiry to which it referred was irrelevant. Aside from this, the stock of the defaulting members could not be forfeited in this summary way by a jury. That could only be done by the association. When stock is in default by the charter or by-laws of a corporation, it may not be forfeited without action on the part of the corporation itself. *Non constat* that it will enforce such right, but may allow the defaulting member a day of grace.

We allowed an assignment to be filed at bar to the form of the verdict. As rendered it was: "We find for the plaintiff in the sum of $514.84, provided that the defendant's four shares of stock in the association (less $376 here credited) is not forfeited." The Court below struck out the clause referring to the stock, and entered judgment on the verdict for $514.84. We have no doubt of the power of the Court to so mould the verdict. It is fully warranted by the rulings in Cavene *v.* McMichael (8 S. & R. 441); Fisher *v.* Kean (1 Watts, 259); and Bickham *v.* Smith (12 P. F. S. 45). That portion of the verdict referring to the stock was surplusage. Moreover, it was erroneous. For how could the defendant possibly have a credit for the stock and yet retain it? The learned Judge correctly held that there was no question of the forfeiture of the stock before the jury. The allowance of a credit therefor upon the judgment compelled the plaintiff to accept the stock *nolens volens*. The legal effect was its extinguishment. This is fully sustained by the reasoning of the Court in North American Building Association

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v. Sutton (11 Casey, 463). We find no error in this record.

Judgment affirmed.

Opinion by PAXSON, J.

SHARSWOOD, C.J., and GORDON and TRUNKEY, JJ., dissent.

Jan. '81, 250. March 30, 1881.

Dailey's Appeal.

Husband and wife—Divorce—Desertion—What sufficient evidence of.

Where the testimony showed that the respondent allowed his wife to be driven away from the house of his mother, where they had been residing together, and subsequently refused to provide a new home for her:

Held (reversing the judgment of the Court below), that this was evidence of wilful and malicious desertion and the case should have been submitted to the jury.

Appeal from the Common Pleas of Monroe County.

This was an action for divorce by a wife on the ground of desertion by her husband.

In her petition, the libellant, Sarah J. Dailey, sets forth that she was married to the respondent, Enseriah Dailey on Dec. 11, 1876; that after they had lived together as husband and wife for nearly a year the mother of the respondent, at whose house they resided, directed her, the libellant, to leave the house, that the respondent refused to accompany her or to provide for her another home, and she was hence obliged to return to the home of her stepfather, where she has since remained.

The respondent, having filed an answer, an issue was granted for a trial by a jury.

On the trial, after evidence had been given to prove the facts averred in the libel, there being no evidence offered for the defence, the Court instructed the jury to find a verdict for the respondent, saying that the evidence failed to show a wilful and malicious desertion. Verdict accordingly and judgment thereon. The libellant took this writ, assigning the above ruling as error.

C. Burnett and *T. M. McIlhaney*, for appellant.

This was not the case of a voluntary separation, as in Ingersoll *v.* Ingersoll (13 Wr. 249). The respondent having permitted his wife to be expelled from their former home, and having refused for the space of two years to provide another for her, must be held to have deserted her, and such desertion being wilful is *prima facie* malicious.

McDermott's Appeal, 8 W. & S. 256.
Grove's Appeal, 1 Wr. 443.
Gordon *v.* Gordon, 12 Id. 226.
McClurg's Appeal, 16 Sm. 366.

May 2, 1881. THE COURT. The substantial question involved in the issue demanded by the respondent in the Court below, was whether he wilfully and maliciously deserted his wife. If the testimony tended to establish the affirmative of the issue, it was improperly withdrawn from the jury, by instructing them, as matter of law, that their verdict should be for the respondent.

The libellant testified, in substance, that, after their marriage, she and her husband had lived together at the residence of his mother for about ten months, when the latter ordered her away, and compelled her to leave the house; that she then appealed to her husband to join her in seeking another home, but he refused to do so, and having no other place of shelter, she was compelled to return to her former home; that, ever afterwards, he not only refused to provide a home for her, or contribute in any manner to her support, but treated her with such studied indifference and disrespect, that he never even called to see her, except on the next evening after she was obliged to take refuge under her stepfather's roof. On that occasion, he came to the house and invited her to attend his funeral two days thereafter, but having no faith in the sincerity of his implied suggestion, she declined the invitation. Thenceforth, according to her own testimony and that of other witnesses by whom in the main she is corroborated, she appears to have been entirely abandoned by him.

The issue as to the charge of wilful and malicious desertion, was granted upon respondent's demand; and, viewing the testimony as a whole, we think it should have been submitted to the jury. If they were satisfied that libellant was practically driven away from the house of the respondent's mother, and he not only neglected and refused to provide another home for her, but never afterwards manifested the slightest desire to do so; in short if his conduct towards her for a period of over two years was inconsistent with anything else than a determination on his part to ignore every marital obligation, the jury would have been warranted in coming to the conclusion that he had in fact wilfully abandoned and deserted her. If he thus acted wilfully and without cause it necessarily follows that his conduct was also malicious.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by STERRETT, J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, OCT. 6, 1881.* [No. 25.

Supreme Court.

May, '80, 81. June 9 & 10, 1881.

Rothermel, Sheriff, etc., v. Marr.

Attachment under Act of March 17, 1869—Defendant's goods only can be attached—Seizure of goods in hands of garnishee, which prove not to belong to defendant, not justifiable—Sheriff liable in trespass to real owner.

Where an attachment is issued under the Act of March 17, 1869 (P. L. 8), the sheriff is not justified in seizing the goods of the person named therein as garnishee.

Where the sheriff does seize and sell the goods of such garnishee he will be liable in trespass, no matter what may be the event of the suit in which such attachment issued.

The bond given by the plaintiff in such suit is intended merely as a security for the defendant in the attachment that the plaintiff shall within a reasonable time prosecute his suit, and if he fails therein, that he will pay the cost, and the defendant's damages. It in no case operates as a security for the garnishee.

Where the plaintiff in an attachment under said Act of 1869 directs the seizure of goods claimed by any person other than the defendant, the proper course for the sheriff is either to demand from plaintiff a bond of indemnity and then seize the goods, or else to frame an interpleader between the plaintiff and the claimant under the Act of January 30, 1871 (P. L. 12), to determine the true ownership thereof.

A. and B., brother and sister, lived together, A. keeping a store. B. from time to time advanced money to A., for which he gave her judgment notes on which she obtained judgment. To secure his indebtedness A. executed to B. a bill of sale of all the goods in the store with an inventory thereof annexed, but continued to attend to the business of the store, assisting his sister. The sign was, however, changed and the bills made out in B.'s name and paid by her. In a contest between B. and A.'s creditors as to the ownership of the goods:

Held, that the question was properly submitted to the jury whether under the evidence there had been a sufficient *bona fide* delivery of the goods in the store from A. to B. to pass the title thereto to B. as against A.'s creditors.

Error to the Common Pleas of Northumberland County.

Trespass by Margaret H. Marr against Samuel H. Rothermel, late sheriff of Northumberland County, for seizing, taking away, and selling certain personal property belonging to the plaintiff. The defendant pleaded not guilty, and a special plea in confession and avoidance, justifying under the authority of a writ of attachment issued by the Court of Common Pleas under the Act of March 17, 1869 (P. L. 8), wherein Wainwright & Co. were plaintiffs and A. P. Marr was defendant, and the said Margaret H. Marr (plaintiff herein) was named as garnishee, commanding the sheriff to attach the goods of A. P. Marr in the hands of Margaret H. Marr, and summon the said garnishee, etc.

On the trial, before ROCKEFELLER, P. J., the evidence was to the following effect: A. P. Marr resided with his sister Margaret H. Marr, in a dwelling and store belonging to her in the borough of Milton. In 1871, A. P. Marr began to keep a grocery in the store. Margaret at that time loaned him $1000, and subsequently other sums amounting to $548.83, for which amounts he gave her his judgment notes on which she caused judgments to be entered in 1871 and 1873. A. P. Marr subsequently, on December 27, 1873, in order to secure this indebtedness to his sister, executed to her a bill of sale of all the goods in the store, appraised by an inventory annexed at $1087.30. He continued to attend to the business of the store, assisting his sister. A new sign was put up in front of the store bearing the words, "Margaret H. Marr's Grocery Store." After the sale, bills were made out in the name of Margaret H. Marr, and paid by her.

On March 2, 1874, an attachment was issued under the Act of 1869, at the suit of Wainwright & Co., against the said A. P. Marr, with a clause of scire facias against Margaret H. Marr, garnishee. The usual affidavit and bond were filed, the condition of the latter being "that if the aforesaid Wainwright & Co., plaintiffs in the attachment to be issued, shall fail to prosecute their action with effect, and shall fail to recover a judgment against the said A. P. Marr, the defendant, that they, the above bounden Wainwright & Co. and Thomas Swenk, shall and will pay to the said A. P. Marr, the defendant, all legal costs and damages which he, the said A. P. Marr, the defendant, may sustain by reason of said attachment." This attachment was placed in the hands of the defendant, S. H. Rothermel, sheriff, who on March 3, 1874, served it on A. P. and Margaret H. Marr on the premises; they both informed him that the goods were not A. P. Marr's but belonged to Margaret H. Marr. The sheriff, notwithstanding, levied on the goods and closed up the store. He suggested to Margaret that she should give him a bond to release the goods. This she declined to do, whereupon the sheriff removed the goods, sold under an order of Court such as were perishable, and subsequently, without any other writ than the attachment, sold the whole stock under the instructions of Wainwright & Co.

Margaret H. Marr afterwards brought this suit

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in trespass against the sheriff to recover the value of her goods sold by him. On the trial the plaintiff gave evidence of the above-mentioned facts, and showed that the attachment suit was suffered to remain without any steps taken to prosecute it to judgment for over five years; no declaration was filed until November 12, 1879, and on January 1, 1880, the plaintiff was non-prossed under rule of Court.

The defendant contended that the sale by A. P. to Margaret H. Marr in December, 1873, was without consideration and fraudulent as against the attaching creditor, and that there was no sufficient change of possession. The Court submitted the evidence on these questions to the jury, and, in reply to numerous points presented by the plaintiff and defendant, charged the jury that the writ of attachment only authorized the sheriff to seize property belonging to the defendant A. P. Marr, and that if they found the sale to Margaret H. Marr in December, 1873, was *bona fide* and accompanied by a sufficient delivery of possession, and that the property belonged to her at the time of the seizure, the writ was not a justification for the seizure.

Verdict and judgment for the plaintiff for $1352. The plaintiff took this writ, assigning for error substantially the instructions of the Court to the jury as above.

William A. Sober, for the plaintiff in error.

Franklin Bound and *S. P. Wolverton*, for the defendant in error.

June 22, 1881. THE COURT. This is an action of trespass against a sheriff for taking the plaintiff's goods. The defendant, plaintiff in error, pleaded not guilty to the declaration, and the issue thus made was tried and all the questions involved were considered. Respecting the special plea, it is enough to say that if good in form it was bad in substance, and had it been demurred to, the plaintiff would have been entitled to judgment. It is insisted upon by the defendant that the controlling question now presented is, whether the sheriff in executing an attachment under the Act of March 17, 1869, relating to fraudulent debtors, issued against one person, may lawfully seize the goods of another. He contends that though it be true that he took the goods of Margaret H. Marr, the writ issued at the suit of Wainwright & Co. against A. P. Marr, commanded and authorized such taking.

Section 1 of the Act of 1869 makes it the duty of the prothonotary to issue an attachment against any defendant, upon the application of any plaintiff who makes and files the prescribed affidavit and also "a bond conditioned that if the plaintiff or plaintiffs shall fail to prosecute his, her, or their action with effect, and recover a judgment against said defendant or defendants, he, she, or they shall pay to said defendant or defendants all legal costs and damages which said party defendant may sustain by reason of said attachment." Section 4 provides that if the writ be personally served on the defendant, or if he reside in the county, or if he "shall appear to the action, the Court shall proceed in the case in like manner as in case of summons for debt regularly issued and duly served," and if there shall not be a personal service, residence, or appearance as aforesaid, the plaintiff, after the first day of the second term, may proceed in like manner against the defendant and garnishee as is practised in cases of foreign attachment and execution attachment.

It is obvious that the issuing of an attachment under said Act is the commencement of a suit; that when the defendant is a resident of the county, or is personally served with the process, or appears, the action is proceeded in as if commenced by summons, and the judgment is personal and final between the parties as to the subject of the action. In case of service, or appearance, even the dissolving of the attachment upon the defendant's application, as provided in section 6, merely discharges the lien and releases the goods from the custody of the law; and the action is proceeded in. When there is no service or appearance and the defendant is a non-resident of the county, the judgment is *in rem*, as it is in foreign attachment where the defendant does not appear.

Sections 2 and 3 direct the manner of executing the attachment, and provide that when the property attached is in the hands or possession of a person other than the defendant, such person shall be summoned as garnishee. It is the duty of the officer to take the property attached into his possession, where it is capable of manual seizure, and when not, the same shall be bound by the attachment in the hands of such party from whom it is due or owing, or whose duty it is to account for the same, unless the defendant or some one for him shall enter into a bond as the Act prescribes. It is plain that the officer is not authorized to attach the property of any person other than the defendant. No one is to be summoned as garnishee, unless he owes the defendant or holds and is liable to account to him for goods or other property. The fact that the officer summons a person as a garnishee is no excuse for taking his goods. A garnishee is not a defendant. It is neither directed nor contemplated in the statute that a garnishee's goods may be seized.

The defendant urges that the bond filed before the issuing of the attachment is for security of the garnishees whose goods may be taken. But this is contrary to the letter and

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spirit of the statute. The bond is conditioned for payment of costs and damages to the defendant if the plaintiff fails to recover a judgment. In the action relied on as a bar to this suit, Wainwright & Co. gave bond to A. P. Marr, with condition that if they failed to prosecute their action with effect and recover judgment against A. P. Marr, they shall and will pay to said A. P. Marr all legal costs and damages which he may sustain by reason of the attachment. That bond is no security for anybody except A. P. Marr. It is in strict accord with the statute which intends it shall be a security for the defendant in the attachment. When the plaintiff directs the seizure of goods claimed by a person other than the defendant, the sheriff may demand a bond of indemnity, and, if the plaintiff neglect to give it, may refuse to take such goods. This right of the sheriff to be secured in such cases is at common law. (Shriver *v.* Harbaugh, 1 Wright, 399.) He may release the goods of a third person if such bond be refused. Or he may have an order upon the plaintiff and the claimant of the goods for an interpleader. (Act of January 30, 1871, P. L. 12.) There is no rule of law which compels the real owner of attached property, on notice of the suit, to intervene and defend *pro interesse suo*, on pain of forfeiting his right of property or of action. (Megee *v.* Beirne, 3 Wright, 50.) Unless he be called on to make good his claim by virtue of the statutes relating to interpleader, he may sue the officer and recover damages.

The learned Judge of the Common Pleas was entirely right in ruling that the writ of attachment in the suit by Wainwright & Co. against A. P. Marr was no authority for seizure of the plaintiff's goods, and that said suit, whether pending or determined, was no bar to her recovery. It mattered not whether that action was tried, or if tried, which party obtained judgment. Margaret H. Marr was not a party in that action. The original writ was as little authority for taking her goods as after judgment an execution would be.

At the trial, the real question of fact in controversy was, whether the plaintiff owned the goods as against creditors of A. P. Marr. This was clearly apprehended by the Court, and the instructions to the jury relating thereto need no vindication. If the sale to her by A. P. Marr was void as respects his creditors, she could not recover, but if valid, the evidence on the part of the defendant conclusively showed that he was a trespasser in seizing the goods. He seized them as the property of A. P. Marr, the order of sale followed that seizure, and is no defence against this action. The evidence was ample that the plaintiff bought the goods of A. P. Marr, took and held possession, and was entitled as owner against all the world. It was rightly submitted, and if believed, warranted the verdict in favor of the plaintiff for the value of the property.

We have considered and endeavored to express our opinion upon the few points raised by the numerous and voluminous assignments of error. The instructions and rulings were quite as favorable to the defendant as he had right to demand. Judgment affirmed.

Opinion by TRUNKEY, J.

Jan. '81, 89. February 24, 1881.

Simpson v. Pinkerton et al.

Attorney and client—Set-off—What not subject of.

An attorney-at-law or in fact employed to collect a claim, when he has received or recovered the money has no right to set off an antecedent debt or claim in his own right against his constituent.

S., as attorney for P., collected a claim for damages to P.'s real estate. Upon being sued for the amount collected, he sought to set off an independent indebtedness to him by P., arising out of the same real estate:

Held, that this evidence was rightly refused, as there was no agreement that S. might retain his own demand out of the money collected.

Error to the Common Pleas No. 2, of Philadelphia County.

Case, by John J. Pinkerton, executor of John Todd, William Keichline, and others, against J. Alexander Simpson to recover the sum of $3028, collected by defendant as attorney for plaintiffs, from the Commonwealth of Pennsylvania.

It was admitted by the pleadings that defendant had acted as attorney for plaintiffs in the collection of a claim from the State for damages done by soldiers to a drove-yard property in Philadelphia, the property of plaintiffs; and that he had received from the State the sum of $3028, none of which had been paid over to plaintiffs.

At the trial defendant, Simpson, offered to prove, under his plea of set-off, that in 1859 plaintiffs had purchased a drove-yard property, and as part payment therefor had agreed to pay the bonds and coupons secured by a certain mortgage subsisting thereon, held by trustees for the bondholders; that the proceeds of sale of the premises under the mortgage were insufficient to pay the mortgage debt, and that plaintiffs therefore owed to the holders of the bonds and coupons, of which defendant owned a large number, the amount of their securities.

The Court rejected this offer of defendant, and instructed the jury to find for plaintiffs for the

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full amount with interest, less certain credits as to which there was no dispute.

Verdict and judgment accordingly; whereupon defendant took this writ of error, assigning for error the rejection of his offer of evidence, and the instruction of the Court to the jury directing them to find for plaintiffs.

Alexander Simpson, Jr., and *B. H. Brewster*, for plaintiff in error.

An attorney's fee for services rendered is a good set-off, even though the amount of the fee has not been liquidated.

Briggs *v.* Moore, 14 Ala. 433.
Riley *v.* Hirst, 2 Barr, 346.
U. S. *v.* MacDaniel, 7 Peters, 1.
U. S. *v.* Wilkins, 6 Wheaton, 135.

The set-off in this case does not lack mutuality, because, though the mortgage was given to trustees, there was an express agreement to pay the bonds and coupons to bearer without the aid of an intervening trustee.

Eagle Beneficial Society's Appeal, 25 Sm. 226.

This set-off is not barred by the Statute of Limitations. The bonds fell due October, 1866, and the plea was filed May, 1872, within six years from the time the bond fell due.

G. T. Bispham and *R. L. Ashhurst*, for defendant in error.

The debt for which suit is brought is clearly a fiduciary one, and therefore defendant below has no right to set up an independent claim such as this.

U. S. Bank *v.* Macalester, 9 Barr, 483.
Turnpike Co. *v.* Watson, 1 Rawle, 331.
Todd *v.* The Borough, 5 Sm. 496.
Russell *v.* The Church, 15 Sm. 9.
Scammon *v.* Kimball, 8 Bankrupt Rep. 40.
Fox *v.* Reed, 3 Grant, 98.
Campbell *v.* Boggs, 12 Wr. 524.
Fleming *v.* Culbert, 10 Id. 500.

There is lack of mutuality in this set-off.

Sailer *v.* Sewing Machine Co., 34 Leg. Int. 115.
Wrenshall *v.* Cook, 7 Watts, 464.

March 7, 1881. THE COURT. We think it very clear that an attorney-at-law or in fact employed to collect a claim, when he has received or recovered the money, has no right to set off an antecedent debt or claim in his own right against his constituent. He ought to show in such case that his constituent expressly agreed that he might retain his demand out of the money.

This renders it unnecessary to examine the other questions raised on the record.

Judgment affirmed.

PER CURIAM.

Jan. '81, 228. March 10, 1881.

Reynolds's Appeal.

Judgment—Lien of—Execution—Extent of land—Effect of.

Defendant's land, subject to the lien of a judgment for $600, obtained December 31, 1874, was extended by a jury of inquest at $300 per annum rent, defendant electing to remain in possession. The semi-annual instalments were regularly paid by defendant to plaintiff until the instalment for January, 1880, which was paid by defendant to the plaintiff in the judgment next in lien, on the ground that the prior judgment not having been revived and no sci. fa. to revive having issued upon it, had expired. Plaintiff thereupon issued a vend. ex. for the sale of the land, which was set aside by the Court:

Held (affirming the order of the Court below), that the venditioni exponas could only issue while the judgment was a lien.

There is nothing in the Act of Oct. 13, 1840 (P. L. 2), repealing the Act of March 26, 1827 (P. L. 129), nor do any of its provisions purport in any manner to give a new life to the lien of judgments from that which was given by the Act of 1827.

Appeal by Simon Reynolds from an order of the Common Pleas of Luzerne County setting aside a writ of venditioni exponas issued on a judgment for $600 obtained December 31, 1874, by Simon Reynolds against Simon Reynolds, Jr.

The affidavit upon which the order was granted set forth, in substance, that on June 1, 1877, the real estate upon which the judgment was a lien was extended by a jury of inquest at $300 per annum rent, the property being taken by defendant; that under said extent defendant paid upon the judgment four instalments of $150 each, making in all $600; that in January, 1880, he stood prepared to pay the instalment of $150 then maturing under the inquest, to the parties entitled thereto, but that being advised that the lien of the aforesaid judgment expired without any attempt at revival on the 31st December, 1879, he paid it to the next lien creditors, thus doing all the law required of him; that since the expiration of the lien of the aforesaid judgment the plaintiff had caused to be issued a writ of vend. ex., and directed the sheriff to advertise the property for sale.

The Court (RICE, P. J.) in granting the order filed an opinion observing, *inter alia*, as follows: "It needs no argument to show that a venditioni exponas acquires no lien beyond or distinct from that of the judgment or the fieri facias which preceded it; hence, if the plaintiff here cannot in any event take anything by the sale, he ought not to be permitted to go on. Assuming for a moment what is probably the fact, that the extent of defendant's real estate was had upon a fieri facias issued on his judgment, it is equally well settled that since the Act of 1827 (March 26, P. L. 129) the fieri facias acquired no lien

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on this land distinct from or independent of the judgment, and that when the lien of the latter expired, the lien of the fieri facias and the levy made under it died with it. (Jameson's Appeal, 6 Barr, 283; Davis *v.* Ehrman, 8 H. 256.) It is true it was held in Packer's Appeal (6 Barr, 277) that a fieri facias levied on land upon which the judgment was not a lien, acquired a lien on the date of the levy prior to the lien of a judgment subsequently entered, but it has over and over again been decided that where the execution is the mere instrument for enforcing the existing lien of the judgment it acquires no lien beyond or distinct from that of the judgment. . . . By Sect. 3, Act October 13, 1840 (P. L. 2, Purd. Dig. 649, pl. 72), upon failure to pay, etc., the plaintiff may issue a writ of venditioni exponas for the 'sale of the real estate as fully and with like effect as though a condemnation thereof had taken place.' If these words mean anything it is that there is the same and no greater authority to sell after an extent and default as there is after a condemnation. It will be seen that this language does not and cannot have the effect of annexing a condition or contingency to a judgment by which its lien is practically continued in case of an extent which would not be annexed to it in case of a condemnation, and hence the writ in the former case as in the latter, is only an integral part of the process for enforcing the existing lien of the judgment." Thereupon the plaintiff appealed, assigning for error the action of the Court in making absolute the rule to show cause why the writ of venditioni exponas should not be set aside.

A. Ricketts, for appellant. It was certainly not the intention of the Act of 1840 in providing that the plaintiff might *permit* defendant to retain possession at an annual valuation, thereby to impair or curtail the right of plaintiff.

In all the legislation on this subject not a word has been said about keeping the lien of the judgment in force. The proceeding in extent is execution process, "and it is less than the statutory remedy if it fail fully to satisfy the judgment."

McKelvy *v.* DeWolfe, 8 H. 374.

The writ of venditioni exponas is not a process distinct from the fieri facias but a part of it, and issues upon the return of that writ.

Hughes *v.* Rees, 4 Mees & Wels. 468.
Wood's Exr. *v.* Colwell, 10 C. 92.
Neil *v.* Colwell, 16 Sm. 216.

The application to set aside this writ being made by defendant himself, cannot be granted, for as between him and plaintiff the lien in any event remains.

Brown's Appeal, Leg. Int. vol. 37, p. 426.

Joseph D. Coons, for appellee.

A judgment and an execution on it have not a distinct and independent lien.

Jameson's Appeal, 6 Barr, 283.

The execution is a mere instrument for enforcing the existing lien of the judgment, and the lien of the judgment having expired before its fruits were realized, the creditor took nothing by his judgment or execution.

Davis *v.* Ehrman, 8 H. 259.

May 2, 1881. THE COURT. The appellant's judgment was entered on December 31, 1874, and was never revived, nor was any writ of scire facias to revive ever issued upon it. On December 31, 1879, the lien of the judgment expired by force of the Act of March 26, 1827. A writ of fi. fa. having been issued against the defendant, his real estate was extended on June 1, 1877, at an annual rental of three hundred dollars, and the defendant elected to remain in possession as he was authorized to do by the third section of the Act of 13th Oct. 1840 (Purd Dig. 649, pl. 72.) The semi-annual instalments were regularly paid to the appellant as plaintiff in his judgment, No. 1020, Jan. T. 1875, until the instalment for January, 1880, fell due, which was paid by the defendant to the plaintiff in the judgment next in lien, upon the theory that the lien of the appellant's judgment having expired, the judgment creditor having the next lien was entitled to the money. Thereupon the appellant issued a vend. ex. *de terris* for sale of the defendant's land, which was set aside by the Court on the ground that the lien of the judgment having expired, the writ was unauthorized. Of this action of the Court below, the appellant complains. He argues as he must, that the right to issue a vend. ex. in such circumstances arises upon the construction of the Act of 1840. Independently of that Act, it is very clear that the writ could not issue after the lien of the judgment had expired. The Act of March 26, 1827, § 1 (P. L. 129, Purd. Dig. 820, pl. 5) contains a positive prohibition against the continuance of the lien of a judgment for a longer period than five years from the date of entry, unless revived by the written agreement of the parties or unless a writ of scire facias to revive is sued out, within that period. It is equally imperative in directing that the issuing of an execution during the pendency of the lien shall not have the effect of prolonging the lien beyond the time fixed by the statute. In Jameson's Appeal (6 Barr, on p. 283), we held, speaking of the Act of 1827, "That Act changed the whole face of the law on that subject, by cutting off every pretence of lien, except that of the judgment revived, at proper intervals, by scire facias or agreement, in consequence of which it became necessary to revive from time to time, though execution were levied, till the land was actually turned into money by a sale." In Davis *v.* Ehrman (8 Harr. 256), the same

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ruling was repeated, and it was also held that a fi. fa. issued to enforce the lien of a judgment, and the seizure of the land does not create a lien on the land distinct from and independent of the lien of the judgment. Woodward, J., on p. 259, said, "A lien is indeed a necessary and inseparable incident of seizure in execution, except where the execution is merely instrumental in enforcing a prior and superior lien by judgment. In such case, it never was supposed by the Legislature or the profession, that a judgment and an execution on it had each a distinct and independent lien. To limit the lien of judgments so explicitly as is done by the Act of 1827, and to leave the lien of executions unlimited, would have been absurd legislation." It was also held in that case, as it has been in others, that a testatum fi. fa. is a lien upon lands by virtue of a special Act of Assembly and that a fi. fa. levied upon after acquired lands becomes a lien thereon because the judgment on which it issued was not, and hence there is no analogy to the present case, to be derived from those illustrations. As the present is the mere case of the issuance of a vend. ex. upon a judgment whose lien had expired, it follows that it was an unauthorized writ, unless there is something in the Act of 1840 which gives it a lawful character.

The appellant's contention on this subject is that by the express terms of the third section of the Act, the defendant becomes liable to pay to the plaintiff the half-yearly instalments until the debt, interest, and costs of the fi. fa. are fully paid, and that on default for thirty days in the payment of *any* half-yearly instalment, "it shall be lawful for the plaintiff upon making affidavit thereof and filing the same in the Prothonotary's office, to issue a writ of venditioni exponas for the sale of said real estate, as fully and with like effect, as though condemnation thereof had taken place."

It is argued that there is no provision requiring the continuing of the lien in the Act, and that as the payments are to continue until the whole amount of debt, interest, and costs is paid, the right to issue a vend. ex. upon default in any of the payments is absolute, and continues throughout the whole period of the payments. The argument is plausible, but in our opinion unsound. The right to issue the vend. ex. after default, is not an absolute and unqualified right. The very words which confer it, restrain its operation so that it can only be exercised "as fully and with like effect as though a condemnation thereof (of the lands) had taken place." This phraseology remits us at once to the inquiry, what would have been the plaintiff's right to a vend. ex. if the lands had been condemned instead of being extended? The answer to that question is too plain for argument. The writ of vend. ex. could only issue while the judgment was a lien. Under the Act of 1827, the lien of the judgment must be kept alive, notwithstanding any process of execution upon it. If that is not done, the right to issue execution for the sale of lands upon which it was a lien expires at the end of five years from the date of its entry. There is nothing in the Act of 1840 repealing the Act of 1827, nor do any of its provisions purport in any manner to give a new or different life to the lien of judgments from that which was given by the Act of 1827. On the contrary, the fourth section of the Act of 1840 expressly provides that the money arising from the half-yearly instalments shall, under the direction of the Court, be distributed "among the different lien creditors according to the priority of their liens, in the same manner and with like effect as in case of distribution of money arising from sheriffs' sales." The money is therefore payable not necessarily to the plaintiff in the writ under which the lands were extended, but to the lien creditors in the order of priority of their liens. The Act must therefore be read and interpreted with reference to the existing state of the law as to liens and the proceedings under them. In view of these considerations, we think the action of the learned Court below in setting aside the writ of vend. ex. issued in this case was clearly right, and the order must, therefore, be affirmed.

Order affirmed and appeal dismissed at the costs of the appellant.

Opinion by GREEN, J. SHARSWOOD, C. J., and MERCUR, J., dissent.

Jan. '81, 20. March 25, 1881.

Leidy v. Proctor.

Execution—Sale of real estate—Rights of purchaser to immediate possession.

The Act of June 16, 1836 (P. L. 780), providing that three months' notice to quit may be given the defendant in execution after a sheriff's sale of the property, does not entitle the defendant to possession for that period, or deprive the purchaser of his right of peaceable entry.

P., a purchaser of land at sheriff's sale, having given defendant in the execution three months' notice to quit, entered upon the land within that period and performed acts of ownership. Trespass being brought against him,

Held (affirming the Court below), that the purchaser at sheriff's sale could lawfully enter upon the land at any time within three months after the notice prescribed by the Act, provided such entry was peaceable.

The rule whereby to determine whether that which was once part of the realty has become personalty on being detached, is that that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character.

Rogers *v.* Gilinger (6 Casey, 185), followed.

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Error to the Common Pleas of Montgomery County.

This was an action of trespass, *quare clausum fregit*, brought by William Leidy against Joseph Proctor, for breaking and entering his close, taking, selling, and carrying away his wood and lime, and ploughing up his field. At the trial, before Ross, P. J., the following facts appeared:—

In August, 1878, a farm in Montgomery County, the property of William Leidy, was sold by the sheriff at suit of J. M. Albertson & Sons, and Joseph Proctor, who was not a lien creditor, became the purchaser. The sheriff's deed to Proctor was acknowledged September 10th following, and on the 12th, Proctor served Leidy with a notice, under the Act of 1836, to quit the premises within three months. Subsequently, on the 23d of the same month, Proctor entered upon the premises, together with a large body of men, ploughed up a field, and held a public sale of certain wood-lots, a portion of the timber land upon this farm. By the terms of this sale no wood was to be taken away until the following April. There was no evidence that Proctor himself had carried or authorized to be carried away any timber, nor was there any evidence that his entry had been otherwise than peaceable.

The Court charged the jury, *inter alia*, as follows: "The next inquiry is, whether, during the three months, the plaintiff having adopted the summary remedy against the defendant or owner, may lawfully enter upon the premises, or rather, to state it more accurately, whether his entry upon the premises without a breach of the peace, and without an ouster, that is, a putting out of the owner or occupier, is a trespass? I distinctly charge you, gentlemen, that it is not, and I say to you that where a man has purchased at sheriff's sale, and enters upon the premises after the deed is acknowledged, either to gather crops, to plough the ground, to cut down timber, or do any other act of ownership, he is no trespasser unless such act of his is done with violence and the strong hand amounting to a breach of the peace. . . . Therefore, when Mr. Proctor entered upon these premises and ploughed this field, having committed no act of wanton violence, having been guilty of no breach of the peace, being the holder of the sheriff's deed, vested with the right of property by virtue of that right and that deed, vested with the right of possession, he was no trespasser, and being no trespasser he could commit no injury to the defendant, and there can be no damages upon that ground. Therefore there can be no recovery here. . . . Then, again, he was vested with the same rights. He was no trespasser, and therefore his business there, and his sale of the property, even although he had given the immediate possession to his vendees, and entered upon these wood-lots and cut wood during the three months there, was no trespass, and therefore no damage done. The entry at that time would not be found to support any verdict for the plaintiff. . . . I charge you that all the timber that lay upon the ground before the sheriff's sale, and which had fallen, did not pass to the purchaser, Mr. Proctor, but was the personal property of Mr. Leidy. I do not think this is material in this case, for the reason that there is no evidence here, not a scintilla, that Mr. Proctor ever carried away a single stick of this fallen wood. If others came in and took it, they are liable for their trespasses. It is not his. Even if they did it under a sale from him it would make no difference whatever in this case, for the conditions were that none of it was to be taken until the first of April next succeeding, and besides, Mr. Leidy declares that, in pursuance of instructions from Mr. Corson, he obtained a portion of that wood which was still lying there, even as against Mr. Proctor's tenants. . . . If you believe the evidence given by both sides all around in this case under the law, as I have declared it to you, it will be your duty to render a verdict in favor of the defendant."

Verdict for defendant and judgment thereon, whereupon plaintiff took this writ of error, assigning for error the action of the Court in charging the jury as above set forth.

George N. Corson, for plaintiff in error.

Proctor had no right to gain possession by entry. If he had, the statute of 1836, which gives the man who has been sold out three months to get his goods away, is of no avail whatever.

The case of Barnes *v.* Dean, 5 W. 543, relied upon by the Court below, differs from this, in that it was not a case of voluntary purchase at sheriff's sale; but an entry by the real owner upon his own land against an intruder.

H. K. Weand, for defendant in error.

Upon receipt of his deed, Proctor became owner of the property, and Leidy was a trespasser, as is shown by the fact that the Acts of 1802 and 1806 give damages for unlawful detention. These Acts do not take away the remedies by peaceable entry and by ejectment.

St. Clair *v.* Shale, 8 H. 105.
Drake *v.* Brown, 18 Sm. 223.
Dunlap *v.* Cook, 6 H. 454.
Snavely *v.* Wagner, 3 Barr, 275.
Rich *v.* Keyser, 4 Sm. 86.
Snyder *v.* Carfrey, Ibid. 90.

An action is well founded only when a right is invaded, but the plaintiff's right ceased by the entry of defendant.

Kellam *v.* Janson, 5 H. 467.

Where redress is allowed by the act of the party, legal remedies provided for such cases do not affect such right.

Overdeer *v.* Lewis, 1 W. & S. 90.

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May 2, 1881. THE COURT. By virtue of a certain writ or writs of venditioni exponas, issued out of the Court of Common Pleas of Montgomery County, at the suit of J. M. Albertson & Sons against William Leidy, the plaintiff in the present suit, the land of the said Leidy was sold by the sheriff to the defendant, Joseph Proctor, and a deed made therefor, which was duly acknowledged and delivered to him on the 10th of September, 1878. From this period he was the absolute owner of the land, and though Leidy continued in the actual possession, that possession was wrongful; the right thereto was in Proctor. This very obvious legal proposition I do not understand to be disputed, but if Proctor had both the title and right of possession, why might he not lawfully enter? Or how does it come, that in the exercise of a lawful right, it is possible for him to be subjected to those pains and penalties to which one whose entry is without right ought alone to be exposed? Had Leidy's possession been by a tenant, immediately upon the delivery of the sheriff's deed, Proctor by force of the statute would have become the landlord of that tenant, and had Leidy after that entered upon the land, he would have been a trespasser. Hence it was held, in the case of St. Clair's Heirs *v.* Shale (8 Harris, 105), that a sheriff's vendee might lawfully obtain possession of the premises by the attornment of the tenant of defendant in the execution. But if the law thus cast the immediate right of possession on the sheriff's vendee, in the one case, why not in the other? Of course, to all this there is but one answer, and that is the one made use of by the plaintiff—that under the Act of 1836, the defendant is entitled to possession for the period of three months after the notice to quit. The learned Judge of the Court below thought this position unsound, and we are of opinion he was right. The summary process given by the Act of 1836 was certainly not intended for the benefit of the defendant in the execution—the language of the Act negatives such an idea; for "in case of a finding for the petitioner, as aforesaid, the jury shall assess such damages as they shall think right, against such defendant or person in possession, for the *unjust* detention of the premises." Clearly the statute was not intended to favor one whose possession it assumes to be unjust; one who maintains such possession without right; it must therefore have been intended for the benefit of the purchaser at the sheriff's sale. Because he may not be able, by reason of the hostile attitude of the defendant or person in possession to possess himself of the premises peaceably, and because the action of ejectment is tedious and expensive, therefore is this summary remedy, under the Act of 1836, given. But the sheriff's vendee is not thereby deprived of any of his previous or concurrent remedies, he *may* serve notice and proceed under the Act, but this is optional with himself. If he does not choose to avail himself of this statutory process he may resort to his common law remedies. This very point was ruled in Kellam *v.* Janson (5 Harris, 467), where it was held that the vendee of land had no title at all as against a purchaser at sheriff's sale under a prior judgment against the vendor, because such title was wholly divested by the judicial sale. In the case cited, the Court below assumed just what is here contended for on the part of the plaintiff, that is to say, that the sheriff's vendee had no right to disturb the possession of the person claiming under the defendant in the execution, except by the process prescribed by the Act of 1836. That case, like the one in hand, was trespass, brought by the vendee of the debtor against the purchaser at the sheriff's sale; and the complaint was that this purchaser had entered during the temporary absence of the plaintiff, broke open his house and turned his goods out of doors. This was undoubtedly a strong case, nevertheless it was held, reversing the Court below, that "an action is well founded only when a right is invaded, but that the plaintiff's right ceased by the entry of the defendant—an act that completely obliterated the shadow of right cast by the plaintiff's possession. A complaint against the assumption of possession is a complaint against the assertion of a right, and a demand that the law shall give the plaintiff damages for the loss of that which it was wrong for him to have." It was further said, that the case was covered by the principle governing Overdeer *v.* Lewis (1 W. & S. 90), and of all those cases where redress is allowed by the act of the party, that the statutory remedies do not affect such right since they are necessary, only because such possession cannot always be assumed by the mere act of the party. It is true that the case cited was one where the plaintiff had entered after the date of the sheriff's sale, and in this it is dissimilar to the case in hand, where the plaintiff merely continued a possession which had previously belonged to him. The principle, however, pervading the two cases is identical. In either case the plaintiff's right of action ceased with his right of possession, and that right had its end when the lawful owner made his entry. Moreover, if Overdeer *v.* Lewis is in point, as it is said to be, any shadow of doubt that might remain is swept away. In this case it was held, that a landlord might enter and remove from his premises a tenant holding over after the expiration of the lease, though he had not given notice as required by the Act of 1772.

These cases then settle this part of the present controversy and support the ruling of the learned Judge of the Court below. It is, however, the

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fifth assignment which the counsel for the plaintiff considers the most important, and he regards that part of the Judge's charge covered by it as containing a startling legal heresy. "I charge you distinctly," says the Court, "that all the timber that lay upon the ground before the sheriff's sale, and which had fallen, did not pass to the purchaser, Mr. Proctor, but was the personal property of Mr. Leidy. I do not think that this is material in this case, for the reason that there is no evidence here, not a scintilla, that Mr. Proctor ever carried away a single stick of this fallen wood. If others came in and took it, they are liable for their trespasses. It is not his. Even if they did it under a sale from him, it would make no difference whatever in this case, for the conditions were that none of it was to be taken until the first of April next succeeding, and besides Mr. Leidy declares that in pursuance of instructions from Mr. Corson he obtained a portion of that wood which was still lying there, even as against Mr. Proctor's tenants." But in this there is no error of which the plaintiff had any right to complain. The Court assumed that Leidy had a right to the fallen timber, though he had done no act prior to the date of the sheriff's sale which indicated an intention to convert it into personal property. On this assumption it may be admitted that had the defendant by sale or otherwise authorized any person or persons to enter and take this fallen timber before the bringing of this suit, he would have been liable as a trespasser, but he did nothing of the kind. He authorized no one to go upon the premises before the 1st April, 1879, which was long after the bringing of this suit, so that if any timber was taken from that land, it was not only without his authority, but in express violation of the conditions of sale. We are, therefore, unable to see how in all this there was error of which the plaintiff could reasonably complain. Had the Court gone farther than it did, and told the jury that the fallen timber which the plaintiff had not converted into saw logs, rails, or firewood, before the date of the delivery of the sheriff's deed, passed with the freehold to the defendant, no more would have been said than the law warranted. In Rogers *v.* Gilinger (6 Casey, 185), where the action was trover for the fragments of a building which had been blown down by a tempest before the date of the sheriff's sale under which the defendants claimed, it was held that the plaintiffs could not recover; that these fragments belonged to the sheriff's vendees.

In this case Justice STRONG, who delivered the opinion of the Court, made use of the following language: "What then is the criterion by which we are to determine whether that which was once part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of re-annexation to the soil, and yet it remains realty. The true rule would rather seem to be that that which was real shall continue real until the owner of the freehold shall by his election give it a different character."

As this opinion was very carefully considered, and as the authorities therein cited most fully sustain it, we must regard it as a definitive settlement of the question, adding only that were the question a new one our own judgment would lead us to the same conclusion.

The judgment is affirmed.

Opinion by GORDON, J.

Jan. '81, 75. February 22, 1881.

Fitler's Appeal.

Will—Construction of—Devise—Life estate—Word "children"—Whether of purchase or limitation—Estate tail and in fee—Rule in Shelley's Case—Act of April 27, 1855.

"Children" is a word of purchase, unless there be something in the will indicating that it is used by the testator in the sense of the whole line of descendants.

In a devise by C., of the income of an estate to his grandson F., during his natural life, and in case of his death without "lawful children," the estate to go to the family of C.'s wife, the words "lawful children" are words of purchase; F. takes a life estate, with remainder over by implication to his children, and not an estate tail under the Rule in Shelley's Case, which becomes an estate in fee under the Act of 1855.

Curtis *v.* Longstreth, 8 Wr. 297, followed.

Appeal from the Common Pleas No. 1, of Philadelphia County.

Bill in equity, filed by Edgar K. Fitler against the Pennsylvania Company for Insurance on Lives and granting Annuities, trustee under the will of John Cole, dec'd, praying for a conveyance, clear of trust, of the property of the said John Cole.

The bill averred that John Cole died October 5, 1866, seized in fee of two pieces of real estate and a small amount of personalty, leaving a will dated October 3, 1866. The will was admitted to probate and letters testamentary were granted to Thomas Reed, M.D., the executor therein named. The will is as follows:—

First. I give my soul to God and my body to be buried.

Second. I desire my funeral expenses and my just debts to be paid.

Third. I desire my executor and trustee to pay to my son John Cole, the sum of two hundred and sixty dollars per annum, derived from my estate in monthly instalments for his support during his natural life.

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Fourth. I desire my executor and trustee to pay to my grandson Edgar K. Fitler, the sum of "five dollars" per week from the time of my decease until such time as certain improvements hereinafter named shall be made to my real estate, situate Nos. 1619 and 1621 Lombard Street, in the city of Philadelphia.

Fifth. In case of the death of my son John Cole, the whole income after deducting the necessary expenses and taxes, shall be paid to my grandson Edgar K. Fitler, during his natural life.

Sixth. In case of the death of my grandson Edgar K. Fitler, then the whole income derived from my estate, both real and personal, after deducting the necessary expenses and taxes, shall be used for the support and comfort of my son John Cole, as far as it may be needed.

Seventh. In case of the death of my grandson Edgar K. Fitler, without "lawful children," then I desire my executor and trustee to give all my aforesaid real and personal estate to the family of my deceased wife Maria I. Kemble Cole.

Eighth. Item. After my executor and trustee shall have paid to my son John Cole, and my grandson Edgar K. Fitler, the sums before mentioned for their support, and the necessary expenses and taxes as before mentioned; the balance remaining shall accumulate until sufficient in amount to improve the aforesaid real estate, Nos. 1619 and 1621 Lombard Street, to the best advantage for my estate.

Ninth. My executor may sell all my stock, except the Erricison stock, at such times as may be most advantageous to my estate. I appoint my friend Thomas Reed, M.D., my executor and trustee.

The testator left to survive him, only his son John Cole, who was an imbecile and unmarried, and his grandson, Edgar K. Fitler; they comprised all of his living descendants and heirs-at-law, no other blood relations being known to exist. Edgar K. Fitler was married without the testator's knowledge, but he had no children born at the date of the making of the will, or at testator's death. Doctor Reed, the executor of John Cole, deceased, subsequently filed his account as such, and had the balance awarded to himself as trustee; and on March 23, 1872, upon his own petition, he was discharged from the trusteeship, and the present defendants were appointed trustees in his place, and they have acted as such since that time, the only personalty which they hold being valued at $140. John Cole the son of testator, died in an idiot asylum, upon February 15, 1880, intestate, unmarried, and without issue.

The bill averred further that the words "lawful children" are words of limitation, and as a fee simple thereby became vested in the first taker, prayed that the trustee file an account, and that he transfer and convey to the plaintiff the real and personal estate of John Cole, dec'd, discharged from all trusts and in fee simple.

The answer asked that the facts be proved, and denied the right to a decree. Testimony was thereupon taken before an examiner, and the facts alleged in the bill were proved.

The plaintiff having died, Amelia Fitler was substituted as his executrix and sole legatee and devisee.

The cause was heard on bill, answer, and proofs, and the Court dismissed the bill; whereupon the plaintiff took this appeal, assigning for error the dismissal of her bill, and the refusal to make the decree prayed for.

Joseph De F. Junkin, for the appellant.

If the word "issue" had been used instead of "children," an estate tail would have been created by implication, which under the Act of 1855, would become an estate in fee.

Powell *v.* Board of Missions, 13 Wr. 56.
Snyder's Appeal, 9 WEEKLY NOTES, 215.

But the testator evidently meant issue, because (1) the will is inartificial,

Blair *v.* Miller, 37 Leg. Int. 414,

and (2) the devise over is to strangers of the testator's blood, and it is reasonable to presume that the testator contemplated an entire extinction of his own descendants before the limitation over was to take effect.

Haldeman *v.* Haldeman, 4 Wr. 30.

As a matter of law, the words "lawful children," mean issue, for the first taker had no children born at the decease of the testator, nor did the latter ever know of his marriage.

Smith on Executory Interests, § 537.
Daley *v.* Koons, 37 Leg. Int. 299.

The trust estate does not prevent a merger with the remainder to the children, for the remainder, being by implication, would also be an equitable estate. If the language of the will creates an estate tail of the land, so does it also of the personal property.

Smith's Appeal, 11 H. 9.

John G. Johnson, for the appellee.

A plainly expressed life estate will not be enlarged into a fee tail, or fee simple, in Pennsylvania, if any other construction be possible.

Walker *v.* Milligan, 9 Wr. 178.
Donohue *v.* McNichol, 11 Sm. 73.
Robins *v.* Quinliven, 29 Id. 333.
Miller *v.* Lynn, 7 B. 443.

The word "children" is not to be read issue unless the context absolutely compels such construction.

Curtis *v.* Longstreth, 44 Pa. 297.
Bedford's Appeal, 40 Id. 18.
Umstead's Appeal, 60 Id. 361.

March 7, 1881. THE COURT. "Children" is a word of purchase, unless there be some language in the will indicating that it is used by the testator in the sense of the whole line of descendants. There was in this will an express estate for life, and by implication a remainder over to children, and the devise over in case of the death of the first taker without children, could not enlarge the estate of the tenant for life. It seems to fall entirely within the authority of Curtis *v.* Longstreth (8 Wright, 297)

PER CURIAM. Judgment affirmed.

MERCUR, J., absent.

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Jan. '81, 152. March 24, 1881.

Betts's Appeal.

Equity — Injunction — Physician — Specific enforcement of contract not to practise.

A contract made by a physician with another physician purchasing his practice, not to practise his profession within a radius of five miles of a certain place, will be specifically enforced by injunction.

Appeal from the Common Pleas of Montgomery County.

Bill in equity, filed Sept. 6, 1880, by John Paxson, a practising physician, against Thomas Betts, also a practising physician.

The bill and accompanying affidavit set forth that complainant agreed, Nov. 5, 1870, with defendant, then a resident and practising physician of Jenkintown, Montgomery County, to purchase his medical practice and personal goods for the sum of $2000; that at the same time an option was given him to purchase defendant's residence for $6500, which was subsequently exercised. The money was paid, and the conveyance executed Feb. 20, 1871. On the same day defendant transferred to complainant his medical practice and personal goods on receipt of $2000, and bound himself by written agreement never again to locate himself for the purpose of practising medicine within a radius of five miles of Jenkintown, Montgomery County, Pa. That some four years afterwards defendant, desiring to establish himself in the practice of medicine at Milestown, in Philadelphia County, which is within the radius of five miles from Jenkintown, made an agreement in writing with complainant, whereby "the said John Paxson, M.D., doth agree and consent that the said Thomas Betts, M.D., may reside and locate himself anywhere within the limits of the city and county of Philadelphia for the purpose of practising the profession of medicine without any limitation or restriction whatever, all or any preceding contract to the contrary notwithstanding, on the following condition, viz.: That if, on the 1st day of April, 1876, said Thomas Betts, M.D., shall desire to continue the practice of medicine within five miles from the present residence of the said John Paxson, M.D., he shall pay to the said John Paxson, M.D., the sum of $500. Nothing herein contained shall refer to or include any place without the limits of the city and county of Philadelphia. Further, the said Thomas Betts, M.D., for his part, does agree that if he shall, on the 1st day of April, 1876, decide to continue and pursue the practice of medicine within the limits above mentioned he shall pay to the said John Paxson, M.D., the sum of $500 without any delay or further demand."

The bill averred that for many months past defendant had violated his contract and practised his profession within the prescribed limits, having, on July 20, 1880, opened an office in Jenkintown, and put up his sign within about one square of the office and dwelling purchased from him by complainant. The bill prayed for a preliminary injunction to restrain him from so doing.

The affidavit of Thomas Betts, defendant, set forth that the agreement of Feb. 1871, never to locate himself within five miles of Jenkintown, was voluntary and without consideration, nothing being said at that time about the purchase of the house by complainant being a consideration for the same. That by the second agreement it was provided that deponent should not *reside* within five miles of the residence of said Dr. Paxson, and said agreement was written by deponent, who fully believed that such was its intent. That under said agreement he paid Dr. Paxson the sum of $500 therein provided for, and continued to practise in and around Jenkintown from the year 1875, the time of making said agreement until the present time, with the entire knowledge of said Dr. Paxson, who, at no time previous to July, 1880, made any objection to deponent practising in said territory, but at all times declared that deponent had an unrestricted right to practise where he pleased since the date of the agreement of 1875.

An affidavit of Thomas E. Shoemaker set forth, in addition, that Dr. Paxson had declared to him that Dr. Betts had an unrestricted right to practise wherever he pleased, as their agreement only prohibited the said Dr. Betts from living outside of Philadelphia.

The Court, without filing an opinion, entered a decree granting a preliminary injunction to restrain defendant from practising without the limits of the city of Philadelphia within a radius of five miles of Jenkintown until hearing and final decree. The complainant took this appeal, assigning the said decree as error.

Redding, *Jones*, and *Carson*, for appellant.

This being merely an interlocutory injunction, it cannot be granted if there be a dispute as to the facts. The Court has no right to weigh evidence to pass upon conflicting statements, or determine the merits of the controversy.

Brightly's Eq. J., §§ 303, 304, 305.
Story's Eq. J., § 959, b.
High on Injunctions, § 720.
Biddle *v.* Ash, 2 Ashm. 211.
Harkinson's Appeal, 78 Pa. St. 196.
Johnson *v.* Kier, 3 Pitts. 204.
McClurg's Appeal, 58 Pa. St. 51.
Cooper *v.* Mattheys, 5 Penna. L. J. 40.

A comparison of the affidavits here is sufficient to disclose a repugnancy of statement as to the facts.

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From the record it appears that complainant has slept on his rights for more than five years. His laches, therefore, added to his express admissions in contradiction of this right, entitle him to no relief from a court of equity.

G. R. Fox, for appellee.

There is no question as to the right and duty of the Court to grant this preliminary injunction.

McNutt *v.* McEwen, 1 WEEKLY NOTES, 552.
McClurg's Appeal, 8 Sm. 51.

The granting of interlocutory injunctions is discretionary with the Court, and depends on the circumstances of each case.

Adam's Eq., § 357.
Hilliard on Injunctions, § 10, p. 95.
Troy *v.* Norment, 2 Jones's Eq. 318.

April 1, 1881. THE COURT. The decree of the Court below, awarding a preliminary injunction, is affirmed, and the appeal dismissed at the costs of the appellant.

PER CURIAM.

Jan. '81, 229. March 10, 1881.

Royer v. Swazey.

Trespass vi et armis—Trespass on the case—Malicious prosecution—Probable cause.

Royer was arrested at the instance of Swazey, charged with larceny. A true bill was found by the grand jury, but on the trial the Judge directed an acquittal. Royer thereupon brought an action of trespass vi et armis against Swazey, who pleaded not guilty. At the trial, plaintiff having closed his evidence, was nonsuited. A motion to strike off the same was refused:

Held, that the grand jury having found a true bill in the larceny case, the arrest was palpably under lawful process, and that in such cases, the action of case and not trespass being the proper remedy, the Court properly entered the nonsuit.

Error to the Common Pleas of Luzerne County.

Trespass *vi et armis*, by William Royer against C. M. Swazey for false imprisonment. Plea, not guilty.

At the trial the following facts appeared: William Royer, plaintiff, rented a small farm from C. M. Swazey, defendant, on shares, it being agreed that Royer was to render as rent one-third of the crops. He raised a crop of buckwheat, and on delivering a portion of the same to Swazey as his share, the latter claimed that it lacked a bushel or two of being the full one-third due him, and caused Royer to be arrested. A true bill was found by the grand jury, and Royer was held for trial on a charge of larceny. This case being called for trial, and Swazey having presented his testimony, the Court directed an acquittal, whereupon plaintiff brought this action.

The facts having been shown in the evidence presented on behalf of the plaintiff, on motion of defendant's counsel the Court granted a compulsory nonsuit. Plaintiff having moved to set aside the judgment of nonsuit, the Court refused so to do, WOODWARD, J., filing the following opinion:—

"In this case the plaintiff's præcipe and declaration, and the writ issued in pursuance thereof, were in *trespass* for false imprisonment. The evidence showed an arrest by E. P. Fitzgerald, a constable of Huntington Township, under legal process issued, upon a regular and formal information, by P. C. Wadsworth, Esq., a magistrate having jurisdiction of the subject-matter. Whatever the motive of this prosecution the process was legal and regular. It has been held by all the text-writers, and by numerous decisions, that for the malicious abuse of legal process, case and not trespass is the proper legal remedy. The rule is thus stated by Waterman, § 307 and note, 'If one knowing that he has no cause of action or complaint, cause another to be arrested, the latter may maintain an action upon the case, although the whole proceedings are perfectly regular and legal in point of form; but he could not in such a case maintain trespass.' (See also 1 Chitty on Pleading, 136; Brown *v.* Chadsey, 39 Barb. 253; Watson *v.* Watson, 9 Conn. 140; Bank *v.* McKinney, 7 W. 214; Barnett *v.* Reed, 1 P. F. S. 190; Berry *v.* Hamill, 12 S. & R. 213; 3 Stark Ev. 1446; Maher *v.* Ashmead, 6 Casey, 344; Baird *v.* Householder, 8 Casey, 168; Kramer *v.* Lott, 14 Wr. 495.)"

Thereupon plaintiff took this writ of error, assigning for error the action of the Court in entering judgment of nonsuit and in refusing to set aside the same.

A. Ricketts, for plaintiff in error.

For causing a person to be arrested on a criminal warrant charging an act which is not a crime, the proper remedy is trespass.

Maher *v.* Ashmead, 6 C. 344.
Baird *v.* Householder, 8 C. 168.

Though *case* is the proper remedy for malicious abuse of regular and legal process, criminal process setting forth nothing more than the simplest breach of contract is not regular and legal.

Palmer, *De Witt*, and *Fuller*, for defendant in error.

No trespass was shown, since defendant did not personally lay hands on the plaintiff.

No constable or other officer can be held liable for the execution of process legal on its face and issued by a court or magistrate having general jurisdiction.

1 Waterman on Trespass, §§ 334, 358, 362, 306.

No false imprisonment was shown because there was no illegal or void process.

1 Waterman on Trespass, § 293.
Johnson *v.* Maxton, 23 Mich. 129.

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Case is the proper remedy, not trespass.
Berry *v.* Hamill, 12 S. & R. 113.
Bank *v.* McKinney, 7 W. 214.
Barnett *v.* Reed, 1 Sm. 190.

A true bill having been found for larceny, and the warrant of arrest not being in evidence, there was no proof that the warrant charged an act which was not a crime, and the presumption is in favor of the regularity of the proceedings.

March 21, 1881. THE COURT. We think there was ample evidence that the arrest of the plaintiff had been on regular process upon a charge of larceny. The grand jury had found a true bill against him charging him with that crime. Certainly every presumption is to be made, that the arrest was under lawful process, and it follows that the learned Court below were right in entering the nonsuit.

Judgment affirmed.

PER CURIAM.

Jan. '80, 239. January 11, 1881.

In re Change of Grade of Germantown Avenue.

Practice—Certiorari—What is brought up by it—When it will be quashed—Road law—Court of Quarter Sessions of Philadelphia County—Act of May 3, 1869—Under it, decree of Court must embrace reference to exceptions when sustained.

A certiorari brings up nothing but the record; and the opinion of the Court is no part thereof.

Since the Act of May 3, 1869 (P. L. 1247), it is the duty of the Court of Quarter Sessions of Philadelphia County to specify which exceptions are sustained, and which dismissed, as well as to state that the report of viewers is set aside in pursuance of exceptions sustained.

Even if upon a certiorari, the opinion were a part of the record, the words: "The award of the jury is set aside and the petition dismissed," are not in compliance with the Act. In such case, the writ of certiorari must be quashed, in order that a proper judgment may be entered in the Court below, when a new certiorari may be issued.

Certiorari to the Quarter Sessions of Philadelphia County.

The petition of George Brandenstein, presented under the Act of Consolidation, § 27, alleged damage to his property by change of grade of Germantown Avenue, and prayed for the appointment of a jury to assess the damages. The jury found that by the change of grade the claimant had been damaged, and assessed the damages at $2500.

The city of Philadelphia filed exceptions on the ground that: (1) there was no change of grade regulation; (2) the alleged change was in reality the first establishment of a grade regulation; (3) the award was erroneous; (4) was excessive; and (5) the petitioner was not the owner of the property.

The Court (ELCOCK, J.) delivered an opinion in which the question of change or establishment of grade regulation was considered, and having arrived at the conclusion that there was no change of established grade, the opinion, without reference to the exceptions filed, closed thus: "Adhering therefore to the principles announced in the case just decided, the award of the jury is set aside and the petition dismissed."

The petitioner thereupon took this writ, assigning for error (1) the dismissal of his petition; (2, 3, and 4) the decision indicated in the question of grade; and (5) the refusal to confirm the award and dismiss the exceptions of the city.

John Roberts (*George L. Graham* with him), for the plaintiff in error, argued the case upon its merits.

[SHARSWOOD, C. J. We have no way of getting at the alleged error. We have nothing before us but the record.]

The opinion of the Court shows that its concluding sentence, setting aside the award of the jury, and dismissing the petition, is based on the city's first and second exceptions to the report of the viewers.

[SHARSWOOD, C. J. But the opinion of the Court is not a part of the record.]

Theo. P. Matthews and *Wm. Nelson West*, for the defendant in error, after considering the cause on its merits, argued—

The record discloses no error. The power of revision on certiorari is confined to revision of questions relating to jurisdiction and regularity of the proceedings.

Commonwealth *v.* Nathans, 5 B. 124.
Mifflin Co. *v.* Elizabeth, 6 H. 17.
Kimber *v.* Schuylkill Co., 8 Id. 366.
Silver *v.* Schuylkill Co., 8 Id. 369.
Hughes *v.* Kline, 6 C. 227.
Chase *v.* Miller, 5 Wr. 403.
Appeal of the Commissioners of Northampton Co., 7 Sm. 452.
In re 34th St., 31 Sm. 27; s. c. 3 WEEKLY NOTES, 130.

January 24, 1881. THE COURT. This was a certiorari to the Quarter Sessions of Philadelphia. This writ brings up nothing but the record, and that fails to disclose a judgment in the Court below. It is true in the concluding sentence of the opinion of the Court, which is printed in the paper-book of the plaintiff in error, occur these words "The award of the jury it set aside, and the petition dismissed." The opinion of the Court is no part of the record and were it otherwise, a judgment in the above form could not be sustained, under the decision in Delaware Avenue (17 P. F. S. 309), where,

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it was ruled, that under the Act of May 3, 1869* (P. L. 1247, Roads in Philadelphia), the Quarter Sessions in setting aside a report, must expressly state, that it was set aside in pursuance of an exception, sustained by the Court. The order there was, "report set aside," and it was reversed, because it was not in conformity with the Act of Assembly. Since that Act, it is the duty of the Quarter Sessions of Philadelphia to specify which exceptions are sustained and which dismissed. This enables us to see to some extent upon what grounds the Court below acted.

For the reasons given, this writ must be quashed. A proper judgment can then be entered in the Court below after which a new writ may be issued if desired. Writ quashed.

Opinion by PAXSON, J. GREEN, J., absent.

May, '81, 76. May 3, 1881.

Swartz v. Hauser.

Bailment—Bailees for hire—Gratuitous bailees—Negligence, gross and slight—Misdirection where it does not prejudice a party not a ground for reversal.

A. sent to B., a land dealer and negotiator of loans, with whom he had been in the habit of transacting business, a certificate of stock with instructions to sell when the stock should touch a certain price. No agreement was made as to B.'s receiving any compensation for his services. B., finding that the stock was rising, deposited it with C., a stock-broker, with instructions similar to those he had received from A. C., in turn, sent it to D., another stock-broker, with like instructions. Subsequently, C. failed, and D. sold out all the securities deposited by him, including the one in question, to cover C.'s indebtedness to D. In an action afterwards brought by A. against B. to recover the value of the certificate, the Court left it to the jury to say whether B. was a bailee for hire, or a gratuitous bailee, instructed them that in the former case he was liable for slight negligence, and in the latter for gross negligence only, and left it to them to say in either event whether B. had been guilty of the sort of negligence for which he would be liable:

Held, a verdict having been found for A., that it was error to leave it to the jury to say whether B. was a bailee for hire or not, as the law would imply that he had contracted for compensation for his services, but that this error having done B. no harm, constituted no ground for reversal:

Held further, that the question of B.'s negligence was properly submitted to the jury.

Error to the Common Pleas of Lancaster County.

Assumpsit, by Henry C. Hauser against David G. Swartz, for the value of twenty shares of the capital stock of the Central Transportation Company.

Upon the trial, before PATTERSON, J., the following facts appeared: On August 4, 1872, the plaintiff, a resident of York County, sent to the defendant, who resided in the city of Lancaster, a certificate for twenty shares of the said stock standing in the name of the plaintiff, with a power of attorney in blank signed by the plaintiff, with instructions to sell the stock as soon as the market price reached $50 per share. The plaintiff had been in the habit of dealing with the defendant, whose business was that of buying and selling Western lands and negotiating loans in the West. Nothing was said by the plaintiff in his letter, nor was there any evidence of any subsequent agreement between the parties, as to what compensation, if any, the defendant should receive for his services. At this time the market price of the stock was about $46 per share. A few weeks later, the price beginning to rise, the defendant took the certificate to the banking-house of J. B. Long, in Lancaster, who transacted a business of buying and selling stocks, with whom Swartz was in the habit of dealing, and requested him to sell it as soon at it would bring $50 per share. The defendant testified that he told Mr. Long it was on Hauser's account. The proper market for this stock being in Philadelphia, Mr. Long sent the certificate to Glendenning, Davis & Co., brokers, in Philadelphia, for sale as soon as it would realize $50 per share. In November, 1872, Long failed, and Glendenning, Davis & Co., to whom he was indebted, sold out all the securities which Mr. Long had placed in their hands, including the twenty shares of stock belonging to Mr. Hauser. The stock did not, at any time, reach $50 a share. Hauser, on January 4, 1873, called on Swartz, who paid him the dividend then due, and subsequently continued to pay him quarterly dividends until July, 1876, at which time Hauser asked for the stock or its proceeds. Swartz thereupon made the following entry in Hauser's pass-book: "On Aug. 4, 1872, I handed to J. B. Long, broker, at Lancaster, twenty (20) shares Central Transportation Co. stock to sell, limit $50 per share, the said stock having been sent to me by H. C. Hauser, to sell for his account, and I took said Long's receipt. D. G. SWARTZ." Swartz paid no further dividend upon the stock, and the plaintiff brought this suit June 18, 1878.

* The Act of 3 May, 1869, provides: "That the true intent and meaning of the Act of . . . . is hereby declared to be that no report of viewers appointed to lay out or widen a street, road, or alley, in the city or county of Philadelphia, or to assess and apportion damages for the opening or widening of any street, road, or alley, shall be set aside unless in pursuance of some exception filed to the said report, as in the same Act provided; and in all cases now pending or hereafter to be brought in the Supreme Court by writ of *certiorari* to the order of the Court of Quarter Sessions, setting aside the report of a jury, the said order shall be revised [reversed] and the cause remanded for further proceedings, if it does not expressly appear from the record that the said order was made in pursuance of an exception or exceptions sustained by the Court below."

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The defendant presented, *inter alia*, the following points: (1) "The undisputed evidence in this case shows that the defendant was a voluntary bailee without reward, he is therefore responsible only for gross negligence." *Answer.* "If the jury find that the defendant was a voluntary bailee without reward, then he is only responsible for gross negligence." (2) "There is no evidence in the case of gross negligence on the part of the defendant, and therefore the verdict must be for the defendant." *Answer.* "The evidence is for the jury. If they find there is no gross negligence on the part of the defendant, and that defendant was a voluntary bailee without hire, then the verdict must be for the defendant."

The Court in the general charge said, *inter alia*, "Is there any evidence that defendant contracted for or received any compensation or reward for anything he did in and about the selling or disposal of this stock sent to him? We have not been able to perceive any, but that is a question of fact for you. . . . . The Court gives you the law on this point, because as the Court comprehends the law of this case it is a case of bailment, and the main inquiry for you is—What is the duty and what is the responsibility of the bailee, Mr. Swartz? Did he do or order anything respecting those twenty shares of stock that a man of common sense under the circumstances would not do with his own stock? . . . If you find that the defendant, Mr. Swartz, was a bailee for hire, in that case the bailee is required to exercise great care, and is responsible for slight neglect. The Court has been unable to see that any hire was paid to the bailee, yet that is a question for you to decide on the evidence. If the evidence so satisfies you, and if you find he was a bailee for hire, and if the loss was occasioned by negligence on his part, he would be liable to the bailor, Mr. Hauser, for the loss.

Verdict and judgment for the plaintiff for $871.36. The defendant took this writ, assigning for error, *inter alia*, the answers to his points, and the portions of the charge above quoted.

D. G. Eshlemann and *A. Herr Smith*, for plaintiff in error.

The Court admitted that there was no evidence that Swartz was a bailee for hire, and no evidence of negligence, yet they submitted the questions to the jury, who found arbitrarily against the defendant. The duty of a bailee being purely a question of law, the Court erred in charging the jury: "The main inquiry for you is, what is the duty and what is the responsibility of the bailee, Mr. Swartz?" It is unnecessary to cite authorities to show that it is error to submit a question of law to the jury, or to submit a question of fact of which there is no evidence.

E. D. North and *H. M. North*, for the defendant in error.

One who undertakes to collect a claim or to sell a security for another, without an express stipulation that he receives it for transmission to a third party for collection, for whose negligence he is not to be responsible, cannot shift responsibility from himself upon his agent or his client.

Bradstreet *v.* Everson, 22 Sm. 124.

Morgan *v.* Tener, 3 WEEKLY NOTES, 398.

It is the duty of an agent to give his principal timely notice of every fact which may make it necessary for him to take measures for his security.

Clark *v.* Bank of Wheeling, 5 Harris, 322.

In this case Swartz not only failed to give such notice, but lulled the plaintiff to confidence by paying the dividends after the stock had been converted. Under the contract, as proved, we think the Court should have directed a verdict for the plaintiff, but the Court declined our points to that effect, and in submitting the question of negligence to the jury, the Court charged more favorably for Swartz than he had a right to expect.

May 16, 1881. THE COURT. It certainly would have been manifest error in the learned Judge to submit any question to the jury of which there was no evidence. He thought there was no evidence that defendant below had contracted for compensation for his services, yet he submitted it as a question of fact. But this did the plaintiff no harm. There was no direct evidence, perhaps, of a contract to pay, but the law implied one in the absence of an express contract not to pay. We see nothing in any of the errors assigned of which the plaintiff has any right to complain.

Judgment affirmed. PER CURIAM.

Common Pleas—Law.

C. P. No. 2. Sept. 24, 1881.

Hopple v. Weber.

Affidavit of defence law—Sufficiency of copy filed—Conveyancer's charges not proper subject of book entries.

Rule for judgment for want of a sufficient affidavit of defence. Appeal by defendant from the

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judgment of a magistrate. The plaintiff filed the following copy of book entries :—

CHARLES WEBER to J. T. HOPPLE, Dr.

1880, Nov. 10.	Drawing mtge., bond and warrant, and expenses . .	$10.00
" " 15.	Examination of title and searches at New Castle, Del. . .	15.00
	Fare Phila. to Wilmington and return	1.00
	Fare Wilmington to New Castle and return	.70
		$26.70

The affidavit of defence set up that defendant was advised that the copy filed did not entitle the plaintiff to judgment.

H. McMillar for the rule.

Goldbeck, contra.

Charges for services are not proper subjects for book entries, nor are professional charges.

Pelzer *v.* Cranston, 2 McCord, 328.
Boyd *v.* Lodlson, 4 Ib. 76.
Thorne *v.* Noel, 5 WEEKLY NOTES, 566.

THE COURT. Whether conveyancer's charges, strictly so called, as distinguished from those of counsel, are a proper subject of book entries, it is not perhaps necessary to decide, though the weight of authority is opposed to the proposition. But certain parts of this account are clearly bad. Such as the indefinite word "expenses" in the first item, and "fare Phila. to Wilmington," etc., in the last item.

Rule discharged.

Opinion by MITCHELL, J.

C. P. No. 2. Sept. 24, 1881.

Timlow v. The Philadelphia and Reading R. R. Co.

Affidavit of defence law—Private Act of Assembly cannot be used on a motion for judgment under—Practice.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by Timlow *et al.*, executors, etc., against the Philadelphia and Reading R. R. The copy filed was of four seven per cent. bonds of the Reading Coal and Iron Co., and averred the non-payment of interest. The bonds contained a guarantee of the punctual payment of principal and interest by the defendant—

J. Cooke Longstreth, for the rule cited—

The Act of March 20, 1872 (P. L. 473), which provides that—

"It shall be lawful for the Philadelphia and Reading R. R. Company to guarantee the bonds of any incorporated company, individual, or firm, that may now or hereafter be engaged or intend to be engaged in the manufacture of iron, or any other manufacture in any county . . etc."

R. C. Dale, contra.

The Act of Assembly in question (like the Act of April 13, 1845 (under which the guarantee was in fact executed), is a private Act and cannot be invoked at this hearing.

Handy *v.* R. R., 1 Phila. 31.

THE COURT. It would seem that the Act of March 20, 1872 (P. L. 472), is a private Act, of which the Court cannot take notice at this stage of the case.

Rule discharged.

C. P. No. 4. Sept. 22, 1881.

National Bank of Chester Co. v. Jones.

Evidence—Admissibility of parol evidence to contradict or vary a promissory note under seal.

Rule for judgment for want of a sufficient affidavit of defence.

Debt, on a promissory note made by defendant to plaintiff's order, under seal, dated February 24, 1880, and payable twelve months after date.

The affidavit of defence set out a parol agreement made at the time of drawing the note, that if the defendant could not meet it at maturity, he was to have two years from date to meet it, and was not to be pressed until the expiration of that time; and that it was only on account of this agreement that the note was given.

James C. Sellers, for the rule.

Parol evidence is inadmissible to show an agreement made at the time of signing that a promissory note or other instrument for the payment of money shall not be paid, or shall be renewed at maturity.

Hill *v.* Gaw, 4 Barr, 493.
Anspach *v.* Bast, 2 Sm. 356.
Hacker *v.* Oil Co., 23 Sm. 93.
Heist *v.* Hart, Ibid. 286.

[THAYER, P. J. In Hoopes *v.* Beale, 9 Nor. 82, the exception to the rule as to the admissibility of parol evidence to contradict or vary a written instrument is strictly limited to the case of negotiable paper in the hands of innocent holders for value.]

There was no consideration for the agreement.

Blackburn *v.* Ormsby, 5 Wr. 97.
Henry *v.* Patterson, 7 Sm. 346.

No counsel appeared contra.

THE COURT. Rule discharged.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, OCT. 13, 1881.* [No. 26.

Supreme Court.

Jan. '80, 295. March 28, 1881.

Fulmer v. Commonwealth.

Criminal law—Larceny—Knowingly receiving stolen goods — Indictment — Count charging larceny of several different articles at the same time and place, though belonging to different owners not bad for duplicity—Jurisdiction of the Court of Quarter Sessions of the crime of knowingly receiving stolen goods not divested by that of the Oyer and Terminer—Acts of March 31, 1860, sec. 31, paragraph 8, and June 16, 1836, secs. 14 and 15—Construction of—Evidence to disprove motive — Pertinent cross-examination—Assignments of error relative to matters de hors the record not reviewable—Remarks of counsel in summing up to the jury.

A count in an indictment for larceny charging the defendant with the larceny of several distinct articles belonging to different owners, when the time and place of the taking of each are the same, is good, and will not be quashed for duplicity.

Where the meaning of certain words in a statute has been judicially determined, and subsequently another enactment is passed in a revision of the statutes with reference to the same subject matter wherein the same words are employed, said words will be construed in the sense of the former adjudication.

Under the provisions of the Act of June 16, 1836, §§ 14 and 15 (P. L. 784), the Court of Quarter Sessions has jurisdiction in cases of indictment for the receiving of stolen goods. The Act of March 31, 1860, Sect. 31, § 8 (P. L. 437), is but a re-enactment of the former provision, and under its terms a like jurisdiction therefore exists.

Where on a trial for larceny the father of defendant, in order to show lack of motive to perpetrate the crime, testified that he supplied his son with money every time he asked for it:

Held, that it was competent for the Commonwealth on cross-examination to ask said witness if the defendant was not in need of money and owed pressing debts.

Remarks made by counsel to the jury in summing up are *de hors* the record, and, no matter how improper, constitute no ground of reversal on error.

Error to the Quarter Sessions of Monroe County.

Indictment against Chester B. Fulmer for larceny and receiving stolen goods, knowing the same to have been stolen. The indictment contained two counts. The first count charged—

"That the defendant . . . . did on August 18, 1879, at the county aforesaid . . . . . feloniously steal, take, and carry away . . . . one gold chain with cross attached of the value of $40, one pearl breastpin of the value of $20, one pair of pearl earrings of the value of $20," and a number of similar specific articles, the value of each of which was specified, "of the goods, chattels, and property of one Elizabeth Evans; fifty pieces of silver coin, current money of the United States, commonly called ten-cent pieces or dimes, each of the value of ten cents and of the aggregate value of $5, seven handkerchiefs each of the value of $1, and one breast-pin of the value of $10, of the goods and chattels, property and money of one Mary N. West; and one gold watch of the value of $40, of the goods, chattels, and property of one Sarah Hannum."

The second count charged the defendant with having received "the above goods and chattels, property and money, feloniously stolen, taken, and carried away from the above mentioned persons, well knowing that the same were feloniously stolen, taken, and carried away."

Plea, not guilty.

The defendant moved to quash the first count of the indictment, because it charged him with the commission of three separate felonies.

Motion refused. Exception (1st assignment of error). The defendant then moved to quash the panel of jurors returned for trial of cases in the Quarter Sessions for December Term, because the charge of receiving stolen goods is triable solely in the Court of Oyer and Terminer. Motion refused. Exception (2d assignment of error).

On the trial before DREHER, P. J., the defence called as a witness Henry Fulmer, father of the defendant. He testified that defendant, who was about twenty-six years of age, was supplied by him with money every time that he asked for it, and that he gave the defendant money shortly before the time when the alleged larceny was committed. On cross-examination, he said that he did not know whether the defendant was in need of money at the time of the alleged larceny, and that he did not know his wants.

The Commonwealth proposed to ask the witness the following questions. "Do you know whether your son, the defendant, was not, in the month of August last (the time when the larceny was alleged to have been committed), in need of money to meet the demands of a large number of creditors in Stroudsburg, Easton, and Philadelphia?" Objected to, because incompetent, irrelevant, and not cross-examination. Objection overruled. Exception (4th assignment of error). The witness answered that he knew that his son had liabilities, that he thought that

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he had sometimes asked him for money to pay these, that he paid some of his liabilities but not all, that he thought he paid some quite recently since the commission of the larceny, that whenever he came to him and asked him by word of mouth to give him money, he did so, and that he did not at all times pay him money when his request was in writing, and that he did not pay his drafts. Question: "Did William C. Henry, who keeps a livery stable at East Stroudsburg, during last summer, prior to the time of the alleged larceny, ask you to pay a livery bill contracted by your son, the defendant?" Objected to, because incompetent and irrelevant. Objection overruled. Exception (5th assignment of error). The witness answered, "In all probability."

Verdict guilty, and sentence thereon. The defendant took this writ, assigning for error, *inter alia*, the refusal of his motions, the admission of evidence for the Commonwealth on cross-examination of Henry Fulmer, and especially "that the counsel who closed for the Commonwealth, in addressing the jury, referring to the effect that proof of good character would have in a case of this kind, stated that the fact that defendant had not proven good character was a circumstance against him."

W. W. Ker and *Henry W. Scott*, for plaintiff in error.

The Court should have quashed the first count, for it contained a charge of three separate felonies. The defendant should have been tried on three separate indictments, or in one indictment he might have been charged in three separate counts. Then the Commonwealth would have been put to their election of the count for trial.

1 Wharton's Crim. Law, § 416.
Comm. *v.* Manson, 2 Ash. 31.

A count charging separate offences is bad for duplicity, and should be quashed.

1 Wharton's Crim. Law, § 382.
Comm. *v.* Bartilson, 4 Norris, 482.
Kilrow *v.* Comm., 8 Id. 489.

Assuming that, where property of different persons is taken at the same time and place, there is no impropriety in the joinder, still the indictment must show upon its face that the offence was committed at the same time and place, so that the continuous act may appear.

The offence of receiving stolen goods is *exclusively* triable in the Oyer and Terminer.

Act of March 31, 1860, Sect. 31, § 8 (P. L. 437).
Commonwealth *v.* Lenox, 35 Leg. Int. 17.

Upon an indictment for larceny it is not competent to prove that the defendant is largely indebted as furnishing a motive for the commission of the crime. Fulmer testified "that he gave his son money every time he asked for it." Whatever tended to contradict that was legitimate subject for cross-examination. But it was incompetent to make this the pretext to crowd into the case proof that the defendant was, at different places, largely indebted, or was extravagant in his habits, for the mere purpose of causing an unfair prejudice in the minds of the jury. It was no rebuttal of the fact that the father gave his son money whenever he asked for it. Even if competent on the part of the Commonwealth, they could not introduce it by way of cross-examination.

1 Greenleaf's Evidence, § 447.

Omission to offer testimony to previous good character does not authorize either the inference that it is bad, or an argument to that effect.

State of Maine *v.* Upham, 38 Maine, 261.

Judgment is reversable on a charge of the Court "that the absence of the proof of good character is to be taken into account against the defendant."

Ackley *v.* People, 9 Barbour, 609.
People *v.* Bodine, 1 Denio, 291.

Comment on absence of proof of good character is the same as if incompetent testimony had been admitted for the Commonwealth. It amounted to the same thing as if the Court had permitted the Commonwealth to prove the general bad character of the defendant, before he had introduced the subject.

D. S. Lee, District Attorney, *L. M. Burson*, and *J. B. Storm*, for defendant in error.

Stealing several articles belonging to different owners, at one time and place, is one offence.

2 Arch. Cr. Pr. & Pl. 1190.

No *locus in quo* need be set out, as contended for by the other side.

1 Wharton's Precedents of Indictments, 417.

The same count may include the larceny of several distinct articles belonging to different owners, when the time and place of taking of each are the same.

Comm. *v.* Williams, Thacher C. C. 84.
State *v.* Nelson, 29 Maine, 329.

Where there is one continuing transaction, although several distinct asportations, yet the party may be indicted for the final carrying away.

2 Wharton's Am. Cr. Law, § 1814.
Rex *v.* Jones, 4 C. & P. 217.

An indictment stating in one count the stealing of several articles belonging to different owners is not double.

State *v.* Newton, 42 Vt. 537.
Warren *v.* State, 1 Green's Iowa Rep. 106.

The question of the jurisdiction of the Court of Quarter Sessions was squarely before the Court and decided in—

Holmes *v.* Comm., 1 Casey, 221.

The offences of stealing and receiving stolen goods differ only in degree, and belong to the same class of crimes, and may well be united, and often must be if justice is to be administered.

State *v.* Hogan, Charlt. Rep. 474.
Wright *v.* State, 4 Humph. 194.

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The defendant opened the door himself in the attempt to disprove motive for the commission of the crime, and he cannot complain that the witness he called to prove the fact failed him on cross-examination.

The language of the counsel for the Commonwealth was not excepted to, and therefore is not the subject of review.

Fife *v.* Comm., 5 C. 429.
Hopkins *v.* Comm., 14 Wr. 9.

May 2, 1881. THE COURT. The defendant moved the Court "to quash the first count of said indictment, because he is charged therein with the commission of three separate felonies;" which motion was refused. Whether its refusal was error must be determined from the count itself, without reference to the evidence subsequently given. It may be noted that there is neither exception nor assignment of error to the receiving of testimony offered to establish the said count, nor to the instructions of the Court in submitting the evidence relating thereto, and, therefore, there can be no review of the rulings or instructions respecting such evidence. The count charges the defendant with the stealing of goods, the property of Elizabeth Evans; of other goods, the property of Mary N. West; and of other goods, the property of Sarah Hannum; at a certain time and place. It closely follows the form of an indictment at common law for stealing the property of different persons. (2 Chit. Cr. L. *960; Whart. Prec. of Indict. 416.)

It is well settled that distinct offences cannot be joined in the same count. (Hutchinson *v.* Com., 1 Nor. 478; Com. *v.* Bartelson, 4 Ibid. 482; Kilrow *v.* Com., 8 Ibid. 489.) Duplicity in a declaration consists in joining in one count different grounds of action, of different natures or of the same nature, to enforce a single demand. Similar to this is duplicity in an indictment; it is the joinder of two or more distinct offences in one count. The criminal law never permits this. But one offence may be committed at the same time and place to the injury of two or more persons, and the offender may be indicted therefor. A man may be indicted for the battery of two or more persons in the same count, or for a libel upon two or more persons, when the publication is one single act, without rendering the count bad for duplicity. In felonies also the indictment may charge the defendant in the same count with felonious acts with respect to several persons, if it was all one transaction. (1 Bish. on Cr. Pro. § 189, 192.) In Reg. *v.* Giddins and others (1 Car. & Mar. 634), the indictment, consisting of only one count, charged the prisoners with assaulting G. P. and H. P., and stealing from G. P. two shillings and from H. P. one shilling and a hat. The defendants contended the felonies were distinct, and moved that the prosecutor be put to election which he would go upon; but it was ruled that the assaulting and robbing G. P. and H. P. at the same time constituted one transaction; the evidence was received, and the defendants convicted. If a person shoot at two persons, intending to kill one, or regardless which he might kill, he may be convicted on an indictment charging a joint assault on both. (Com. *v.* McLaughlin, 12 Cush. 615.)

If the property of several persons be stolen at one time, the whole may be considered as one taking, and will amount to grand larceny. (2 Chit. Cr. L. 924.) A count charging two distinct offences will be quashed on the defendant's motion; but a count may join the larceny of several distinct articles belonging to different owners, when the time and place of the taking of each are the same. (Whar. Cr. L. §§ 382, 391.) In a recent well-considered case it was held, "where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offence." (State *v.* Hennessy, 23 Ohio, St. R. 339; see State *v.* Nelson, 29 Me. 329.)

We see no reason for departure from the current of authority. As the case comes, the evidence can no more be considered now than when the motion to quash was made. That motion had to be disposed of before the evidence could be heard, and it was rightly denied.

The second assignment of error is intended to gainsay the jurisdiction of the Court of Quarter Sessions to try a person charged with the crime of receiving stolen goods, knowing them to have been stolen. Before and since the Crimes Act of 1860, it has been common in this State, in indictments for larceny, to add a count charging the crime of knowingly receiving stolen goods, and to try the offender so charged in the Quarter Sessions. The offences of stealing and knowingly receiving stolen goods belong to the same class of crimes, and may well be united in the indictment, and often must be, if justice is to be administered; for the proof may not sustain the charge of larceny, but would that of knowingly receiving stolen goods, and, therefore, it is the common practice to charge both offences in the indictment. (2 Archb. Cr. Pr. & Pl. 1164, n.) It is contended that the eighth paragraph of the thirty-first section of the Act of 1860 (P. L. 437) gives exclusive jurisdiction to the Court of Oyer and Terminer to try a person charged with receiving stolen goods. The paragraph is as follows: "All persons charged with the second or any subsequent offence of receiving, harbor-

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ing, or concealing any robber, burglar, felon, or thief, or with the crime of receiving or buying any goods or chattels which shall have been feloniously taken or stolen, knowing the same to be so taken or stolen." This is part of the section enumerating the crimes of which the Court of Oyer and Terminer shall have exclusive jurisdiction; and the whole paragraph might well be construed as relating to second or subsequent offences. However, there is no occasion now for its construction. The entire section is a re-enactment of sections 14 and 15 of the Act of 1836 (P. L. 784). Prior to said re-enactment, it was decided that exclusive jurisdiction was not vested in the Court of Oyer and Terminer to try a person charged with receiving stolen goods, knowing them to have been stolen, by section 15 of the Act of 1836, and that the Quarter Sessions had jurisdiction to try said crime. (Holmes *v.* Com., 1 Casey, 221.) It is a settled rule of interpretation that "Words and phrases, the meaning of which in a statute has been ascertained, when used in a subsequent statute, are to be understood in the same sense." How much stronger the reason for holding that, when the meaning of a statute has been judicially determined, its subsequent enactment in a revision of the statutes is in the sense of the adjudication. To rule otherwise could be nothing less than setting aside its intendment by judicial repeal.

The fourth and fifth assignments would be well taken had not the defendant made the questions therein stated pertinent in cross-examination of the witness. On behalf of the defendant, his father testified in chief that he gave the defendant money every time he asked for it, and that he gave him money in July. If this was for any purpose, it was to show absence of motive, because the son was not in want of money by reason of his father's supplies. It was competent to ask the same witness if the defendant was not in need of money and owed pressing debts. There had been no offer by the Commonwealth to prove the defendant's pecuniary condition as evidence of motive for commission of the crime. The defendant attempted to disprove motive by showing that money was furnished for his wants, and he cannot complain of pertinent cross-examination.

The only remaining assignment which was pressed charges error because of alleged remarks by counsel in summing up to the jury. Whether the remarks were proper or improper cannot here be determined; it is plain that they are altogether *de hors* the record.

Judgment affirmed.

Opinion by TRUNKEY, J.

June 6, 1881. THE COURT. It is ordered that the judgment of this Court be amended by adding thereto the following: And it is further ordered that Chester B. Fulmer, the plaintiff in error, be remanded to the end that the sentence of the Court below be executed, and that he be confined, according to said sentence, for the residue of the term which had not expired on the 27th day of February, 1880, the date of suspension of sentence; and that the record be remitted, that the sentence and this order be carried into effect.

PER CURIAM.

Jan. '81, 16. March 10, 1881.

Dampf's Appeal.

Husband and wife—Powers of married women—Act of April 11, 1856, § 4—Letter of attorney.

P. died, a member of the firm of P. Brothers, which was largely interested in real estate. His daughter A., a married woman, gave her husband a power of attorney, acknowledged, but not separately, whereby she authorized him generally to manage her estate. The husband, acting by virtue of this power, gave to the firm of P. Brothers, a receipt, stipulated therein to be in full settlement of all claims against the estate of P., both real and personal, with the exception of the amount to be paid on the death of P.'s widow. It also contained this clause: "I hereby release and discharge P. Bros. from all claims against them as surviving partners, and discharge the administrators of P. from all claim by me against them, except" as above. Subsequently the administrators of P. filed an account charging themselves, *inter alia*, with decedent's share of the proceeds of certain real estate owned by P. Brothers:

Held, that, the receipt itself showing a continuing interest in the decedent's real estate, A. was entitled, notwithstanding its execution, to file exceptions to the administrators' account and to be heard thereon.

Held further, that, if the receipt was viewed as an attempt to pass A.'s title to real estate, it was insufficient for such a purpose, the letter of attorney authorizing the same not being separately acknowledged.

Held further, that the Act of April 11, 1856, § 4 (P. L. 315), enabling a married woman, in case of a legacy or distributive share of personalty due to her, "to execute such instruments and perform such acts as may be lawfully required by the executors or administrators," did not authorize her to execute such an instrument as was relied upon in this case to estop her from filing exceptions to the administrators' account.

Appeal of John Henry Dampf and Fanny P. Dampf, his wife, in right of said wife, from the decree of the Orphans' Court of Bradford County, dismissing the exceptions of the said Fanny P. Dampf to the account of the administrators of Daniel F. Pomeroy, deceased, and confirming the final account of said administrators.

The facts were substantially as follows: Daniel Pomeroy, late of Troy, Bradford County, Penna., died in April, 1872, intestate. Eleazar Pomeroy and Dummer Lilly were appointed his adminis-

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trators. He left surviving him a widow, Henrietta B. Pomeroy, and two children, Fanny, now the wife of John Henry Dampf, and Daniel F. Pomeroy, a minor. At the time of his death, he was a member of two firms, the one doing business at Troy, under the name of Pomeroy Brothers, and the other at Blossburg. The business of both firms was banking, and, in addition thereto, Pomeroy Brothers dealt largely in real estate, and were the owners of a considerable amount thereof at the time of his death.

On July 11, 1874, Fanny Dampf gave to her husband a letter of attorney, "to take charge, care, and management of all my property, both real and personal, and to care for, manage, and control the same, . . . to sell and convey any part of my estate, and execute and deliver all necessary papers, to transfer or convey the same under seal or otherwise, to endorse in my name all drafts and notes, and in general to do all other acts or things which he may consider useful or necessary, connected with my business, property, and interest," etc.

This power was signed by said Fanny P. Dampf in Corning, in the State of New York, and acknowledged "to be her free act and deed," before a notary, according to the laws of New York and recorded in the office of the Recorder of Deeds for the county of Bradford, Pennsylvania.

On October 7, 1874, John Henry Dampf, as attorney for Mrs. Fanny Dampf, acting under said letter of attorney, signed the following receipt, though no account of the partnership had been exhibited by the surviving partners of Pomeroy Brothers:—

"$3855.

Received, Troy, Pa., Oct. 7, 1874, from Pomeroy Brothers, three thousand eight hundred and fifty-five dollars, being in full settlement of all my claims of whatever kind or nature against the estate of my deceased father, Daniel F. Pomeroy, both real and personal, with the exception of the amount to be paid me at the death of Mrs. H. B. Pomeroy, widow. And hereby release and discharge the said Pomeroy Brothers from all claims against them as surviving partners, and release and discharge Eleazar Pomeroy and Dummer Lilly, administrators of said D. F. Pomeroy, from any and all claim by me against them, excepting the said sum to be paid me at the death of said H. B. Pomeroy."

The administrators having filed their account May 16, 1879, wherein they charged themselves, *inter alia*, with certain sums received on account of the interest of D. F. Pomeroy in the real estate of the firm of Pomeroy Brothers, though no mention was made of decedent's interest in the other firm, exceptions were filed to said account Nov. 22, 1879, on the part of Mrs. Dampf, together with an affidavit signed by Dampf and wife, stating that they believed the estate to be much larger than was set forth in the inventory. Subsequently, on Feb. 21, 1880, the Court refused a motion of counsel for Mrs. Dampf for the appointment of an auditor, and on April 16, 1880, filed an opinion dismissing her exceptions and confirming the account, on the ground that, by reason of the above-mentioned receipt, she had no interest in her father's estate, and no standing in court.

Whereupon the said Dampf and wife took this appeal, assigning for error the dismissal of their exceptions, and the confirmation of the account of the administrators.

Rodney A. Mercur and *A. Ricketts*, for appellants.

The surviving partners, standing in a fiduciary relation to appellant, could not bargain with her to their own advantage and her disadvantage.

Fox *v.* Mackreth, 1 Lead. Cas. in Eq. 172 (3 Am. Ed.).
Keech *v.* Sandford, Id. 44.
Parsons on Partnership, 442.
Holden's Admr's *v.* McMakin, 1 Pars. Sel. Eq. Cas. 270.
Greenfield's Estate, 2 H. 489, 505–6.

Appellant was not *sui juris;* therefore she should not have been turned out of court before putting the surviving partners to the proof of the propriety of their purchase.

The letter of attorney, being simply acknowledged "to be her free act and deed," was insufficient to convey away her interest in the real estate to which she was entitled by inheritance, nor does it estop her from asserting her rights.

Glidden *v.* Strupler, 2 Sm. 400.
Quinn's Appeal, 5 N. 447.
Act April 11, 1848, sec. 6, P. L. 536.

Overton and *Sanderson*, for appellees.

There is no question here as to an interest in land. The matter involved is an administration account.

The power of attorney was valid as to the personalty according to the laws of the State of New York; therefore it is valid everywhere.

Laws 1860, ch. 90.

Under the Act of 1848, and its supplement, the Act of May 14, 1874 (P. L., 158), a separate acknowledgment is not necessary as to personalty.

Under the Act of April 11, 1856, a married woman entitled to a distributive share of personal estate, or the proceeds of sale of real estate of a deceased person, may, in person or by attorney, execute all such acts as may be lawfully required by the executor or administrator, upon the payment to her of moneys to be distributed, the same as if she were sole.

The receipt or use of a wife's money by the husband without objection is ground for presumption of a gift to him.

Hinney *v.* Phillips, 14 Wr. 382.

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McGlinsey's Appeal, 14 S. & R. 64.
Towers *v.* Hagner, 3 Wh. 48.
Naglee *v.* Ingersoll, 7 Barr, 204.

An acknowledgment is not necessary.

Bond *v.* Bunting, 28 Sm. 210.
Fryer *v.* Rishele, 3 N. 521.

The husband may be employed by the wife as her agent.

Wharton on Agency, p. 10.
Husband on Married Women, p. 77.
Welch *v.* Kline, 7 Sm. 428.

May 2, 1881. THE COURT. The appellant is a daughter and heir of D. F. Pomeroy, deceased. The appellees are administrators of his estate. On her petition, they were cited to file their account, and filed it. She filed exceptions thereto and applied for the appointment of an auditor. The Court, being of opinion she had no interest in her father's estate, refused her application, dismissed her exceptions without considering the matters therein charged, and confirmed the account. The only contention is whether all her interest in the estate was divested, so that she had no right to be heard. Such divestiture is claimed to result from a receipt given by her husband and attorney in fact, under authority from her.

The main facts necessary to understand the case are these. At the time of his death, D. F. Pomeroy was associated with Horace Pomeroy and S. W. Pomeroy under the name of Pomeroy Brothers, as bankers, at Troy. The firm of Pomeroy Brothers was also associated with Frederick E. Smith, under the name of Pomeroy Brothers and Smith, as bankers, at Blossburg. The firm of Pomeroy Brothers, in addition to banking, was also engaged in farming and in buying and selling cattle. They owned a large amount of real estate. Whether it was held by them as tenants in common, or a portion as co-partners, does not appear.

The estate of D. F. Pomeroy was of considerable magnitude. In the account filed, the administrators charged themselves with proceeds of real and personal estate amounting to $122,565.58, but no mention is therein made of decedent's interest in the firm of Pomeroy Brothers and Smith.

While the question of appointing an Auditor was being held under advisement, the appellees filed a receipt, to which the hand and seal of the appellant, by her attorney in fact, J. H. Dampf, was affixed. It is in these words, to wit:—

"$3855. Received, Troy, Pa., October 7, A. D. 1874, from Pomeroy Bros., three thousand eight hundred and fifty-five dollars, being in full settlement of all my claims, of whatever kind or nature, against the estate of my deceased father, Daniel F. Pomeroy, both real and personal, with the exception of the amount to be paid me at the death of Mrs. H. B. Pomeroy, widow. And hereby release and discharge the said Pomeroy Bros. from all claim against them as surviving partners, and release and discharge Eleazer Pomeroy and Dummer Lilly, administrators of said D. F. Pomeroy, from any and all claim by me against them, excepting the said sum to be paid me at the death of said H. B. Pomeroy."

The Court thought the effect of this receipt, in connection with the affidavit of the appellant attached to the exceptions filed, showed she had no interest in the estate.

We will first consider the effect of the language of the receipt. Assuming it to have been executed by authority of the appellant, the administrators were not a party to it. There is no averment that the money came from them or from the estate. It does purport to except out of the settlement made with Pomeroy Bros. so much of the estate as is to be paid to her on the death of Mrs. Pomeroy, the widow of her father. With the exception stated, it acknowledges the money paid to be in full of her claims against the estate of her father, and it releases and discharges the said Pomeroy Bros. from all claim against them as surviving partners. It closes by releasing the administrators from all claim by her against them, except as before excepted.

Thus it is shown the receipt does not profess to divest all her interest in the estate. It expressly reserves a claim against the administrators. It recognizes the existence of real estate, and declares that on the death of the widow, the appellant shall be entitled to an additional sum. If a sale of the real estate should be made by the administrators, the appellant would be interested in that sale. The measure of her claim would be affected by it. The account filed shows a sale of real estate was made, and the sum received therefor is one of the items. This exception, in the receipt, of itself shows a continuing interest of the appellant in the estate, and gives her a standing in court. Her right to be heard being thus established, she may file all proper exceptions to meet the justice and equity of her case. The court thought the affidavit rather equivocal in averring her interest. It may be admitted that it is not drawn with commendable precision, yet we think there is a substantial averment of interest. In fact, that she was a daughter and heir of the decedent was not questioned.

Additional reasons may be stated why this receipt shall not be given the conclusive effect claimed. She was a married woman. Her husband assumed to execute it, under a power of attorney from her. The certificate of acknowledgment of that power is not made in the form required by the Act of Assembly to pass the real estate of a married woman. It merely

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certifies to her identity, and that "she acknowledged the execution thereof to be her free act and deed." It does not declare that she was examined separate and apart from her husband, nor that she executed it without any coercion or compulsion from him, nor that it was either read to her, or that the contents thereof were made known to her. These facts should be substantially stated when the wife unites with her husband in conveying her lands to another. With stronger reason should they be required when the husband attempts to convey his wife's land under power of attorney to himself. A married woman lacks capacity to convey her real estate otherwise than in the manner prescribed by the statute. (Rumfelt *v.* Clemens, 10 Wright, 455; Dunham *v.* Wright, 3 P. F. Smith, 167; Brown *v.* Bennett, 25 Id. 420; Innis *v.* Templeton, Pittsburgh Legal Journal of Oct. 20, 1880, page 73.) It is true this rule does not apply to a sale or transfer of a wife's personal estate, nor to her receipt of money. The 4th section of the Act of 11th April, 1856 (Purd. Dig. 1009), declares, when a married woman shall be entitled to a legacy or to a distributive share of the personal estate, or of the proceeds of the real estate of a deceased person, it shall be competent for her, either in person or by attorney, to sign, seal, and deliver a refunding bond in pursuance of the Act of Assembly in such case made and provided, and also to execute all such other instruments, and to perform all such other acts, as may by law be necessary to be done, or may be lawfully required by the executor or administrator upon the payment to her of the moneys to be distributed as aforesaid, with the same effect in binding her separate estate as if she was a *feme sole.* The object of this Act is not to give a married woman general powers, nor the power to transact business generally, but to bind herself by such acts and instruments as may be necessary, or be lawfully required by the executors or administrators, "upon the payment to her of the money to be distributed." It is to protect them and give them a legal voucher for what they have actually paid to her. This receipt was not given to the administrators. It does not recite the payment of any money by them. No account had been settled showing her distributive share. It shows no authority for Pomeroy Bros. to act for the administrators. In fact, it was not treated as a voucher for money paid by them; but it appears to have been treated by them and by the Court as an assignment to Pomeroy Bros. of her portion of the estate. This, as is held in Buchanan *et al. v.* Buchanan (10 Wright, 186), is the assumption of a power not intended to be given by the Act of 1856, cited. It does not appear in the case that any of the money mentioned in the receipt actually reached the hands of the appellant.

Some of the exceptions filed are very general, yet reasons are given therefor, which if true, in a great measure excuse their generality. The exceptions raise questions of fact to be ascertained by evidence to be taken. Whenever exceptions to the account of an administrator are filed by one interested, it is made the duty of the Court, by the Act of 14th April, 1835 (Purd. Dig. 445), to decide whether the matters contested call for a reference to an Auditor, and if they do, to appoint one or more. The Court did not decide that the contested matters averred in the exceptions did not call for a reference, and it is very clear they did, but that the appellant had no such standing in the case as to permit her to make the inquiry. In this the learned Judge erred.

The ability of the appellant to sustain any of her exceptions, or to disprove the correctness of the account filed, are questions not now before us. We think she has a right to make the attempt.

Decree of final confirmation of the account reversed at the costs of the appellees; the exceptions are reinstated, and a *procedendo* awarded.

Opinion by MERCUR, J. GORDON, J., dissents.

Jan. '81, 235. March 24, 1881.

Bainbridge's Appeal.

Decedents' estates—Will—Construction of—Bequest for monument.

B. directed the proceeds of his estate to be invested by his executor, and the interest thereof to be paid to his mother during her life, and at her death, after the payment of certain legacies, "all the rest and residue of the estate" he directed his executor "to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hands will warrant." The executor's account, filed after the death of testator's mother, showed a balance of $807.43 applicable to the residuary clause above cited. Of this amount the Court appropriated the sum of $715 for a monument in accordance with the plans and estimates submitted by the executor, directing the small balance to be distributed among the next of kin of testator.

Held (affirming the Court below), that the word "suitable" in the will related only to the form and style of the monument, and was not intended by the testator to deprive the executor of the right to use the whole amount of the residue of the estate in the erection of the monument.

Held, that, there being no devise over, testator evidently intended that the whole residue should be applied to the monument, and, the executor having exercised the election granted him in the premises, the testator's intention should be carried out.

Appeal of Henry Bainbridge from the decree of the Orphans' Court of Montgomery County, making distribution of the estate of William M. Bainbridge, deceased.

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The facts, as ascertained by the Auditor, were as follows:—

William M. Bainbridge died, unmarried, June 11, 1869, leaving a will wherein he directed that all his real and personal estate should be sold by his executor, and the interest of the proceeds be paid annually to his mother for life, and after her decease the same to be disposed of as follows: to Norristown Encampment, No. 37, of the Independent Order of Odd Fellows, the sum of one hundred dollars: to Curtis Lodge, No. 239, of the Independent Order of Odd Fellows, the sum of one hundred dollars: to his nephews, William Tustin and William Fulmer, twenty-five dollars each: "and all the rest, residue, and remainder of my estate, after the decease of my said mother and the payment of said bequests, I direct my said executor to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hands will warrant."

Sarah Bainbridge, testator's mother, died April 26, 1880; and on May 8, 1880, the executor, Geo. W. Calhoun, filed his final account in said estate, showing a balance due the estate amounting to $1118.43.

The Auditor accordingly decided that the sum of $300 was a suitable amount under the will to be appropriated for the monument therein directed to be erected, and distributed the remainder among testator's brothers and sisters surviving. To this report the executor filed exceptions, on the ground that the Auditor erred in not awarding the whole residuary fund, to wit, $807.43, for the construction of said monument.

The Court (Ross, P. J.) confirmed the exceptions so far as to order the sum of $715 to be appropriated out of the residue of the estate towards the construction of the proposed monument, in accordance with a plan and estimate submitted by the executor; and further decreed that the sum of $92.40, remaining over and above the cost of the proposed monument, be divided among the heirs of testator in conformity with the intestate laws. Thereupon Henry Bainbridge, brother of the testator, took this appeal, assigning for error the action of the Court in decreeing the sum of $715 to the executor for monumental purposes, and in not confirming the Auditor's report.

Geo. W. Rogers, for appellant.

This was not an absolute bequest for monumental purposes, because the testator attached to it two qualifications, viz., "suitable," and "such as the amount of funds in his hands will warrant." These words must therefore be construed according to their common intent, and in connection with the whole.

Griffith *v.* Woodward, 1 Yeates, 316.
Cheesman *v.* Wilt, Ibid. 411.
Cheesman *v.* Watson, 8 How. 263.
Oswald *v.* Kopp, 2 C. 518.

The assets of an estate should not be squandered in ostentatious displays for the gratification of the weakest of vanities; and in construing wills that meaning is to be preferred, as against such displays, which inclines to the side of inheritance.

Barclay's Estate, 33 Leg. Int. 108.
McKannay's Estate, 1 Leg. Gazette, 12.
Scott *v.* Guernsey, 48 N. Y. 106.
Hancock *v.* Dodmore, 20 Eng. C. L. 260.

A chancellor will so control a trustee that he shall not disappoint the intent of the donor as gathered from the instrument containing the power.

Williams's Appeal, 23 Sm. 249.

Theo. W. Beam, for appellee.

It is not to be presumed that the testator intended to die intestate as to any portion of his estate, if a contrary intent can be fairly deduced from the language of the will.

Axford's Estate, 33 Leg. Int. 265.
Stehman *v.* Stehman, 1 W. 466.

Particular expressions that would stand in the way of the general intent of the testator are to be construed in subordination to it, or disregarded.

Musselman's Estate, 5 W. 9.
Doebler's Appeal, 14 Sm. 9.
Earp's Will, 1 Pars. 453.

May 2, 1881. THE COURT. This contention arises under the will of one who died unmarried and without issue. He appears to have thought that he had a right to make such a disposition of his estate as he saw proper, provided he did not violate any principle of public policy, religion, or morality, nor impinge on any statute. Whether he knew Blackstone defined a will to be "the legal declaration of a man's intentions which he wills to be performed after his death," we are not informed. Nevertheless he did execute a last will and testament in due form of law. After the payment of his debts and funeral expenses, he directed that all his estate be converted into money and invested in good first mortgage securities, the interest thereof to be paid half yearly to his mother during her natural life. After her death, he bequeathed one hundred dollars to Norristown Encampment, No. 37, of the Independent Order of Odd Fellows, and a like sum to Curtis Lodge, No. 239, of the same order. Also the sum of twenty-five dollars to each of two of his nephews named. Then "all the rest, residue, and remainder of my estate, after the decease of my said mother, and the payment of said bequests, I direct my said executor to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hands will warrant."

In the exercise of this power the executor se-

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lected a monument which cost seven hundred and fifteen dollars, being about ninety dollars less than the residuary estate. The Court sustained him in so doing; this presents the ground of complaint. It is contended the language of the will does not justify the expenditure of so large a sum. It is claimed to be more than "the amount of funds in his hands will warrant." This is an attempt to give undue weight to that clause and make it paramount to the previous clause appropriating the whole fund. It should be construed in connection with, and subordinate to, the former clause. He had therein directed his executor to appropriate and use "all the rest, residue, and remainder" of his estate for the purposes named. The whole fund was "in his hands" for that purpose. The last clause was not intended to take from him the right to so use the whole fund. The word "suitable" manifestly related to the form and style of the monument, which were left to the discretion of the executor, with the cautionary direction to have due regard to the amount of the funds. There is absolutely nothing indicating that he may not use the whole fund. There is no devise over of any part thereof. The reason therefor evidently is, that he expected all of it would be expended for the specific purpose named. Why then shall not due effect be given to an intention so clearly expressed? May not the testator have said to the appellant as the good man of the house said to the laborer, "Is it not lawful for me to do what I will with mine own?"

We will not consider the wisdom or the folly of this disposition. He had a right to make it; he did make it according to the forms of law; he gave the fund, and clearly expressed his intention as to its use. We see no cause to set at naught his will or to impair its force. The executor made his election under it, the Court confirmed the action. The appellant has no just ground of complaint.

Decree affirmed, and appeal dismissed at the costs of the appellant.

Opinion by MERCUR, J. SHARSWOOD, C. J., dissents.

July, '80, 106. February 22, 1881.

Baumgardner v. Burnham.

Evidence—Books of original entry—Irregular and lumping charges—General and special objections—When evidence must be specially objected to—How record must show error.

Where a court has, under general objection, admitted book entries in evidence, the judgment rendered will not be reversed on error because the book entries comprised improper and lumping charges. If, however, they be rejected by the Court under the general objection, this will not constitute ground for reversal.

Where such entries are admitted in evidence, in order to warrant reversal the record must show that the inadmissible parts were specially objected to, and brought to the attention of the Judge in the Court below.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by George Burnham *et al.*, trading as Burnham, Parry, Williams & Co., against Henry Baumgardner *et al.*, trading as H. Baumgardner & Co., to recover on a *quantum meruit* for two sets of repairs on a locomotive engine, redelivered to defendants on June 21 and Aug. 1, 1876.

Upon the trial, before FINLETTER, J., the plaintiff offered in evidence the alleged book of original entries containing a charge composed of about one hundred items under date of June 21, and a charge dated Aug. 1 containing forty items. The first, to which the second was similar, began thus:—

PHILA., June 21, 1876.

MESSRS. H. BAUMGARDNER & Co.
TO BURNHAM, PARRY, WILLIAMS & Co.

Repairs to engine "Strasburg" as follows:—

No. 1. Pistons.	2½ lbs. babbitt, 40c. = $1.00; 6¼ lbs. brass bolts and nuts, 38c. = $2.38 . . .	$3 38
	Labor	10 95
No. 1. Guides and cross-heads.	Babbitt, 10¼ lbs., 40c. . .	4 10
	Labor	58 20
No. 1. Reverse gear.	1 lever handle, $1.15; 1 latch, $1.40; 2 spring rods, $1.00	3 55
	Turned bolts, 2¼ lbs., 20c. .	45
	Labor on links, etc. . .	54 64
Connecting rods.	Brasses, 55 lbs., 38c. . .	20 90
	Turned bolts, 2¼ lbs., 20c. .	45
	Labor, fitting brasses, etc. to rods	67 05
	Labor of boring and facing valves, and labor on above .	230 14
	* * * *	*
	Labor	12 23
	* * * *	*
	Labor	98 43
	etc. etc.	

The only witness called testified: "I am a bookkeeper, and am and was during the year 1876, in the employ of the plaintiffs as such. I have here their books of original charge. The entries are in my handwriting. It is the original charge-book of plaintiffs. I made these entries always within two or three days of the completion of the work. The entries in this case (pointing to the entries of 21st June, 1876) were made on the day they bear date. I made no entry during the continuance of the work. I don't know when the work was commenced. The labor is stated in a lump. All I know is

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what is in this book. These entries are made out from the charges or returns sent from the shop. They are made from the different departments to the charge clerk, and he furnishes the data to me, and from them these entries are made. The returns are made from the shop to him daily. He keeps an account or memorandum of his own. These entries of mine are made in my book daily. I make them from the directions of the charge clerk after the completion of the work. I know nothing about these charges except from the return of the charge clerk. I do not know what the items are. He keeps his own memoranda. The first charge against the customer is made in this book. The charge clerk's compilation is simply a memorandum. There is no other book of original entry in which we make our entries against the customers than mine. The prices are given me by the charge clerk."

The objection to the offer of the book in evidence appears thus in the bill of exceptions: "Counsel for defendant did object thereto." Objection overruled. Exception. The defendant offered no evidence.

Verdict for plaintiffs for the amount appearing due by the charges, and judgment thereon; whereupon the defendants took this writ, assigning for error the admission of the book in evidence.

Silas W. Pettit (with whom was *John R. Read*), for the plaintiffs in error.

Books, in order to be admitted as of original entry, must contain the first permanent record of the transaction recorded; it must appear affirmatively that the entries are true, and that the work was done or the goods delivered to the knowledge of the person who made the entries. He must swear that the charges are just and reasonable, and the entries must not be lumping charges.

Heart *v.* Hummel, 3 B. 414.
Henshaw *v.* Davis, 5 Cush. 145.
Earle *v.* Sawyer, 6 Id. 142.
Hughes *v.* Hampton, 3 Brevard, 544.
Bank *v.* Boraef, 1 R. 152.
Meighen *v.* Bank, 1 C. 292.
3 Davies Abr. Ch. 81, Art. iv. § 1 and 2.
Summers *v.* McKeim, 12 S. & R. 405.
White *v.* Wilkinson, 12 La. Ann. 359.
Gray *v.* Dick, 8 WEEKLY NOTES, 435.
Fahnestock *v.* Speer, 37 Leg. Int. 399.

Where the memoranda from which the book entries are made are preserved, they must be produced.

1 Wharton on Evidence, § 682.

Unless these requisites are observed, a defendant, as was the case here, is utterly unable to show that the price charged is excessive, for it does not appear what work was done.

John G. Johnson, for the defendants in error.

It is not necessary that the work should have been done, or the goods delivered, within the knowledge of the person who made the entries.

Curren *v.* Crawford, 4 S. & R. 3.
Kline *v.* Gundrum, 1 Jones, 249.
1 Wharton on Evidence, § 683.

The price is presumed to be correct. It was not possible to make the charges until the repairs were done.

Wollenweber *v.* Ketterlinus, 5 Harris, 389.

It would have been improper to have produced the charge clerk's memoranda.

Rogers *v.* Old, 5 S. & R. 404.
1 Wharton on Evidence, § 682.
Breinig *v.* Meitzler, 11 Harris, 156.
Stokes *v.* Fenner, 30 Leg. Int. 84.

The undertaking was not to furnish certain labor and materials, but to make certain repairs; the detail is unusually minute.

March 7, 1881. THE COURT. Had the objection in the Court below been specially to the lumping charges for labor, it would have been error to have admitted them. But the objection was to the books generally, and improper entries are not sufficient to exclude the whole, in which there were many entries entirely regular. Had the whole been rejected, the Court could not have been convicted of error, for though the admission of the particular items was not objected to, still they were offered with the others, and if any part of an offer be inadmissible, the rejection cannot be assigned for error. But where the evidence was admitted, there the record must show affirmatively that the inadmissible part was specially objected to, and brought to the notice of the Judge. Otherwise it is plain that both the Judge and the opposite party may be entrapped, and the case reversed on evidence which the party would not have insisted on, nor the Judge admitted, had the objection been made specially to that part of the offer.

PER CURIAM. Judgment affirmed.

MERCUR, J., absent.

Jan. 1881. March 15, 1881.

Mulford v. Downer.

Evidence—Act of April 15, 1869 (P. L. 30)—Construction of—Is enabling and never disenabling—Assignor of thing in action—Competency as a witness.

The Act of April 15, 1869 (P. L. 30), renders no one incompetent as a witness who was competent before its passage. Hence an assignor of a judgment, who, it was well settled prior to 1869, was competent to give evidence of any defence to its payment, is not rendered incompetent since the passage of the above mentioned Act by the death of his assignee.

Error to the Common Pleas of Susquehanna County.

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Feigned issue between B. H. Mulford, and R. B. Downer, to try whether the amount of a judgment held by Mulford against Downer had been paid.

On the trial, before McCollum, P. J., it appeared that the original judgment had been entered upon a judgment note for $4000, payable in seven annual instalments, given by defendant Downer to Ralph S. Birchard. Birchard entered up judgment on the note, and assigned the judgment to Fanny J. Mulford, who in turn assigned it to B. H. Mulford, the plaintiff. The judgment was revived twice, the last time in the name of B. H. Mulford. Fanny J. Mulford died before the trial of the feigned issue. Defendant put in evidence receipts for payments made upon the judgment, showing that a large part of it had been paid. By way of defence as to the residue he called one William J. Mulford, son of Fanny J. Mulford, deceased, who testified, that, about the same time Birchard entered up his judgment, said Birchard being anxious to be paid the amount thereof in cash, Downer, the defendant, called on the witness and asked him to furnish the money, offering to pay him interest at the rate of ten per cent. if he would do so. The witness then testified that he obtained the money from his mother, Fanny J. Mulford, paid it to Birchard, and took an assignment to her of Birchard's judgment to secure her for the amount. He further testified that he computed the excess of interest on the principal at the rate of ten per cent. over the rate at six per cent., and took a note for that amount, viz. $639.52, from defendant, Downer, payable to Fanny J. Mulford. Witness further testified that the amount of this note was intended only as a compensation to witness for his trouble in procuring the money, and that said note had been paid in full. Defendant then offered in evidence the above note for $639.52, claiming that it was a mere cloak for usury, and that, if applied to the payment of the principal judgment, it would cancel the residue of the indebtedness thereon.

Objected to, "because, where a party agrees to obtain a purchaser for a judgment for a certain compensation, the transaction is nothing more than an agreement for compensation for services rendered, and is not usurious."

Objection overruled, and evidence admitted. (First assignment of error.)

The defendant then offered as a witness Ralph S. Birchard in corroboration of the above.

"Objected to as incompetent, it being shown by the record that the witness was the assignor of the thing in action, and that his assignee, Fanny J. Mulford, was dead."

Objection overruled, and evidence admitted. (Second assignment of error.)

The Court instructed the jury, that, as far as the receipts put in evidence by defendant went, they should find for defendant. As to the residue of the judgment, he left it to the jury to say whether the note for $639.52 had been given as usury or as compensation to William J. Mulford for his services in obtaining the money, instructing them that if the former were the case the defendant was entitled to set off the amount paid on that note as against the judgment.

Verdict and judgment for defendant. Plaintiff thereupon took this writ, assigning for error the admission of evidence as above.

W. H. Jessup, for plaintiff in error.

The note should not have been admitted in evidence. No ground had been laid to show that it was given for usury.

The witness Mulford was incompetent to testify.

It is well settled that the meaning of the words "assignor of the thing in action" in the proviso to the Act of April 15, 1869 (P. L. 30), is, that, where a living person is offered to testify in derogation of rights transferred by the witness to one deceased, his mouth shall be closed by policy of law.

Karns *v.* Tanner, 16 Sm. 305.
Arthurs *v.* King, 3 N. 525.
Chase *v.* Irvin, 6 Id. 286.
Hess *v.* Gourley, 8 Id. 195.
Gardner *v.* McClellen, 29 Sm. 398.

McCollum and *Watson*, for defendant in error.

The question whether the note was for usury or not was for the jury. It was therefore rightly admitted in evidence.

The witness Mulford was properly allowed to testify. If not competent before, he was rendered so by the Act of 1865 (P. L. 38), and it is well settled that the Act of 1869 renders no one incompetent who was competent before its passage.

Gamble *v.* Hepburn, 9 Norris, 439.

March 28, 1881. The Court. The first assignment of error has not been pressed, and could not have been with any show of reason. The second is as to the competency of Birchard. He was not objected to as interested. He was not a party to the proceeding, which was a feigned issue, ordered by the Court, to determine whether a judgment on a bond held by Mulford under an assignment from Birchard was paid. Whether the issue was in fact in that form or included Birchard as a nominal plaintiff, it does not vary the case. It was a feigned issue, which ought always to be between the real parties. The last revival was in the name of Mulford. Birchard was not objected to as a party to the suit. He was called by the defendant. The objection was that "the witness was the assignor of this judgment at the time, and that his assignee was dead." It seems to have been sup-

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posed that the Act of 1869 made the witness incompetent in such a case. But that statute is an enabling, not a disabling one. It made no one incompetent who was not so before. An assignor is competent to impeach by his evidence the instrument assigned, if it be not negotiable paper. Baring *v.* Shippen (2 Binney, 165) is in point, and the principle is perfectly well settled.

Judgment affirmed.

PER CURIAM.

Jan. '80,260. January 11, 1881.

Schleppi v. Kochler.

Will—Legacy—Contingent and vested—When legacy does not lapse—Intention of testatrix.

A bequest to D. of an annuity for the rest of her unmarried life, and on her marriage day the sum of $3000 to be paid to her, and thereupon the annuity to cease, means an annuity until marriage, and the legacy on marriage.

The marriage before the death of the testator does not cause the legacy to lapse, but the condition having been fulfilled when the will went into effect, the legacy was absolute.

Error to the Common Pleas No. 2, of Philadelphia County.

Amicable action case, by William Kochler and Lizzie his wife, against Susanna C. Schleppi, to recover a legacy under the will of Elizabeth Ditsche, deceased.

Upon the trial, before MITCHELL, J., the following facts appeared: The testatrix died on March 27, 1876, leaving a will dated December 4, 1875, which contained the following clause:—

"Sixth. I give, devise, and bequeath unto Lizzie Ditsche (her name before adoption being Lizzie Bauman) a bedstead and what belongs to it and the furniture for one room. These articles are to be selected by my sister, Mrs. Susanna Catharine Schleppi (maiden name Seigfried), or, if she should have died, by my hereinafter named executors. Furthermore, I give, devise, and bequeath unto said Lizzie Ditsche a yearly annuity of two hundred dollars ($200) for the rest of her unmarried life; on her marriage day the sum of three thousand dollars ($3000) shall be paid over to her by sister Mrs. Susanna Catharina Schleppi (maiden name Seigfried), or by her estate; said yearly annuity, which must likewise be paid by my sister, Mrs. Susanna Catharina Schleppi (maiden name Seigfried) or by her estate, ceases at her marriage, after the legacy of three thousand dollars has been paid to her."

On March 7th, 1876, twenty days before the death of the testatrix, Lizzie Ditsche intermarried with William Kochler.

The defendant contended (1) that the legacy lapsed, and (2) if not, the testatrix had in her lifetime advanced $2000 upon account of the legacy at the time of the marriage.

The Court refused the defendant's point, which was: "If the jury find that after the execution of the will, and before the death of the testatrix, the plaintiff got married, then the legacy of $3000 to the plaintiff lapsed, and the verdict should be for the defendant."

Verdict for plaintiff for $3255, and judgment thereon; whereupon the defendant took this writ, assigning for error the refusal of her point.

John H. Campbell, for plaintiff in error.

The condition attached to the gift of the legacy had already taken place in the lifetime of the testatrix. The legacy was not vested, as is apparent in assuming that the legatee had died unmarried in the lifetime of the testatrix. Time was annexed to the very essence and substance of the gift.

McClure's Appeal, 22 Sm. 414.
Chess's Appeal, 6 Nor. 362.

W. W. Montgomery (*Samuel Wagner* with him), for the defendant in error.

A bequest to a man, to be paid to him on the day he arrives at the age of twenty-one years, if he so long live, would be unconditionally due him if he had come of age before the death of the testator.

Roper on Legacies, 756.

The intention of the testatrix that the money should be a marriage portion for her adopted daughter is clear; "on her marriage day" is only a different way of saying "when married," or "after her marriage."

January 24, 1881. THE COURT. The intention of the testatrix is very manifest, and effect must be given to it, unless it contravenes some rule or policy of law, which certainly is not the case in this instance. She meant that her adopted daughter should have the annuity until marriage, and the legacy on her marriage. As she was married before the death of the testatrix, the condition when the will went into effect had been fulfilled, and the legacy was absolute.

Judgment affirmed.

PER CURIAM. GREEN, J., absent.

Common Pleas—Equity.

C. P. of Cumberland County. March 16, 1881.

Adams v. Manning.

Joint-stock companies—Articles of association of directors—Liability of—Equity—Multifariousness.

Bill in equity, filed by E. Adams *et al.*, complainants, against H. Manning *et al.*, defendants.

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The bill alleged, that, on Feb. 25, 1870, Robert Montgomery, John Oiler, *et al.*, associated themselves together for the purpose of carrying on business as "bill and exchange brokers and private bankers," under the firm name of the People's National Bank of Newville, under regular articles of association, by which the association was to continue for the period of ten years from Feb. 25, 1870. Subsequently certain other persons were admitted as partners, and the name of the partnership was changed to the People's Union Bank of Newville. The bill then sets forth the persons who acted as directors from the date of the organization of the Bank down until November, 1870, when it ceased to do business, who were charged with large losses by reason of mismanagement, whereby the complainants being shareholders were called upon to pay an amount aggregating $12.000.00 over and above the capital stock of $50.000, which was all lost, and the reputed assets of the firm. The bill then avers: "This loss has been occasioned by the directors who managed the business of the firm. Their conduct as agents of the firm chosen by its members to manage and control its business and affairs under the articles of association was in direct opposition to those articles, and against the oaths taken by them, and each of them, when they accepted the position of directors and managers; and the plaintiffs, as showing the disregard of the said directors in the premises, allege and specify as follows, to wit:—

"The 8th article of association provides as follows: 'That the total liabilities to the association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the capital stock of said association; provided, that the discount of *bona fide* bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation or firm requesting the same shall not be considered as money borrowed.' Contrary to this article of the association, on October 24, 1870, the defendants, who were then directors, discounted for P. A. Ahl & Bro. a note drawn by them to the order of John S. Ahl & Co., at ninety days from Oct. 21, 1870, for $5,000.00, having then a note in the bank of the said P. A. Ahl & Bro. for the sum of $1,625.00. The amount thus loaned to P. A. Ahl & Bro, was increased from time to time from 1870 until it aggregated the sum of $75,069.28 due by them to the association on April 16, 1878, and this amount was compromised for the sum of $30,000.00, thus resulting in a loss of over forty-five thousand dollars to the said association." In like manner loans were made to J. A. Woodhem of $35,000.00, of which over $17,000.00 was lost. The bill also charged the directors with declaring dividends when there were no profits, with borrowing money on their personal security and repaying themselves when they became aware that the bank must fail; and with negligently managing the affairs of the bank, so that great losses occurred. The bill prayed for an account of the amount lost by the violation of the articles of association, and a decree that that amount be paid by defendants. The directors served without compensation. To this bill the defendants demurred, alleging multifariousness, want of equity, no cause of action, and insufficient statement of facts to bind defendants.

Lemuel Todd, *J. Mc D. Sharpe*, and *Duncan Graham* (with them *J. H. Graham*), for the demurrer.

It will not do to aver mere negligence as the ground of liability of defendants, who were directors serving gratuitously. The opinion of Judge SHARSWOOD in Spering's Appeal (21 Smith, 1) rules this case. "Directors are not liable for mistakes of judgment, although so gross as to appear absurd, if honest and within the scope of their powers." (Spering's Appeal, *supra.*)

Directors without compensation are responsible only for *gross* negligence. (*Ib.*)

The bill is bad for multifariousness.

1 Daniel's Chancery, 334.

The plaintiffs have an adequate remedy at law.

John Hays, *W. F. Sadler*, and *S. Hepburn, Jr.*, contra.

The bill is in its nature a bill for an account between partners.

Collyer *v.* Collyer, 2 Wr. 257.
1 Daniel's Chancery, 334 et 365, notes.
2 English Chanc. Proc. Simmons, 289.
Story's Eq. Pleading, Sec. 531–9.
Story's Eq. Pleading, Sec. 505, note b.
Collyer on Partnership, Sec. 285 a. 307–11.

Sharpe, in reply.

A partnership bill for an account is a technical one well understood by the profession. This bill neither in form nor nature is such a bill. The complainants seek to hold the defendants because of an alleged violation of the articles of association; to create a liability they must aver gross negligence. This they have not done.

"He who comes into equity must do so with clean hands." The plaintiffs received the dividends of which they complain. Before they can be heard on this ground let them pay back the money they have received.

May 11, 1881. THE COURT. This is not a bill for an account, in the sense in which that term is understood when used in reference to the settlement of partnership accounts. The plain-

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tiffs are stockholders in a joint stock company doing business in the name of the People's Union Bank of Newville under articles of association, and the defendants were directors of the company. The bill does not charge the defendants with having embezzled or withheld any of the funds or property of the association nor with having failed or refused to render a true account of their management. The allegations are that in their office as directors they transgressed the articles of association and were negligent and inattentive in the performance of their duties, so much so that great loss resulted to the company from such transgression, negligence, and inattention, and the purpose of the bill is to charge upon and recover from them the losses which have been thus sustained. It is the stockholders, some of whom are depositors, who have brought this suit. The defendants received no compensation for their services as directors, they undertook gratuitously to perform the duties entrusted to them by the stockholders. They were entrusted with the management and direction of the affairs and business of the association, and their relation to the stockholders is analogous to that existing between the directors and stockholders of a corporation. In the performance of their duties the law required of them good faith, and the application of reasonable or ordinary skill and diligence, but no more.

On the subject of the relation which directors of a corporation sustain to its stockholders, Mr. Justice SHARSWOOD, in Spering's Appeal (21 P. F. Smith; 20), says, "They are undoubtedly said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandatories, persons who have gratuitously undertaken to perform certain duties, and who are bound therefore to apply ordinary skill and diligence, but no more. Indeed as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill. Ought they to be held responsible for mistakes of judgment or want of skill and knowledge? They have been requested by their co-stockholders to take their positions, and they have given their services without compensation. We are dealing now with their responsibility to stockholders, not to outside parties, creditors, and depositors. . . Upon a close examination of all the reported cases, although there are many *dicta* not easily reconciled, yet I have found no judgment or decree which has held directors to account except when they have been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or when such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say, by any means, that their responsibility is limited to these cases, and that there might not exist such a case of negligence or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen elected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places." Then after summing up and citing many authorities, English and American, on the subject, he concludes thus: "These citations which might be multiplied, establish, as it seems to me, that while directors are personally responsible to the stockholders for any loss resulting from fraud, embezzlement, or wilful misconduct, or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers, or co-directors, yet they are not liable for mistakes of judgment, even though they be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." Here, then, we have a rule applicable to the case in hand, for surely no one will contend that the defendants, as directors of this joint stock company, were required to apply to the performance of their duties a higher degree of skill and diligence than the law requires of directors of a corporation. The law requires of these good faith and ordinary or reasonable skill and diligence, and no more.

The excessive loans to P. A. Ahl & Bro., and to J. A. Woodburn, appear to constitute the substantial ground of complaint as set forth in the bill. Had these loans been paid in full, I apprehend no complaint would have come up from any one, and all would have been well, for the charge in the 8th paragraph as to the improper declaration of dividends seems to proceed upon the theory, not that there was a lack of profits at the time, but that the directors were bound to know and foresee that the losses which subsequently became apparent on the compromise and settlement with Ahl & Bro. and Woodburn would certainly ensue. Upon the facts and circumstances disclosed by the bill it may well be assumed that their conduct and action in this respect, if at all improper, was at the very worst,

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but an honest mistake of judgment; and certainly it is not pretended that they sought to make any profit by it that was not common to all the stockholders. All the stockholders shared in these dividends, and unless they can show more than is alleged in the bill. I cannot see upon what principle of equity or justice they can expect to charge or recover from the directors anything on this account. So the same excessive loans lie at the foundation of the charge contained in the 9th paragraph. Had these loans been paid in full, resulting in profit to the bank, there could, so far as the allegations in the bill are concerned, be no ground for complaint on the part of the stockholders, that the liability of the directors for money borrowed for the association on their individual notes and applied to its purposes, was discharged with "sundry assets of the association."

But the capital stock was $50,000.00, and the articles of association provided "that the total liabilities to the association of any person or any company, corporation, or firm for money borrowed, including in the liabilities of a firm or company the liabilities of the several members thereof, shall at no time exceed one-tenth part of the capital stock of said association." Now the bill charges that, contrary to this provision in the articles, the defendants, who were then directors, discounted for P. A. Ahl & Bro. a note of $5000, on the 24th Oct. 1870, having then in bank a note of the same parties for $1625, and that the loans then were increased from time to time, until, on the 16th April, 1878, they aggregated the sum of $75,069.25, and that this amount was compromised for the sum of $30,000.00, thus resulting in a loss of over $45,000.00, and that in like manner loans were made to J. A. Woodburn, beginning in 1870, and gradually increasing until in January, 1878, they aggregated over $35,000, of which over $17,000 was lost. The bill charges them with having negligently managed the affairs of the association and against the express provisions of the articles of association, and their oaths as directors. These loans to Ahl & Bro., aggregating an amount which is $25,000, in excess of the whole capital stock, and to Woodburn of a sum within $15,000 only, of the whole capital stock, were most excessive and clearly beyond the scope of the powers and discretion confided to the directors. Great losses having resulted from these excessive loans made, as is alleged, in the face of an express prohibition, negligently, and against their oaths as directors, I cannot say that they ought not to be required to answer. If the allegations in the bill be true, and we must so regard them in determining the questions raised by the demurrer, the conduct of these defendants in making or permitting these excessive loans to be made, thus being shown to us, without any justification or excuse, appears to have been grossly inattentive and negligent. It may be that upon filing their answer and a full development of all the facts and circumstances attending their management they will be found to be free from any liabilities, but that time has not yet come, and I cannot see what state of facts will then be established. For the facts of the case at this stage of the proceeding, I cannot look beyond the allegations in the bill.

I do not think the objections to the bill for multifariousness are well founded. The Court will not permit a plaintiff to demand, by one bill, several matters of different nature against several defendants; for this would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the state of the several claims of the other defendants, with whom he has no connection. Neither can a plaintiff join in one bill several distinct and independent demands against one defendant. But to support such an objection, the different grounds of suit must be wholly distinct, and each ground must be sufficient, as stated, to sustain a bill; if the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing, and all tending to one end, the objection does not apply. (Brightly's Equity, sec. 555.) Now the defendants constituted the board of directors of this company, and as such acted together as a board. It is the official conduct of these defendants as such directors, that is complained of. The transactions, from which it is alleged the losses resulted, are the same which all took part in and assented to. True, it appears that some were not in office during the whole of the period during which these transactions occurred, but still the allegation is that they were connected with them. Indeed it will be seen that if as many separate bills were filed as there are defendants, the same investigation would necessarily have to be made in each case, with but slight variations. But by joining them together in one bill, one investigation only is rendered necessary with but one bill of costs, and I think a more equitable determination and adjustment of their liabilities will be arrived at. If it is improper to join these defendants in one and the same bill, and the bill for that reason is bad for multifariousness, it is difficult to conceive of a case in which the same objection would not apply. I do not well see how the plaintiffs could have done otherwise than join them in the same bill.

Demurrer overruled, and defendants assigned to answer within 30 days.

Opinion by HERMAN, P. J.

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Common Pleas—Law.

C. P. No. 2. Sept. 24, 1881.

Scatchard v. Landenberger Manufacturing Company.

Non-resident claimant in sheriff's interpleader not permitted to file his own bond—Practice.

Rule to show cause why claimant in a sheriff's interpleader should not have leave to file hi own bond.

The affidavit by Thomas A. Bond, the claimant, was in the usual form, setting forth his ownership of the goods levied upon, and that he did not derive title through the defendants. It was admitted that Bond was a non-resident.

I. Newton Brown, for the rule.

George Junkin, contra, cited—

Mitchell on Rules, 37.

Emerson *v.* Grattan, 4 WEEKLY NOTES, 574.

THE COURT. Rule discharged.

C. P. No. 3. Sept. 30, 1881.

Richards et al. v. Harper.

Affidavit of defence law—What is a sufficient copy of book entries.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit upon book account. The book entries filed by plaintiff were as follows:—

New York, ... 188 .
E. Ira Richards, Mr. Henry Harper.
F. B. Richards, Bought of E. Ira Richards & Co.,
C. I. Richards, Manufacturing Jewellers,
E. Ira Richards, Jr. 200 Broadway, New York.
Manufactory, North Attleboro, Mass.

1880.		
Nov. 18.	1 pr. Bands,	$3.50
"	¼ doz. scarf pins, 4½,	1.12
"	⅙ " " ea. 12, 10½, 7½, 12,	7.25
Etc.	etc. etc. etc.	etc.
		$265.99

On the back of the copy was indorsed the following: "Copy of plaintiff's book of original entries upon which suit is brought."

The defendant filed a suggestion of record, setting forth that the copy filed was not such a one as entitled plaintiff to judgment for want of an affidavit of defence.

Sharp & Alleman, for the rule.

De Forrest Ballou, contra.

THE COURT. Rule discharged.

C. P. No. 4. June 13, 1881.

Ashton v. Walton.

Limitations—Recorder of Deeds—Act of April 13, 1872—Liability of Recorder of Deeds for issuing false or erroneous certificates of search limited to five years.

Sur demurrer to special plea.

Case, by Ashton against Walton, late Recorder of Deeds, of the city of Philadelphia, for negligence in issuing false certificate of search. The defendant pleaded the general issue, and a special plea setting forth that the plaintiff ought not to have or maintain his action, "because . . . . the said supposed cause of action in the said declaration did not accrue within five years next before the commencement of this suit." The plaintiff demurred, assigning for cause that he was not bound to bring his action within five years from the time when the said cause of action accrued.

Robert H. Neilson, for the demurrer.

The Act of April 13, 1872 (Purd. Dig. 459, pl. 9), imposes a new liability; it makes the Recorder liable "not only to the person upon whose order the search was made or given, but also to any person claiming title through . . . . said person who may suffer loss." The object of the act was to give relief to grantees and assignees of mortgagees, so that they might avail themselves of searches issued by order of their respective grantors and assignors; this liability continues for five years, but the *original* liability to the grantors continues. The Act is not a statute of limitation. The case of Owens *v.* The Savings Fund (9 WEEKLY NOTES, 465), was recently ruled on the Statute of Limitations without reference to this Act.

J. H. Shakespeare, contra.

Under the law as it formerly stood, the Recorder of Deeds was not required to give these searches: when he did so, he was regarded as an insurer by the Courts. The Act of 1872 is *in pari materia* with the General Limitation Act of 1713. A subsequent affirmative statute is a repeal, by implication, of a former one made concerning the same matter, if it introduce a new rule upon the subject, and be evidently intended as a substitute for the former law; although it contain no express words repealing it.

Johnston's Estate, 9 Casey, 511.

Gwinner *v.* The Railroad Company, 5 Smith, 126.

C. A. V.

June 17, 1881. THE COURT. Judgment for defendant on the demurrer.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, OCT. 20, 1881.* [No. 27.

Supreme Court.

Jan. '80, 283. February 28, 1881.

Getz's Appeal.

Railroads—Sidings—Right of construction of, through private property—Charter of the West Reading R. R. Co.—Acts of April 13, 1846, § 17, March 20, 1860, and General Railroad Act of Feb. 19, 1849—Right to build sidings or branches incidental to the grant of a railroad—Right to build sidings to mining and manufacturing establishments along route of a railroad.

The grant of a right to construct a railroad carries with it, by necessary implication, the right to construct all works and appendages usual in the convenient operation of a railroad. Sidings are among such works.

The Phila. and Reading Railroad Co., by virtue of the general railroad law of Feb. 19, 1849 (P. L. 81), of sect. 17 of the Act of April 13, 1846 (P. L. 322), extended to said company by the Act of April 12, 1864 (P. L. 396), and of the Act of March 20, 1860 (P. L. 471), is authorized to construct sidings leading to manufacturing or mining establishments held by private owners, and for this purpose may take, by virtue of the delegated power of eminent domain in it reposed, the interjacent lands belonging to other parties.

The right of running sidings to such private establishments, and of taking the necessary land for the purpose, is clearly within the constitutional power of the Legislature to confer, because the *public* interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the State and promoting the general wealth and prosperity of the community.

Edgewood Railroad Co.'s Appeal (29 Smith, 257) distinguished.

TRUNKEY, J., dissents.

Appeal from the Common Pleas of Berks County.

Bill in equity, filed Nov. 7th, 1878, by Hiram S. Getz and James K. Getz, trading as Hiram S. Getz & Co., and Hiram S. Getz against The Phila. and Reading R. R. Co.

The bill alleged that Hiram S. Getz & Co. were the lessees and Hiram S. Getz the owner in fee of a lot of ground, situate on the southwest corner of Spruce and Canal Streets, in the city of Reading, extending along Canal Street eighty-three feet, more or less; along Spruce Street one hundred and twelve feet, more or less, to the Schuylkill Canal; along the canal one hundred and thirty-seven feet, more or less; thence by a straight line to the place of beginning on Canal Street one hundred and twenty-four feet, more or less; on which lot were erected costly and extensive buildings and machinery, consisting of a steam marble mill for sawing blocks of marble into slabs and posts, a large warehouse for storing the same, and a two-story frame dwelling-house, extending along the whole length of the Spruce Street boundary of the lot, the dwelling-house having been occupied by a tenant since April, 1878; that the Phila and Reading R. R. Co. was a corporation incorporated under the laws of the Commonwealth, and by virtue of authority granted to it had become the owner of the West Reading Railroad running along Canal Street and in front of complainants' premises, including the rights and franchises formerly vested in the West Reading Railroad Co.; that the complainants had been for over four years past extensively engaged in the marble business, and in its prosecution had had the unobstructed enjoyment of this lot or yard, including the use of the western part of the said Canal Street and the footways along both street boundaries, including the convenience of passing along and across Canal Street for the purposes of their business; that the defendants had notified the complainants that they intended to erect a siding, and proposed to proceed forthwith, from the track of the said West Reading Railroad immediately in front of the complainants' premises, commencing at a point nearly opposite the south line of their lot, and from thence by a curved line across the corner at Spruce and Canal streets of said lot, and through the dwelling-house, as well as across the pavements on both Canal Street and Spruce Street, and to continue the same westwardly along Spruce Street and across the canal bridge to the rolling or sheet mill of the Reading Iron Works, in order to do which it would be necessary to fill up several feet on the lot, as well as over or on the pavements or sidewalks, and to tear down the dwelling-house. The following was the notice served on complainants:—

In the matter of the Railroad Siding to run into the sheet mill of the Reading Iron Works. } Geo. F. Baer, Att'y-at-law, Office, 518 Washington St.

READING, Nov. 6, 1878.

You are hereby notified and required to remove all your property, including the building which is now on the right of way of the Phila. and Reading R. R. Co., as described in draft filed in Court. If this is not done tomorrow morning, we shall take possession and proceed with all necessary force to move all obstructions.

(Signed) GEORGE F. BAER,
Att'y for P. & R. R. Co.

To A. G. Green, Esq., Att'y for H. S. Getz.

The bill then further alleged that the erection of the siding was for the special accommodation

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of the Reading Iron Works, a private corporation for the manufacture of iron of various kinds for private gain, and at the instance of the Reading Iron Works; that by the construction of the siding the complainants would sustain irreparable injury; that it would cut off their marble yard and mill from the public highway, rendering egress and ingress for the purposes of their business practically impossible, and forcing them to remove at heavy expense and loss to another locality; that the improvements upon the lot were worth in all about $18,000, the machinery, including engine, etc., alone having cost $12,000; that the building of the siding across the property of the complainants for the purpose of reaching the sheet mill of the Reading Iron Works, besides being ruinous to the premises and business of the complainants, was without authority or warrant of law; and that the Philadelphia and Reading Railroad Co. had no right to take the complainants' property either for its own benefit or for the benefit of a private person or corporation. The bill prayed for (1) Equitable relief; (2) A preliminary injunction to restrain the defendants from proceeding to erect the siding and track across the complainants' premises, and from obstructing the use of their mills and marble yard; (3) An answer to the bill; (4) General relief. The bill was fortified with several affidavits. The Court, on motion, granted a preliminary injunction, which was subsequently, after hearing, dissolved.

Defendants then filed a plea, wherein they alleged that on the 8th day of April, 1878, they presented their petition and bond to the Court, setting forth the location of said railroad on the plaintiffs' property; that the bond was approved and filed; and that by virtue of the Act and supplements thereto, incorporating the Philadelphia and Reading Railroad Co., and also by the Act of March 20th, 1860 (P. L. 471), incorporating the West Reading Railroad Co., the defendants were given the right to enter upon and take possession of the said property, and erect such a siding as was proposed.

The Court (HAGENMAN, P. J.) sustained the plea, and dismissed the bill, delivering the following opinion: "In this case we do not see anything left for the plaintiffs but in the proper manner provided by law to seek their remedy in damages. If there is equitable relief, we ourselves fail to discover it. We believe the remedy at law providing damages for injury or destruction of property thus condemned and appropriated by the railway company, under a delegated right of eminent domain, will give the compensation contemplated by the fundamental laws of the land."

The complainants thereupon took this appeal, assigning for error the decree of the Court in sustaining the defendants' plea, and in dismissing the bill.

H. Willis Bland and *A. G. Green*, for the appellants.

The question is, whether the defendants have the right to erect a branch railroad for the sole and exclusive use of a private corporation upon the ground of the complainants? That the Legislature cannot take the property of one citizen for the mere purpose of transferring it to another is well settled.

Palairet's Appeal, 17 Smith, 488.
Brown *v.* Hummel, 6 Barr, 86.
Lambertson *v.* Hogan, 2 Id. 24.

The authority to erect the branch road, if it exist at all, must be statutory. But such power must be clearly granted before its exercise; for whatever powers are not expressly granted to a corporation are withheld.

Diligent Fire Engine Co. *v.* Com., 25 Sm. 291.

Without such authority the act of the defendants is illegal and arbitrary. Is such authority conferred by the charter of the West Reading Railroad Co.? The charter of that company, Act of March 20, 1860 (P. L. 471) creates a corporation—

"with power and authority to construct a railway beginning at any point on and connecting with the Lebanon Valley R. R., between Fourth Street in the city of Reading and the river Schuylkill, thence by such route as shall be deemed best, and across or along such streets in said city as may be found expedient to use, to a point on Canal Street in said city, near the Reading Gas Works, with power to extend said road to the Henry Clay Furnace."

This is their whole grant of power. The West Reading Railroad is laid along Canal Street, and the Reading Sheet Mill is at no point within 500 feet of Canal Street. The defendants, therefore, derived no power from the charter to construct a branch road, and all the franchises were exhausted by the choice of the route and the construction of the road thereon. In the charter of the West Reading Railroad and in the General Railroad Act of 1849, while there is authority to take land in connection with the main track for the construction of sidings, there is no power given to build *branch* tracks. The power thereby conferred to construct "turnouts, sidings, and other devices," is confined to the main line of the railroad, which is located in this case on Canal Street. There is a clear distinction between a siding and a branch road. The former may be constructed under the provisions of the General Act, while the latter must be *specifically authorized*. Section 17 of the Act of April 13, 1846 (P. L. 322), extended to the Reading Railroad by Act of April 12, 1864 (P. L. 396), does not give the needed authority. That Act is as follows:—

"And it shall be lawful for the said company, subject to conditions, etc., to make such lateral railroads or

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branches leading from the main line of their road to such convenient place or point in either of the counties into or through which the said main line of their road may pass, as the president or directors may deem advantageous and suitable to promote the convenience of the inhabitants thereof, and the interests of the company."

The Act cannot be construed as having any reference to extending railway facilities to private corporations, but only to villages at some distance from the main line of the road.

Pittsburgh *v.* Penna. R. R. Co., 12 Wr. 355.

The Commonwealth transfers to her citizens her power of eminent domain only when some existing *public* need is to be supplied, or some *public* advantage is to be gained.

Edgewood R. R. Co.'s Appeal, 29 Sm. 269.
Cooley's Cons. Law, 530.

George F. Baer, for the appellees.

The right to lay down as many sidings and other collateral tracks as are requisite to accommodate its business, is incident to the right to construct a railroad.

Black *v.* R. R. Co., 8 Sm. 249.
Cleveland & Pittsburgh R. R. Co. *v.* Speer, 6 Sm. 325.
R. R. Co. *v.* Williams, 4 Id. 103.
2 Redfield on Railways, 245.

Side tracks leading from the main line to the great manufacturing industries built along its track, are necessary to enable the road to perform its obligations to the public to transport freight cheaply and expeditiously. It is in the highest sense a "public use," and every public use is directly or incidentally of private advantage to some one. It is absurd to suppose that a railroad could, in this age, consist of a mere trunk.

The Act of April 13, 1846 (P. L. 322) confers all the requisite authority. It makes the president or directors the sole judges of the "point or place" to which the road shall run, as well as of its necessity. The case is ruled by—

Pittsburgh *v.* Penna. R. R. Co., 12 Wr. 359.

The company is alone intrusted with the location of its road, subject to the liability imposed by law for damages occasioned thereby.

Struthers *v.* R. R. Co., 6 WEEKLY NOTES, 161.
Parke's Appeal, 14 Sm. 137.
New York and Erie R. R. *v.* Young, 9 C. 175.
Anspach *v.* Mahanoy & Broad Top Mt. R. R. Co., 5 Phila. 491.

March 28, 1881. THE COURT. The bill in this case sought to restrain the defendant from laying a piece of track 600 feet long from its main road to certain iron works in the city of Reading. The plaintiffs contend that there is no lawful authority for the structure in question. The case was heard on a plea in bar to the bill, alleging a legal right to make the structure under certain Acts of Assembly set forth in the plea. A preliminary injunction, granted when the bill was filed, was dissolved and the bill itself dismissed by the Court below, and of this action the plaintiffs complain. The proposed track extends for a short distance over a lot of ground of which the plaintiffs are lessees, with buildings, machinery, and a warehouse used as a steam marble mill, and also a dwelling-house erected thereon. The track is laid along two streets immediately in front of the premises of the plaintiffs on two sides, and from these causes it is claimed that great damage will arise to the plaintiffs if the track in question is permitted to remain and be used by the defendants. As the latter allege a perfect legal authority for their act the question of damage is not material to the discussion, as the injury of the plaintiff is a subject of compensation in appropriate proceedings, which in point of fact are already pending.

The defendant claims that it has the power to lay the track under the authority conferred by the charter of The West Reading Railroad Company, passed March 20, 1860 (P. L. 471), and also by the seventeenth section of the Act of April 13, 1846 (P. L. 312) incorporating the Pennsylvania R. R. Co. It is conceded that the defendant has duly acquired the franchises of the West Reading Railroad Company, and the rights conferred by the 17th section of the Act of April 13, 1846, by appropriate legislation. The West Reading Railroad Company was by its charter vested "with power and authority to construct a railway, beginning at any point on and connecting with the Lebanon Valley Railroad between Fourth Street in the city of Reading and the river Schuylkill; thence by such route as shall be deemed best, and across or along such streets in said city as it may be found expedient to use, to a point on Canal Street, near the Reading Gas Works, with power to extend said road to the Henry Clay Furnace, subject to all the provisions and restrictions" of the general Act of Feb. 19, 1849, and with the limitation that the road should not exceed five miles in length. The right to occupy streets in the city of Reading, is thus expressly given, so far as the main track is concerned, and in point of fact the road is laid and in use along Canal Street, directly in front of plaintiffs' premises. The siding or branch in question starts on and runs along Canal Street for some distance passing in front of and then across the property of the plaintiffs. So far as Canal Street is concerned, the structure is clearly lawful unless the company has no right to construct sidings at all. But that position is not tenable. In the case of Phila., Wilmington, and Balt. R. R. Co. *v.* Williams (4 P. F. S. 103) the authority conferred was "to locate and construct a railroad of one or more tracks" and "to make, construct, and erect such warehouses, toll-houses, carriages, cars, and all the works and appendages necessary for the convenience

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of the said company for the use of said railroad." We held that "This grant of power unquestionably carries with it the right to construct turnouts, sidings, stations, and engine houses, and all works and appendages usual in the convenient operation of a railroad. A railroad without switches, sidings, turnouts, and buildings for fuel, water, engines, stations, etc., would be useless in a great measure. They are essential to the operation of the road and to the transportation of freight and passengers with security and dispatch." In the case of Cleveland and Pittsburgh R. R. Co. *v.* Speer (6 P. F. S., on page 335), AGNEW, C. J., in delivering the opinion of the Court said, "By the express words of this charter, the power is conferred of making as many sets of tracks as are deemed necessary. But if this power were not expressed it is clearly to be inferred from the general powers conferred, and the essential purposes of the grant. A power to build side tracks is essential to the purpose and use of the road." In Black *v.* P. & R. R. R. Co. (8 P. F. S., on page 252), we said that "the word 'railroad' *ex vi termini*, includes siding." It cannot be doubted therefore that the right to build sidings is included as a necessary incident in the right to build a railroad.

But in addition to this implied power, this company is expressly clothed with the powers conferred by the general railroad law of 1849, which includes the power to construct "branches or lateral railroads" and "turnouts, sidings, and other devices," and still further with all the power and authority given to the Pennsylvania Railroad Co. by the 17th section of the Act of April 13, 1846. By that Act, authority is given "to make such lateral railroads or branches leading from the main line of their said road to such convenient place or point in either of the counties into or through which the said main line of their road may pass, as the president or directors may deem advantageous and suitable, to promote the convenience of the inhabitants thereof, and the interests of said company." In the case of Black *v.* The P. & R. R. R. Co., above cited, the powers of the Phila. and Reading R. R. Co., the present defendant under this Act, were construed by this Court, and it was there held that the company had the right to build branch tracks from their main road, through the streets of Philadelphia to their coal wharves on the river Delaware. Although the charter gave only a right to build a railroad, with one of its termini "at some suitable point in or near the city of Philadelphia," under which a road was built terminating at Richmond on the river Delaware, yet it was held that on account of the necessarily increasing wharf accommodations required for increased business, additional tracks or branches might lawfully be built from the main line to the various wharves. So far, the authority was implied. But it was also held that such additional tracks or branches were branch railroads within the meaning of the 17th section of the Act of 13 April, 1846. This was going further than is necessary in the present case. In that case the branch track was laid solely in the interest and for the advantage of the railroad company. It commenced and it terminated on their own property, while in its course it was built through the streets of the city, whereas here, the branch makes a new connection, affords an additional facility for transportation, and procures increased traffic to the main road. We cannot assent to the opposing contention, which holds that a side track, which leads only to a manufacturing or mining establishment, held in private ownership, is illegal because it does not subserve a *public* use. These establishments are very numerous, especially in Pennsylvania, along a near line of railroad. They serve to develop the resources of the State, they give employment to vast numbers of citizens and constitute a most important element in the general wealth and prosperity of the community. Convenience and consequent cheapness of transportation are in most cases essential, and in many vital to their maintenance. Moreover, considerable portions of the general public are directly interested in the traffic which goes to them, and in that which comes from them. Hence in the connection in which we are now considering them, we cannot regard them as merely private interests and therefore without the pale of that public use, for which private property may be taken in the construction of railroads lawfully established and actually used for public purposes.

In Cleveland & Pittsburgh R. R. Co. *v.* Speer (6 Casey, p. 332), we held that "it does not admit of a doubt in this State, that a railroad company may use a public street or highway when authorized by its charter expressly or inferentially," and in Mayor, etc., of Pittsburgh *v.* Pennsylvania R. R. Co. (12 Wr. 359), we decided construing this same 17th section of the Act of 13th April, 1846, that "these branches or lateral railroads, within the space of the counties mentioned, depend upon the discretion of the president and directors, who are made the judges of the convenient place or points, to which they are to be led and also of their advantages, and whether they are suited to promote the convenience of the inhabitants of such counties and the interests of the company. If these terms are fully complied with, then, in making such branches or lateral railroads, the company have or, using the language of the Act, the president and directors have, exactly the same

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power and authority as they possess, and can exercise, in constructing their main line. The branches and the main line, in these respects are placed on the same footing." The foregoing principles and decisions cover every aspect of the present case, and are entirely convincing that there was no error in the action of the Court below.

The case of Edgewood Railroad Co.'s Appeal (29 P. F. Sm. 257), has no application to the present case. That was an attempt by the owners of a coal mining property to build a lateral road, connecting their mine with the Pennsylvania Railroad, without complying with the provisions of the lateral railroad statutes by effecting an organization under the Acts of 1868 and 1871, authorizing the construction of railroads for *public* use. It was perfectly apparent, and we so held, that "the conveyance of persons and property" in the sense in which those words are used in the Act of 1868, would be out of the question, and that the only business to be done on the road was the transportation of the coal of the Hampton Coal Company. To create a company for the building of such a railroad under the provisions of the laws authorizing the creation of companies to build railroads for public use, would be a clear violation of the express terms of those laws. The seventeenth section of the Act of 13th April, 1846, was not before us in that case, nor was it in any manner considered.

Decree affirmed.

Opinion by GREEN, J.

Dissenting opinion by TRUNKEY, J.

The bill charges that the defendant intends forthwith to construct a siding across and through the plaintiffs' lot and dwelling-house, thence along a street to the rolling or sheet mill of the Reading Iron Works; that to do so, it will be necessary to tear down the dwelling-house; that the defendant has notified the plaintiffs to remove their property including said building, and if they do not by to-morrow, the defendant will proceed with necessary force to remove the obstructions; that the erection of said siding is for the special accommodation of said Reading Iron Works, a private corporation, and at its instance and for private gain; and that by construction of said siding, the plaintiffs will sustain irreparable injury. And defendant's plea, avers its authority "to erect such a siding as is proposed." The cause was heard on bill and plea, and the facts charged must be taken as admitted.

I shall do no more by way of protest, than call attention to the undisputed facts upon which the bill is dismissed. As I understand the decisions and the facts on which they are respectively based, never before has such a taking of private property in this State received judicial sanction, and I doubt if ever before a railroad company attempted it. No one denies that a railroad company may lay as many sidings and turnouts as are fairly requisite to accommodate its business, nor that the company is entrusted with the location of its road and branches, keeping within the limits of its charter. Locating its road between certain points, or locating a branch to a certain point for accommodation of the public, is altogether different from locating a branch or siding merely to accommodate a private person, natural or artificial, for private gain.

Here is the naked fact of running a siding, as it is called, across the plaintiffs' lot, against their will, for private gain, to a rolling-mill. This siding is not for public use. Its terminus is on private property. If the defendant may lawfully construct it, it may arbitrarily run its sidings to every private place it chooses, doing irreparable mischief to owners of property who are in the way. In Reading, the plaintiff's dwelling and business are destroyed to-day, in laying a siding to an iron-mill; to-morrow another citizen may be ruined by a siding to an ice-house; another by one to a tannery, and so on indefinitely. Other companies have like powers as this defendant. In Philadelphia dwellings may be demolished in running sidings to sugar refineries, shoe factories, shops, and salesrooms, and other private places at the arbitrary discretion of the several boards of directors. Outside of the cities, no man's farm will be secure from a siding to any stone quarry or other private place, whose owner may be favored by the judgment of a board of directors. I am not convinced that it was the legislative intent to grant such rights, and do not believe they have been granted. But if within the words of the statutes or charters, it seems to me a gross violation of the citizen's right, that his property should be violently taken for private use.

The statutes relating to lateral railroads, make provisions for owners of mines, mills, and the like, to secure rights of way, and under these, the owners of private property have some protection against the cupidity or interested judgment of their neighbors. If the Reading Iron Works made a connection with the defendant's road, and is entitled to cross the plaintiffs' lot at all, it should be by proceeding under those statutes, instead of an abuse of the rights granted to defendant.

Although indicating the grounds of dissent, I am not unmindful that the decree settles the rights of the parties, and that I have taken an erroneous view of the facts and law of this case.

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Jan. '80, 293. March 10, 1881.

Gray's Appeal.

Judgment, when not conclusive—Estoppel—Power of auditor—Interest.

A. contracted to sell a piece of land to B. for a sum certain, payable in instalments without interest. The contract contained a confession of judgment by B. to A. for the whole purchase-money, and a provision that "payments might be anticipated in sums of not less than $500, when a corresponding interest would be allowed." Several instalments being due and unpaid, A. entered up judgment, issued execution, and sold the property.

Held, That, in the distribution of the proceeds of this sale, the proper method for an auditor to compute the amount due to A. was what A. had shortly before admitted it to be, viz., to take the amount of unpaid instalments, add to this the interest on the instalments overdue, and then deduct the interest on the instalments not yet matured.

It also appeared that A. had, some time before the sale, represented to C., who had been B.'s counsel, that his (A.'s) claim was only to a limited amount, on the faith of which C. had purchased judgments against B. subsequent in lien to A.'s judgment.

Held, That, as against C., A. was estopped from claiming from the proceeds of the sale any greater amount than he had represented to C. was due him.

Appeal of John Gray from the decree of the Common Pleas of Luzerne County, confirming the report of the Auditor appointed to make distribution of a fund arising from a sheriff's sale. The facts, as found by the Auditor to whom the cause was referred, were substantially as follows:—

By articles of agreement dated January 18, 1869, John Gray contracted to sell to Frederick Liem certain premises, situated on Main Street in Wilkesbarre, for the sum of $27,005, without interest, payable as follows:—

$2500 January 18, 1869.	$500 April 1, 1869.
$2255 October 1, 1869.	$1450 April 1, 1870.
$1840 April 1, 1871.	$1780 April 1, 1872.
$1720 April 1, 1873.	$1660 April 1, 1874.
$1600 April 1, 1875.	$1540 April 1, 1876.
$1480 April 1, 1877.	$1420 April 1, 1878.
$1360 April 1, 1879.	$1300 April 1, 1880.
$1240 April 1, 1881.	$1180 April 1, 1882.
$1120 April 1, 1883.	$1060 April 1, 1884.

The contract contained a confession of judgment by Liem to Gray for the amount of $27,005, and a provision that "payments may be anticipated in sums of not less than $500, when a corresponding interest will be allowed."

On November 11, 1876, several instalments being unpaid, judgment was entered on the contract in favor of Gray to the whole amount of $27,005, although some $6500 had already been paid, and it was so noted on the contract. Upon this judgment several writs of execution issued, and finally a vend. ex. to May Term, 1877, by virtue of which the premises were sold by the sheriff to said John Gray for $16,000. Gray presented his receipt as a lien creditor, which, being returned to Court, upon application of certain other lien creditors, the Auditor was appointed to make distribution of the proceeds of sale.

Before the Auditor, among other claimants, appeared John Gray, the appellant, and John Espy, an assignee of two judgments obtained by one Hummel against Liem. Espy had acted as Liem's counsel, but bought the judgments on his own account. It was in evidence that, at a conference some months prior to the sale, Gray had assured Espy that his claim did not exceed $13,500, and upon the faith of this assurance Espy purchased the two judgments aforesaid.

The Auditor decided that the judgment of Gray, not being absolute, but collateral to the general undertaking, was not conclusive as to amount; that the provision that payments might be anticipated in sums of not less than $500, and that in such case an allowance for interest should be made, entitled the creditor to receive only the present value of instalments not matured; and finally that Gray was estopped from claiming more than the amount he represented as unpaid on his judgment, because it was on the faith of such representation that Espy purchased the two judgments he now asked to have paid out of the fund.

He accordingly awarded to the claimant, Gray, the amount unpaid on instalments prior to the day of sale, including interest, together with the value of the then unmatured instalments after deducting interest according to the terms of the agreement, and costs, the sum total amounting to $13,754.71, and the remainder to the other judgment creditors in the order of date.

Thereupon Gray filed exceptions to said report, on the ground that the Auditor had erred in not awarding to him the full sum of $27,005.

The exceptions were overruled by the Court, and the report confirmed; the appellant thereupon took this appeal, assigning for error the action of the Court in overruling the exceptions to the Auditor's report.

A. Ricketts, for appellant.

The question here was one of distribution merely, and not as to the validity of the creditor's lien. The Auditor, therefore, exceeded his powers.

Dyott's Estate, 2 W. & S. 557.
Leeds *v.* Bender, 6 W. & S. 315.
Edwards's Appeal, 16 Sm. 89.
Borland's Appeal, 16 Sm. 470.
Malone's Appeal, 29 Sm. 481.
Kendig's Appeal, 1 N. 68.
Dougherty's Estate, 9 W. & S. 189.
Logue's Appeal, 10 H. 50.
Thompson's Appeal, 7 Sm. 175.

The doctrine of estoppel cannot be invoked

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where the other party was acquainted with all the facts.

Kreiser's Appeal, 19 Sm. 194.

The party in whose favor the estoppel is applied is the counsel of the defendant in the execution, to whom all the facts were well known, and who bought the judgments on his own private account.

Chas. D. Foster, for appellees.

An auditor may receive testimony to show that a judgment has been paid or otherwise satisfied.

Borland's Appeal, 16 Sm. 470.
McGowin *v.* Remington, 2 Jones, 56.
Souder's Appeal, 7 Sm. 502.

Where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting to the prejudice of that other the contrary of that of which his conduct has induced the belief.

Hill *et al. v.* Epley *et al.*, 7 C. 334.
2 Wharton on Evidence, 1150.
Commonwealth *v.* Moltz, 10 Barr. 531.

May 2, 1881. THE COURT. The judgment of appellant, instead of being absolute and conclusive in his favor, is in reality collateral to the undertaking of the vendee as expressed in the articles of agreement upon which the judgment itself is based. Hence it was strictly proper for the learned auditor to inquire and determine how much of the purchase money mentioned in the agreement and secured by the judgment was paid at the date of the sheriff's sale. It is a mistake to suppose that this involved an inquiry into the validity of the judgment.

The fund for distribution represents the real estate which appellant, by articles of agreement dated January 18, 1869, contracted to sell to Mr. Liem, for the consideration of $27,005.00, payable without interest, in annual instalments from that date to April 1, 1884, inclusive. The time and amount of each payment are particularly specified in the contract of sale, and it is provided, that "payment may be anticipated in sums not less than $500.00, when a corresponding interest will be allowed." The clause whereby the vendee confesses judgment in favor of appellant for the consideration money above mentioned, is also incorporated in the contract, so that the collateral character of the judgment is clearly apparent on the face of the very instrument which contains the confession of judgment and forms a part of the record thereof. The terms and provisions of the contract invite inquiry as to the amount of purchase money unpaid at the date of the sale.

The fund was more than sufficient to pay the residue of the judgment, including instalments not then due; and inasmuch as the payment of the latter was thus anticipated, the auditor, in accordance with the provision in relation to allowing interest on payments made in advance of their maturity, etc., above quoted, ascertained the then cash value of the future due instalments to be $7056. This, together with the balance of past due instalments, interest, and costs, amounting to $13,754.71, he appropriated to appellant in full satisfaction of his judgment. The principle on which he proceeded in reaching this result is entirely correct, and there is no allegation of error in calculation. The spirit if not the strict letter of the contract, fully justified him in discounting, as he did, the instalments payable in the future, without interest. Appellant has no reason to complain of a construction which he himself put upon the contract a short time previously. He has received as much of the fund as in strict justice he is entitled to.

Independently of all this, however, the auditor was clearly right in holding that, so far as Mr. Espy is concerned, appellant would be estopped from claiming more than the amount he represented as unpaid on his judgment, viz. $13,500, as of April 1, 1877. The testimony clearly shows that Mr. Espy, in reliance on appellant's statement, took an assignment of two judgments which he claims out of the fund. In relation to this matter and the unearned interest on instalments not then due, the auditor found, upon amply sufficient evidence, that in a conference with Mr. Espy and others, shortly before the sheriff's sale, appellant stated that the amount owing on his judgment would be about $13,500, as of April 1, 1877; and that he and Mr. Espy then made a calculation, a copy of which was given in evidence, showing the exact balance to be $13,491.87; that the correctness of the statement, which upon its face shows a deduction for unearned interest on the instalments not then matured, was assented to by appellant, who shortly afterwards assured Mr. Espy that $13,500 would cover his claim, and that relying on the truth of this assurance, Mr. Espy purchased the two judgments for $1200.

It is scarcely necessary to cite authorities to prove that the foregoing facts, corroborated by others found by the auditor, are sufficient to evoke the doctrine of estoppel, so far at least as Mr. Espy is concerned. The general principle, as stated by Mr. Justice STRONG, in Hill *et al. v.* Epley *et al.* (7 Casey, 331), is, "that, where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the prejudice of that other, the contrary of that of which his conduct has induced the belief. The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential,

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either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up."

The first three assignments of error are not according to rule, but we have considered the questions intended to be presented by them. The fourth and fifth assignments are destitute of merit, and require no further notice.

Decree affirmed and appeal dismissed at the costs of the appellant.

Opinion by STERRETT, J.

May, '81, 14. May 2, 1881.

McGettrick's Appeal.

Auditor—Power of, to pass on validity of deed conveying interest of distributee of fund—Orphans' Court.

Where an auditor is appointed to distribute the proceeds of the sale of real estate of a decedent, and the share of a distributee is claimed by virtue of a deed conveying all said distributee's interest, the validity of which deed is contested by the distributee upon the ground that it has been fraudulently obtained, it is competent for the auditor to pass upon the validity of such deed and to make distribution accordingly.

Appeal of Eleanor J. McGettrick, from a decree of the Orphans' Court of Lancaster County, distributing the estate of John McGrann, deceased. The facts of the case were as follows:—

John McGrann died intestate, in 1872, unmarried and without issue, leaving as one of his heirs-at-law a niece, Eleanor J. McGettrick.

The real estate of the intestate was sold under an order of the Orphans' Court of Lancaster County, by a trustee appointed for that purpose, and an auditor was appointed to distribute the proceeds. Before the auditor, the distributive share of Eleanor J. McGettrick, a niece of the decedent, was claimed by one Robert Taylor, who presented a deed from her for her interest in decedent's estate, dated in March, 1876, at Wilmington, Delaware, and recorded in Lancaster County the same month.

Eleanor McGettrick resisted the claim on the ground that the deed was executed without consideration, and at a time when the grantor was incapable of making a contract by reason of her intoxication, and was, therefore, voidable by her.

The auditor, after taking testimony as to the circumstances under which the deed was executed, reported that the deed was conclusive as to him, and that he had no jurisdiction to inquire into its validity; he, therefore, awarded Eleanor McGettrick's share in the fund to Taylor.

Eleanor McGettrick filed exceptions to the report of the auditor, and prayed for an issue to test the validity of the deed.

The Court, in an opinion by PATTERSON, J., dismissed the exceptions, confirmed the report, and refused the issue prayed for.

Eleanor J. McGettrick thereupon took this appeal, assigning for error the decree of the Court and the refusal to grant the issue prayed for.

D. G. Eshleman, for appellant (with him *B. F. Eshleman*).

The Orphans' Court has jurisdiction to distribute a decedent's estate among those entitled thereto.

Whiteside *v.* Whiteside, 8 Harris, 474.
Gochenaur's Estate, 11 Harris, 460.

In Dundas's Appeal, 23 Sm. 474, this very case is decided. A legatee, before the amount of his share was ascertained, assigned it. He alleged fraud in the transaction. It was held that the Orphans' Court had jurisdiction.

The power to decide all questions essential to distribution follows the power to distribute.

Kittera's Estate, 5 H. 416.

Wm. Aug. Atlee, contra.

If the deed was fraudulent, the remedy is by a bill in equity.

McMurray and Wife *v.* Davis, 5 WEEKLY NOTES, 305.

An auditor for distribution has no power to examine into and decide upon the validity of a deed properly executed. There are no cases upon the point, but the cases deciding that an auditor cannot examine into the validity of a judgment, are relied on as analogous.

Dyott's Appeal, 2 W. & S. 557.
Leeds *v.* Bender, 6 W. & S. 315.
Thompson's Appeal, 7 Sm. 175.
Borland's Appeal, 16 Sm. 470.
Kendig's Appeal, 1 Norris, 70.
Titusville Bank's Appeal, 4 Norris, 528.

Dundas's Appeal decides only that the Orphans' Court has power, on petition for payment of a legacy, to inquire into the validity of an alleged transfer; it does not decide that an auditor to distribute has such power.

May 23, 1881. THE COURT. In this case the proceeds of the sale, under an order of the Orphans' Court, of the real estate of an intestate, were in the hands of the trustee for distribution. One of the claimants to the fund was a niece of the intestate. Her share of the proceeds was claimed by the appellee, Robert Taylor, by virtue of a deed to him from the appellant for her interest in the lands sold. This deed was attacked as having been obtained fraudulently from the appellant, and as being consequently void. The auditor held that he had no jurisdiction to inquire into the validity of the deed, and for that reason declined to consider the merits of the controversy, and awarded the share of the appellant to her grantee. On exceptions taken to this action of the auditor, an application was made to the Orphans' Court for an issue to try

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the validity of the deed to Taylor, but the Court refused the issue, holding that tbe appellant was bound by the action of the auditor, and that the latter had decided adversely to her claim. We are of opinion that the auditor was mistaken in supposing he had no jurisdiction to inquire into the validity of the deed, and that the learned Judge of the Orphans' Court was in error, in dismissing the appellant's exceptions to the report of the auditor. It is of course undisputed that the Orphans' Court has exclusive jurisdiction to distribute the estates of decedents among those entitled to them. Such distribution necessarily includes the power, and the duty, to ascertain the persons to whom distribution must be made. When the share of one who is apparently entitled is claimed by another, such claim must be established in the proceeding for distribution, and as it must be there established, so it may be there impugned. There is no occasion to resort to any other Court, or to any other proceeding, to determine the validity of the claim, as the Orphans' Court has full power and adequate procedure, to dispose of the controversy. If a deed or other instrument is set up as a muniment of title for the interest of a distributee, an attack upon its validity is in no respect an impeachment of it in a collateral proceeding. A deed is not a proceeding, nor the result of one. It is not a judgment of a Court, nor a decree of any species of tribunal. It is but an instrument *inter partes*, and has no higher sanction than can be given to it by the act of the parties. As such it must abide the tests of all voluntary contracts. It is, therefore, as liable to impeachment as any other form of contractual relation, and is necessarily subject to be invalidated whenever it is proffered to a tribunal as the basis of a right. These considerations are fundamental, and the authorities which prove that the judgment of a Court cannot be impeached collaterally, and is, therefore, obligatory upon an auditor, have no application.

Decree reversed, and record remitted with directions to the Court below to re-commit the case to the auditor for further proceedings before him, the costs of this appeal to be paid by the appellee.

Opinion by GREEN, J.

Jan. '81, 208. March 10, 1881.

Delaware, Lackawanna, and Western R. R. Co. v. Hill.

Foreign attachment—When plaintiff is entitled to judgment upon answers of garnishees.

Where the answers of a garnishee in foreign attachment to interrogatories admit the possession of assets, but suggest that they are claimed by other parties, and an interpleader is awarded and framed between the plaintiff in the foreign attachment and the other parties, claimants; upon the issue raised by such interpleader being tried and a verdict rendered for plaintiff, judgment may at once be rendered on the answers of garnishee to the interrogatories.

In such case the interposition of the plea of nulla bona will not entitle the garnishee to a trial of the question of his liability, or of the right of plaintiff to the fund, that question being already decided by the interpleader.

Error to the Common Pleas of Luzerne Co.

Foreign attachment, brought to January Term, 1873, by J. F. Hill against Joseph Fellows, defendant, and the Delaware, Lackawanna and Western R. R. Co., garnishee. Judgment was obtained against Fellows for $12,000. The garnishee filed an answer to the interrogatories, admitting that under a lease with Joseph Fellows made in 1860 and assigned to garnishee in 1868, rents had accrued after the service of the attachment on garnishee up to the time of the death of Joseph Fellows on April 29, 1873. The answer further set forth, that said Fellows, by various conveyances and instruments in writing, long prior to said attachment, had conveyed to John Heermans, his heirs and assigns, forever, all his real and personal estate, in trust, as fully set out in said deeds of assignment; that John Heermans under these conveyances claimed the said rents and royalties in the hands of the garnishee, and had so notified the garnishee. And further, that said Fellows was in his lifetime a resident of the State of New York; that on February 14, 1876, a judgment was obtained in that State at the suit of Benj. F. Young, administrator of one Pultney, against the administrator of Fellows, for $175,000; that by proceedings in the Supreme Court of that State, said Young was appointed by said Court receiver of the personal property to the amount of $300,000, which might come into the hands of John Heermans by virtue of the conveyances of Fellows to him, to be applied to the payment and discharge of the said Pultney judgment, the Court directing such securities to the amount aforesaid to be transferred to said receiver; that in pursuance of said decree the administrator of Fellows and said Heermans assigned and transferred November 6, 1876, among other securities the royalties on rents due from the Delaware, Lackawanna & Western R. R. Co., and all that might fall due for three years therefrom; that said Young as receiver claimed all rent due and unpaid under said lease in the hands of said garnishee, and has so notified said garnishee. Plaintiff then moved for judgment upon these answers. On June 5, 1880, the garnishee filed a plea of nulla bona, and on the same day presented a petition for a rule on John Heermans, Trustee, and B. F. Young, Receiver, to appear and interplead in

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the sci. fa. against the garnishee. This rule was made absolute August 31, 1880, and the said parties were admitted to interplead and defend, the case being ordered to be put at issue between Hill as plaintiff, and Heermans and Young as defendants. On January 12, 1881, a verdict, under charge of the Court, was rendered in favor of plaintiff, on which judgment was entered January 17, 1881.

On January 26, 1881, judgment was entered upon the answers against the garnishee, the Court, RICE, P. J., filing the following opinion:—

"The garnishee by her answers admitted having assets in her possession, but suggested that they were claimed by John Heermans, Trustee, and B. F. Young, Receiver, under certain recited deeds, assignments, or conveyances. While the rule was pending upon the petition of the garnishee, an interpleader was awarded and framed between the plaintiff and the said Heermans and Young to try the right to the fund. That issue has been tried and a verdict and judgment entered for the plaintiff. If there was any objection to the granting of the interpleader or to the form of the issue, it ought to have been made at the time. We do not know of any valid objection to either; on the contrary, the authority of the Court to award an interpleader in common law proceedings is well recognized, although not frequently exercised, and the practice may be easily applied to attachment proceedings. But to return to the question before us. The facts set up in the answer are the same as those developed on the trial. We held there, as matter of law, that the plaintiff was entitled to a judgment, but if so, then, as a matter of law, he is entitled to judgment on the same facts set up in the answer. Further, the granting of the interpleader was necessarily based on an unconditional admission by the garnishee of liability to either one or the other of these parties; it certainly cannot be that by the simple interposition of the plea of *nulla bona* she can still demand a trial of the question of her liability which she has thus admitted, or of the right of the plaintiff to the fund which has been decided in the interpleader which she invoked.

The practice in interpleader proceedings is thus laid down in Brownfield *v.* Canon (1 C. 301). 'If he (the intervener) defends unsuccessfully, the plaintiff will have judgment for the thing claimed against the defendant, and against the garnishee for damages or interest and costs. If the intervener pleads, the issue to the Court or jury is between him and the plaintiff, and the defendant stands aside altogether, and has nothing further to do but to pay the money or deliver the thing sued for according to the judgment of the Court.'

But it is suggested that a writ of error will be taken by Heermans and Young, and that therefore we ought to stay the entering of judgment until that is determined. Now either the plaintiff is entitled to judgment, or he is not, and the right cannot be affected by what may happen in the future, but even if we had any discretion in the matter the suggestion would seem to furnish us additional reason for entering judgment now, if the plaintiff has a right to it, for then one writ of error will determine the whole question; whereas, if we refuse to enter judgment, and say that the plaintiff must now try out the issue with the garnishee, we subject the plaintiff to two trials and two writs of error involving exactly the same issue.

Undoubtedly it is our duty to protect the garnishee to the fullest extent, and this we can do by controlling, and if necessary staying execution until the writ of error is decided. On the record and answer we think plaintiff is entitled to judgment against the garnishee.

Rule absolute, formal order to be drawn by counsel and submitted to the Court."

Thereupon the company, garnishee, took this writ of error, assigning for error the action of the Court.

1. In holding that the garnishee had admitted liability to Joseph Fellows in the answers to interrogatories, and that plaintiff was entitled to judgment against the garnishee.

2. In making the rule to show cause why judgment should not be entered against garnishee absolute, while the plea of *nulla bona* was pending.

3. In entering judgment against the garnishee.

Andrew T. McClintock, for plaintiff in error.

Whether, under the trusts, the rent arising from the property conveyed was subject to the foreign attachment, is a question that the garnishee was, under the notice of adverse claim, entitled to have decided under the issue raised, in such way that the ruling of the Court below might be reviewed by the Court of last resort.

The plea of *nulla bona* is properly the general issue.

Sergeant on Attachment, p. 100.

The garnishee was not a party to the issue tried, and the verdict was not conclusive against him.

The cases of Coutes *v.* Roberts (*infra*) and Wallace *v.* Clinger (9 Barr, 51, 52), as also Brownfield *v.* Canon, cited by the Court below, are not in point, because here the Court directed the issue between plaintiff and Heermans and Young, the claimants of the fund, without reference to the garnishee.

Palmer, *Dewitt*, and *Fuller*, for defendant in error.

The judgment is fully justified by—

Mackason's Appeal, 6 Wr. 330.

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Girard Life Ins. and Trust Co. *v.* Chambers, 10 Wr. 485.

A mere stakeholder who admits possession of a fund and prays an interpleader to determine the right of property in the same between two adverse claimants, cannot, after a determination of the issue framed therein, demand a trial against the successful claimant upon a plea of *nulla bona*.

Brownfield *v.* Canon, 1 C. 301.
Coates *v.* Roberts, 4 R. 111.
Fox *v.* Reed, 3 Gr. 81.

March 21, 1881. THE COURT. This judgment is affirmed upon the opinion of the learned President of the Court below.

PER CURIAM. Judgment affirmed.

Jan. '80, 203. March 4, 1881.

Grosser v. Hornung.

Married women—Contracts—Bond and warrant to secure loan for purchase-money of real estate void—Feme sole trader—When married women not liable as such—Sole and separate use—Powers under instrument creating—Construction of—When not exercised—Mortgage.

The bond and warrant of a married woman given to secure a loan of money employed in purchasing real estate are void.

A married woman living apart from her husband but not engaged in any trade or business is not liable as a *feme sole* trader.

Real estate was conveyed to A. in trust for the sole and separate use of B., a married woman. The deed conferred upon A. a power to mortgage with B.'s consent to pay off any part of the purchase-money. The purchase-money was borrowed from C. and paid to the vendor, A. and B. entering into a joint bond and warrant to C. for the amount thereof:

Held, that the instrument creating the trust conferred upon B. no power to execute such bond and warrant, and that therefore as to her, she being a married woman, the same were void.

Error to the Common Pleas of Schuylkill County.

Judgment by confession in favor of August Grosser against Anna Maria Hornung and Peter K. Hornung, trustee, for $987, entered March 23, 1876. On March 1, 1879, a fi. fa. against real estate issued, and on the 27th of the same month, upon the petition of Anna Maria Hornung, a rule was granted to show cause why the judgment should not be opened, and she be let into a defence. On September 15th, the rule was discharged, and under an *alias* writ of fi. fa. issued on the same day the real estate named therein was condemned, and advertised to be sold on January 3d, following. On December 22d, however, on the affidavit of Anna Maria Hornung, a rule was granted to show cause why the judgment should not be stricken off.

It appeared from the deposition of Anna Maria Hornung, taken in support of this rule, that she was a married woman, but that she and her husband had lived apart since 1869, and that during this time he had contributed nothing to her support. That in 1855 the property which was about to be sold, a house and lot in Ashland, had been conveyed to her while a *feme covert*, and that subsequently it was sold under a judgment against her husband and title to it taken by John Kemple, one of her husband's creditors. Subsequently by deed dated March, 1872, Kemple, in consideration of the sum of one thousand dollars, conveyed the lot to Peter K. Hornung, son of the defendant Anna Maria Hornung, in trust to permit the defendant to "occupy, manage, let and demise, and take, receive, and enjoy the rents, issues, and profits, etc.," for life, subject to her power of appointment by will, and in default thereof, to convey to those who would take should she survive her husband and die intestate, with power in the *cestui que trust* to make void the trust or create new uses or trusts: the deed further authorized the trustee "by and with her consent, signified by her becoming a party to and signing, sealing, and delivering a deed of conveyance to sell and dispose of the said premises, hereby granted, or any part thereof, or to mortgage the same, and with the proceeds arising from such sale, disposal, or mortgage to pay off any amount of purchase-money or balance thereof on the above-described premises, or for the improvement or repairs of the said premises, or for the payment of the taxes or insurance on the same, etc., or to pay the said proceeds arising from such sale or disposal or mortgage to and unto the said Anna Maria Hornung, or to any person or persons whom she may legally authorize and empower to receive the same." The payment of the purchase-money to Kemple was effected by obtaining a loan from August Grosser, the plaintiff, who took as security the bond and warrant of Anna Maria Hornung and Peter K. Hornung, trustee, for $987, upon which judgment was entered up in this case. The deeds referred to were offered in evidence and attached to the deposition.

On January 8th the rule to strike off the judgment was made absolute as to Anna Maria Hornung and discharged as to Peter K. Hornung. Thereupon the plaintiff took this writ of error, assigning for error, (1) the granting of the rule, and (2) making it absolute as to Anna Maria Hornung.

Fergus & Farquhar, for plaintiff in error.

(1) The bond and warrant were substantially given for purchase-money, and the plaintiff is

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therefore entitled under those decisions which hold such a bond and warrant valid against a *feme covert*, to the fruits of his judgment.

If the trustee had advanced money to pay off a lien on the real estate, he would be subrogated to the rights of the holder of such lien.

Robb's Appeal, 5 Wr. 45.
Cottrell's Appeal, 11 Harris, 294.
Mosier's Appeal, 6 Sm. 76.

The plaintiff should have a like right. Any equitable right he may have may be enforced in this proceeding.

Brunner's Appeal, 11 Wr. 73.

(2) At the time the judgment was entered Mrs. Hornung was to be regarded as a *feme sole* trader. She had been deserted by her husband, and the judgment was confessed for a debt created for the very protection of her and her family.

Acts of Feb. 22, 1718, and May 4, 1855, Purdon's Dig. 692.
Black *v.* Tricker, 9 Sm. 13.
Wilson *v.* Coursin, 22 Sm. 306.
Winternitz *v.* Porter, 5 Norris, 35.
Conley *v.* Bentley, 6 Norris, 40.

(3) The defendant had power under the deed of trust to make any disposition she chose of the estate; anything included within the powers therein conferred was therefore binding.

Lancaster *v.* Dolan, 1 Rawle, 231.

In the deed she is given the right to mortgage: this is in effect nothing but a mortgage and the Court ought so to construe it.

Maurer's Appeal, 5 Norris, 380.
Penna. Co. *v.* Austin, 6 Wr. 257.

(4) It was purely an exercise of equitable power to open this judgment, and defendant is not entitled to equitable consideration, after permitting the plaintiff to incur costs and delay.

D. B. Green and *M. M. L'Velle*, contra.

The bond and warrant were absolutely void—

Keiper *v.* Helfricker, 6 Wr. 325.
Glidden *v.* Strupler, 2 Sm. 400.
Finley's Appeal, 17 Sm. 453.
Morr's Appeal, 30 Sm. 427.

The only case in which judgment by confession can be enforced against a married woman is where it forms part of the agreement under which she takes the land.

Guinn's Appeal, 5 Norris, 447.

This was not purchase-money, she had owned the land twenty years before; at best it was but money loaned to protect her estate. She was not within either act with relation to *feme sole* traders, her husband had not gone to sea, nor had she engaged in any business; she cannot be made *liable* under the Acts unless she has strictly complied with their provisions.

Jacobs *v.* Featherstone, 6 W. & S. 346.
Cleaver *v.* Scheetz, 20 Sm. 500.
Cochran *v.* Garrettson, 3 Leg. Gaz. 220.

There must at any rate be proof that she was thrown upon her own resources.

Conley *v.* Bentley, 6 Norris, 40.

March 28, 1881. THE COURT. There is no fact appearing on this record which takes this case out of the general rule which declares the bond of a married woman absolutely void. The bond here was given for borrowed money, which it may be, was applied to pay for property she had purchased. But that gave the obligee no equity to have recourse to that property. Nor is the other ground that she was a *feme sole* trader available to the plaintiff. The married woman, was engaged in no trade or business. Nor can we see that the power given to her to mortgage in the mode specified in the deed, can render this bond and judgment thereon valid.

Judgment affirmed.

PER CURIAM.

Oct. & Nov. '80, 83. Oct. 19, 1880.

Van Vliet v. Conrad.

Practice—New trial—Motion for reargument—Judgment—Associate Judges.

Where the President Judge of the Common Pleas discharged a rule for a new trial and on the same day permitted a motion for reargument of that rule to be filed:

Held, that as both these acts were legally contemporaneous the effect was to postpone the final consideration of the rule for a new trial to some future time, and to annul the order then made, and that therefore, judgment having been afterwards entered on the verdict, and then the rule for a new trial having been made absolute by the Associate Judges of the Court alone, on certain conditions which the defendant complied with, such last mentioned order was legal and valid, and that the defendant could not be deprived of a right thus lawfully acquired by an attempt of the Court to reverse its own order.

Spang *v.* Commonwealth, 2 Jones, 258, distinguished.

Error to the Common Pleas of Jefferson County.

Assumpsit, by John Conrad against George Van Vliet.

On May 24th, 1879, a verdict was rendered for the plaintiff, and on the same day a rule was taken for a new trial. On July 8, 1879, this rule was discharged by the Court (JENKS, P. J.), and on the same day by permission of the Court a motion for reargument of the rule for a new trial was filed. On July 9th, 1879, the plaintiff paid the jury fee and entered judgment on the verdict. On Nov. 8, the Court (JENKS, P. J.) referred the motion for a new trial to the Associate Judges of the Court on application of the defendant. On November 17, 1879, the Associate Judges of the Court, the President Judge being absent, made absolute the rule for a new trial, defendant to pay costs and enter security for the amount of the verdict. Said costs were paid and said security duly entered and approved the same

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day. On December 8, 1879, plaintiff moved to strike off the order of November 17, 1879, making absolute the rule for a new trial. On March 20th, 1880, McDERMITT, P. J., of another judicial district, then presiding in the Common Pleas of Jefferson County, vacated the order of November 17, 1879, granting a new trial, and directed plaintiff to collect the amount of his judgment.

Defendant took this writ, assigning for error, *inter alia*, the order of March 20, 1880, last referred to.

White and *Scott* (with them *Gordon* and *Corbett*).

The action of the Court on July 8, 1879, in permitting a motion for a reargument of the rule for a new trial that day discharged to be filed, virtually kept open that rule so as to make it perfectly proper for the Associate Judges to make it absolute. The action of McDERMITT, P. J., in vacating the order made by the Associate Judges was therefore erroneous.

Stewart and *Marlin* (with them *Jenks* and *Clark*), for defendant in error.

The mere filing of a motion for reargument, did not suspend the order disposing of the case or prevent the entry of judgment on the verdict.

Spang *v.* Commonwealth, 2 Jones, 358.

The judgment therefore was rightly entered and could not be set aside. (1) Because with a judgment standing in full force a new trial cannot be granted.

Syracuse Pithole Oil Co. *v.* Carothers, 13 Smith, 379.

Lane *v.* Shreiner, 1 Binn. 292.

Lessee of Fehl *v.* Good, 2 Binn. 495.

(2) Because the Associate Judges had no right to reverse the decision of the President Judge.

Syracuse Pithole Oil Co. *v.* Carothers, *supra*.

Kolb's Case, 4 Watts, 154.

Glamorgan Iron Co. *v.* Snyder, 3 Norris, 397.

McDERMITT, P. J., was therefore right in vacating the order of the Associate Judges.

November 8, 1880. THE COURT. The action of the Court below on the 17th of November, 1879, granting a new trial, was not only regular but final and conclusive. This action was founded on the rule taken May 24th, 1879, the day of the rendition of the verdict, which was continued by the motion for rehearing, filed July 8th. As the conditions on which the new trial were granted were fully complied with, the judgment improperly entered on the 9th of July, should have been stricken off and the parties allowed to proceed to a re-trial of the case. Instead of this, we find the Court, on the 11th of December, being then presided over by a Judge from a neighboring district, entertaining a rule to inquire into the regularity of the former proceedings, and the power of the Associates to grant a new trial, which rule was by the same Judge disposed of on the 20th of March, 1880, by a vacation of the order for a new trial. In support of this action it is urged that the Court had no power to entertain the rule for reargument after discharging the motion for a new trial, and in support of this view of the case, Spang *v.* the Commonwealth (2 Jones, 358), is cited. In this case, however, nothing was determined but that a rule to show cause why a judgment should not be opened does not operate to stay proceedings unaccompanied by an order to that effect, but it does not rule that the Court could not under that motion have proceeded to open the judgment.

In the case in hand the question is, Did the motion for reargument continue the consideration of the previous rule for a new trial? We think it did.

On the same day the order was made by the Court discharging the first rule it entertained, or what is the same thing, permitted to be filed a motion for the rehearing of that rule. Now as both these acts occurred on the same day, and hence were legally contemporaneous, the effect was to postpone the final consideration of the rule for a new trial to some future time, and to annul the order then made. It follows that power was not wanting in the Court to consider and dispose of, as it did on the 17th of November, the rule thus pending. What then is wanting to the regularity of that action?

It is said the Associates had no power to overrule the previous act of the President Judge; but they did nothing of the kind, they only acted as they had full power to do upon a pending rule granted by the President Judge himself, a rule moreover which he in express terms had referred to his Associates for their consideration and final action.

The conclusion resulting from the above stated condition of affairs is this, the new trial having been granted by a Court having full power so to do, the defendant having complied with the conditions there imposed upon him, by paying the costs and giving a bond with approved sureties for the security of the plaintiff, he could not be deprived of a right thus lawfully acquired by an attempt of the Court to reverse its own order some four months after it was made.

The remaining assignments of error we leave undetermined, thinking it better to send the case back with a procedendo that it may be proceeded in from the point where it was left when the new trial was granted.

The judgment of the Court below, as well as the order of 20th March, 1880, is reversed and set aside and a procedendo awarded.

Opinion by GORDON, J.

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Quarter Sessions.

Q. S. of Chester Co. June, 1881.

Commonwealth v. McClure.

Criminal law—Indictment for obstructing office of justice of peace—How prisoners may be committed—Constitutional law—Constitution of Penna., Art. 1, Sect. 8.

Indictment, for obstructing the office of a justice of the peace. The records of the case showed that the warrant to arrest the defendant was not supported by any oath, and that the defendant without any preliminary hearing was "held for a contempt before J. H. Leamy, Esq., and for obstructing his office as a justice of the peace."

The indictment charged the defendant with "unlawfully and wilfully interfering with, obstructing, and impeding one John H. Leamy, a justice of the peace, in the due and legal execution of his office; the said John H. Leamy being then and there engaged in the trial of a civil issue in accordance with the provisions of the Acts of Assembly of this Commonweath in relation to justices of the peace." The grand jury having found a true bill, defendant's counsel moved to quash the indictment on the ground:

1. That it does not show in what particular the justice was obstructed or hindered.

2. Because it is not based on an accusation made before a committing magistrate, founded on probable cause, supported by oath or affirmation, nor is it based on a presentment by the grand jury made from personal knowledge or observation of its members, nor upon testimony of witnesses who had been previously examined upon oath by the Court and sent before the grand jury.

3. Because the offence charged is not of such a nature as to require the extraordinary intervention of the Court, so that the grand jury at the instance of the Court should proceed to its investigation.

H. Pleasants, Jr., for the motion to quash.

The Constitution of Pennsylvania provides that without the preliminary oath "no warrant to seize any person shall issue."

Constitution of Penna., Art. 1, Sec. 8.

And its provisions are to be strictly construed in favor of liberty.

Conner *v.* Com'th, 3 Binn. 38.
Com'th *v.* Lowry, 2 Leg. L. Obs. 409.
In re Prothonotary, 9 Phila. 492.

Nor does the present case come within any of the exceptions indicated by the reasons given for quashing the indictment.

Whart. Crim. Dig. § 458.

It is expressly held that justices have no power to punish summarily for contempt.

Lapp *v.* Albright, 2 Casey, 99.

And while they are entitled to hold to bail for conduct which obstructs their office, yet clearly this "*holding to bail*," must be in due course of law, as in the case of any other misdemeanor. "The high power of punishing by attachment in the hands of many magistrates might become a public grievance."

Brooker *v.* Com'th, 12 S. & R. 175.

In general, it is necessary for the indictment "to state the facts with as much certainty as the case will admit of." . . . "So as to enable the defendant to prepare his defence."

Com'th *v.* Corson, 2 Pars. 475.
Com'th *v.* Miller, Id. 480.
Com'th *v.* Ramsey, 1 Brewst. 425.

A fortiori are particulars in the indictment necessary where there has been no preliminary oath to support and fix the responsibility of the prosecution or preliminary hearing to justify it. And where the justice (as perhaps he might have done) has not even given an *official certificate* of the particulars of the offence.

Thos. W. Pierce (District Attorney), contra.

The design of the oath and hearing are for the information of the committing magistrate; if the offence be committed *before him*, the reason for the oath and hearing are dispensed with.

The course here pursued by the justice is proper.

Lapp *v.* Albright, 2 Cas. 99.

Sept. 12, 1881. THE COURT. [After quoting the indictment and the first two reasons urged to quash it.]

Justices of the peace have no power to punish summarily for contempt. The justice in this case did not undertake to punish the defendant but held him to answer at court for a contempt before him and for obstructing him in his office as a justice of the peace. The offence is properly punishable by indictment, and that a defendant so charged should be bound to answer at court is recognized by the authorities as the proper practice. (Brooker *v.* The Commonwealth, 12 S. & R. 175; Albright *v.* Lapp, 2 Casey, 99; Fitler *v.* Probasco, 2 Browne, 142.)

It is contended, however, that a warrant should have issued, supported by oath or affirmation, charging the defendant with the offence and a hearing had on the charge so made before the defendant was bound over to answer at court. We do not think this was at all necessary. The proper practice in such cases, as recognized by the authorities cited, is for the justice before whom the offence is committed, or who is obstructed in the performance of his duties, to hold the offender to bail to answer upon indictment and to be of good behavior meanwhile and to

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commit him in default of bail. This may and frequently must be done at the time the offence is committed or the justice interfered with, otherwise he would be unable to protect himself while in the actual performance of his duties. The course pursued by the justice in holding the defendant to answer at court was entirely proper. To have required him to submit to the alleged obstruction with no power to stay it until such time as a warrant could be procured based on oath and a hearing had thereon would be to trifle with the administration of justice. The provision of the Bill of Rights referred to by the counsel of the defendant was not intended to apply to such a case. (McCullough *v.* Com'th, 17 Sm. 30; Rowand *v.* Com'th, 1 Norris, 405.)

The bill of indictment sufficiently charges the alleged offence, and it is not necessary to state therein the circumstances constituting the offence with greater particularity than is there done. If it shall hereafter appear to the satisfaction of the Court that the defendant is not able properly to present his defence for want of previous knowledge of what is charged, we will see that no injury is suffered by the defendant by reason thereof. The motion to quash is dismissed.

Opinion by FUTHEY, P. J.

[*Cf.* Commonwealth *v.* English, 11 Phila. 439.]

Common Pleas—Law.

C. P. No. 3. Sept. 19, 1881.

The American Life Insurance Co. v. Black et al.

Judgment note—Effect of alteration—Introduction of words "with interest" after delivery of the note—Opening judgment.

Sur rule to open judgment and let the defendant into a defence; proceedings to stay.

The docket showed that the judgment was entered on a single bill under seal, dated April 21, 1881, for $2000, payable one day after date, with interest, release of errors, etc.

The depositions of defendants showed that the words "with interest" were not in the note at the time of its execution and delivery, and that the alteration was made without the knowledge of defendants. The note itself read thus: "Two thousand dollars . . . with interest."

W. H. Peace, for the rule, cited—

Clark *v.* Eckstein, 10 Harris, 507.

Hill *v.* Cooley, 10 Wright, 259.
Foster *v.* McGraw, 14 Smith, 464.
Robinson *v.* Myers, 17 Smith, 9.
Neff *v.* Horner, 13 Smith, 327.
Fulmer *v.* Seitz, 18 Smith, 237.
Kountz *v.* Kennedy, 13 Smith, 190.

Charles Carver, contra.

C. A. V.

Sept. 22, 1881. THE COURT. Rule absolute.

C. P. No. 4. Sept. 19, 1881.

In re Quaker City Marriage Benefit Association of Philadelphia.

Corporations—Incorporation of—Act of April 29, 1874—Marriage benefit associations—Not beneficial associations within the Act of 1874—Refusal to grant charter as against public policy and morality.

Sur application for approval of charter of the Quaker City Marriage Benefit Association of Philadelphia.

The proposed charter contained the following material clauses: "*Second.* The said corporation is formed for the purpose of issuing certificates of membership in certain specified amounts, and to pay the parties for whose benefit the certificates were made from a fund to be raised in each case of marriage by an assessment of the members. The principle upon which the association is to be conducted being that of assessment upon its members. *Fifth.* . . . There is no capital stock, and none has been subscribed."

The application was made under the provisions of the Act of April 29, 1874 (P. L. 73), and its supplements.

September 24, 1881. THE COURT. This is an application for a charter of incorporation for what is called a Marriage Benefit Association. The application is made under the provisions of the Act of April 29, 1874, and supplements.

The object of this institution, so far as it can be gleaned from the very meagre and general outline of it contained in the proposed charter, is to offer a bonus for entering into the marriage relation. The society is to issue certificates, stipulating that, in the event of marriage, it will pay to the holder of the certificate a certain sum proportioned to the premium paid, which sum is to be raised by assessment of the members of the association. Whether these certificates are to be transferable, and are to be hawked about for sale, as unfortunately is too frequently the case in some localities in this Commonwealth with policies of insurance of another kind, does not appear. However this may be, it must be acknowledged that such institutions as that for

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which a charter is now applied for, are novelties in this community. They have recently, however, been the subject of judicial consideration in the Twelfth Judicial District of Pennsylvania, and after argument before Judges PEARSON and HENDERSON, the Court came to the conclusion that such associations were not beneficial associations within the meaning of the second section of the Act of 1874, and that the Judges could not, under the third section of that Act, certify that the proposed corporation would not be injurious to the community.

Upon deliberate reflection, I concur in the opinion of the Judges of the twelfth judicial district, that such associations as these are not beneficial associations within the meaning of the Act; and it appears to me that they are opposed to public morals and against public policy. It may well happen, under the influence of such associations, that, as was said by Judge HENDERSON in the case referred to, a premium upon marriage may be the price of virtue. It is not, in our judgment, fitting that the marriage relation, which is the corner-stone of society, should be made the subject of such speculations.

Entertaining these views, I can see no good reason why judicial encouragement should be given to the existence of such associations by conferring upon them the rights and privileges of corporations.

The application is refused.

Oral opinion by THAYER, P. J.

[*Note.*—The following is the opinion of HENDERSON, A. J., (PEARSON, P. J., concurring therein), referred to in the foregoing opinion: "This is an application for a charter of incorporation of a mutual aid association of unmarried persons under the provisions of the Act of 29th of April, 1874, by the name of the "Mutual Aid Association of North America for Unmarried Persons." The avowed object of the association is to issue certificates of membership in certain specified amounts, and to pay the parties for whose benefit the certificates are made from a fund to be raised in each case of marriage by an assessment of the members. It has no capital stock. Due proof has been made of the publication of the notice of this application; and it is now our duty to peruse and examine it, and if in proper form, and within the purposes named in the first class specified, and shall appear lawful and not injurious to the community, to approve of the same.

"By the Act referred to, corporations are divided into two classes, corporations "not for profit" and "corporations for profit." A Law Judge is authorized to grant charters to corporations of the first class. These are again designated or described according to the purpose or object of the society. We find among others that the ninth clause of the third paragraph of section 2 of said Act provides that corporations may be formed for 'the maintenance of a society for beneficial or protective purposes to its members from funds collected therein.' We propose to inquire:—

"1. Is the purpose of this society beneficial or protective to its members? The object is distinctly announced. The machinery may or may not be expensive. If it is—whilst it may be a source of profit to the officers—at least compensatory—it may become a burden to the members, and thus pervert the purpose of the organization, and defeat the true intent and meaning of the law. If we group together the different kinds of 'corporations not for profit,' we find that one general expression of equality of participation or of benevolent or philanthropic design pervades them all. It is true, as argued, that if these associations are run in the interests of a few officers, whose salaries or commissions depend upon assessments upon the members, this is an *abuse* of the privilege granted and ought not to influence the judgment against the 'purpose' of the association. We do not therefore anticipate any such result. We incline rather to the opinion that the principle of these associations is foreign to any beneficent purpose, and if worked out to a practical result we fail to discover any beneficial or protective feature. Beneficial associations had their origin in the benevolent purpose of giving assistance or protection to persons in cases of want, of sickness, of suffering, or of misfortune—to those who required it, aid to those who were unable to help themselves, and in cases of death to provide for funeral expenses. Such is not the design here. It may be purely speculative. The certificate of membership promises to the holder a specified amount upon marriage, without reference to the wants or necessities of the member, neither marked or qualified by any benevolent, charitable, or protective purpose. Beneficial and protective associations are clearly defined in their operations and are well known to the professional man and understood by the layman. Unless a 'marriage association' comes within the class of beneficial or protective associations we are without power in the premises. The language of the 9th clause of section 2 of said Act is very general, it is true, but for this reason we should closely scan the specified purpose of the association to ascertain if it comes within the purview of the Act. We cannot find that the charter asked for comes 'within the purposes named in the first class' specified in said Act, and therefore we have not the power to grant it.

"2. We are constrained by another consideration to withhold our approval of this charter. By the third section of the Act it is made the duty of the Judge to peruse the charter, and if it is found to be lawful and '*not injurious to the community*,' to approve the same. We have given the purpose and design of these associations, and those of a similar character, our serious consideration, and especially those out of which speculative life insurance has arisen, which is near akin to the moving principle of 'marriage associations.' In the one case the holder of the certificate realizes upon his investment or risk at the death of the subject, in the other at the time of marriage. There is a temptation here—there may be a victim in either case. We are not satisfied that these associations are not injurious to the community. They are not calculated to inspire confidence in the marriage relation. Its purity is the rock bed of society. Neither the welfare of the State or the community demands any such benefit or encouragement as is here sought to be given to the individual. It does not add to, but takes away from the sanctity of an holy ordinance. As a civil contract the highest consideration should be mutual love and affection It is degraded by any other, and the idea of mutual benefit and protection in the mode prescribed by certificates of membership and assessments upon the members is, in our opinion, altogether chimerical—no practical or beneficial result can flow from it. A premium upon marriage may be the price of virtue. Neither the wants of the community, the good of society, or the welfare of the individual, require any such organizations. On the contrary, we believe in the end they will prove subversive of virtue and good morals.

"The application is not approved."]

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, OCT. 27, 1881.* [No. 28.

Supreme Court.

May, '80, 186. June 14, 1881.

Kramer and Bell v. Goodlander. [No. 1.]

Trespass — Timber — Treble damages—Act of March 29, 1824—Object of—Possession of unimproved land—Evidence—Sales of seated lands for taxes—Boundaries of.

The Act of March 29, 1824 (P. L. 152) imposing a penalty of treble damages upon any one cutting and converting to his own use timber upon the land of another without the owner's consent, applies, even though the person guilty of such cutting and conversion did not know at the time that the cutting was not on his own land.

Watson *v.* Rynd, 26 Smith, 59, followed.

The Act was intended, however, only to prevent the wilful or careless cutting of another's timber. Hence the owner of land whereon such cutting is done has no right to avail himself of the provisions of the Act if he has by any positive acts misled the defendant as to the extent of his claim, even though at the time of the commission of said acts he was ignorant that his title extended beyond the limits at that time claimed by him.

The party having a good title to unimproved land is constructively in possession thereof.

Where the location of a tract of land long before surveyed has, up to the time of bringing a suit in reference thereto, been generally recognized to be as claimed by one of the parties, evidence to the effect that surveyors and other parties interested, including the opposite party, had formerly recognized its location to be such, is admissible to prove that that is its true location, even though there may be other evidence in the case showing that that is not the true location.

Where a party claims title to real estate under a sale of an unseated tract, whereof it is alleged to be a part, for taxes, evidence that said real estate was included at the time of sale within the described limits of an adjoining seated tract whereon taxes had been regularly paid, is admissible to show want of title thereto in the party claimant.

Error to the Common Pleas of Clearfield County.

Trespass, brought March 24, 1873, by George B. Goodlander against George Kramer, William Bell, *et al.*, to recover treble damages for cutting trees on land of the plaintiff* in the winter of 1872–3.

The defendants were the joint owners of an adjoining tract known as the "Jonathan B. Smith survey, No. 5862." The fact of cutting was not denied, but the defence set up was: That the tract of plaintiff was not located where the plaintiff claimed it to be, and did not cover the ground where the timber was cut; that the land on which the timber was cut was within the boundaries of a tract held by George Kramer, one of the defendants, as seated land, which was taxed on the seated list, and that Kramer had paid taxes on it as seated land for the years 1862–63; that as to the timber cut on the western part of the land claimed by Goodlander, *i. e.*, on that part west of a certain survey, made in 1870 in the name of G. B. Goodlander, being a strip about 50 perches wide and 313 perches long, upon which most of the timber was cut, there could not, in any event, be a recovery for double or treble damages, for the reason that the cutting upon it was not a cutting without the consent of the owner within the meaning of the law, and that Goodlander had no such possession of said strip at and before the time the suit was brought as entitled him to recover, at all, in this action of trespass for what was cut on that strip.

On the trial of the case before CUMMIN, P. J., the following facts appeared: "Tract No. 1434, David Kennedy," was a survey made June 4, 1793, upon a warrant dated May 17, 1792, for 363 acres, 118 perches, and allowance. According to the official draft, it was 155 perches wide from east to west, and 398 perches long from north to south. It called for a *beech tree* at its southwestern corner, and for posts at the other corners. It called for the Ann Kennedy survey, No. 305, on the north, and vacant land on the other three sides. Prior to 1873, it was considered that the northeast corner of tract No. 1434, and the southeast corner of the Ann Kennedy tract were at the same point. This tract was purchased by the plaintiff, George B. Goodlander, at a treasurer's sale of unseated lands for taxes on June 13, 1864.

West of the said David Kennedy tract, No. 1434, was another David Kennedy tract, No. 386, a survey of 1785. The actual distance across from No. 386 to No. 1434, according to its recognized location prior to September, 1873, was, according to actual measurement, about 326 perches.

"Jonathan B. Smith, No. 5862," was a survey made December 8, 1808, on a warrant dated

* The Act of 29 March, 1824, § 3 (8 Sm. Laws, 283), provides that "In all cases where any person . . . . shall cut down or fell, or employ any person or persons to cut down or fell, any timber tree or trees, growing upon the lands of another, without the consent of the owner thereof, he, she, or they so offending shall be liable to pay to such owner double the value of such tree or trees so cut down or felled; or, in case of the conversion thereof, to the use of such offender or offenders, treble the value thereof, to be recovered, with costs of suit, by action of trespass or trover, as the case may be; and no prosecution by indictment shall be a bar to such action."

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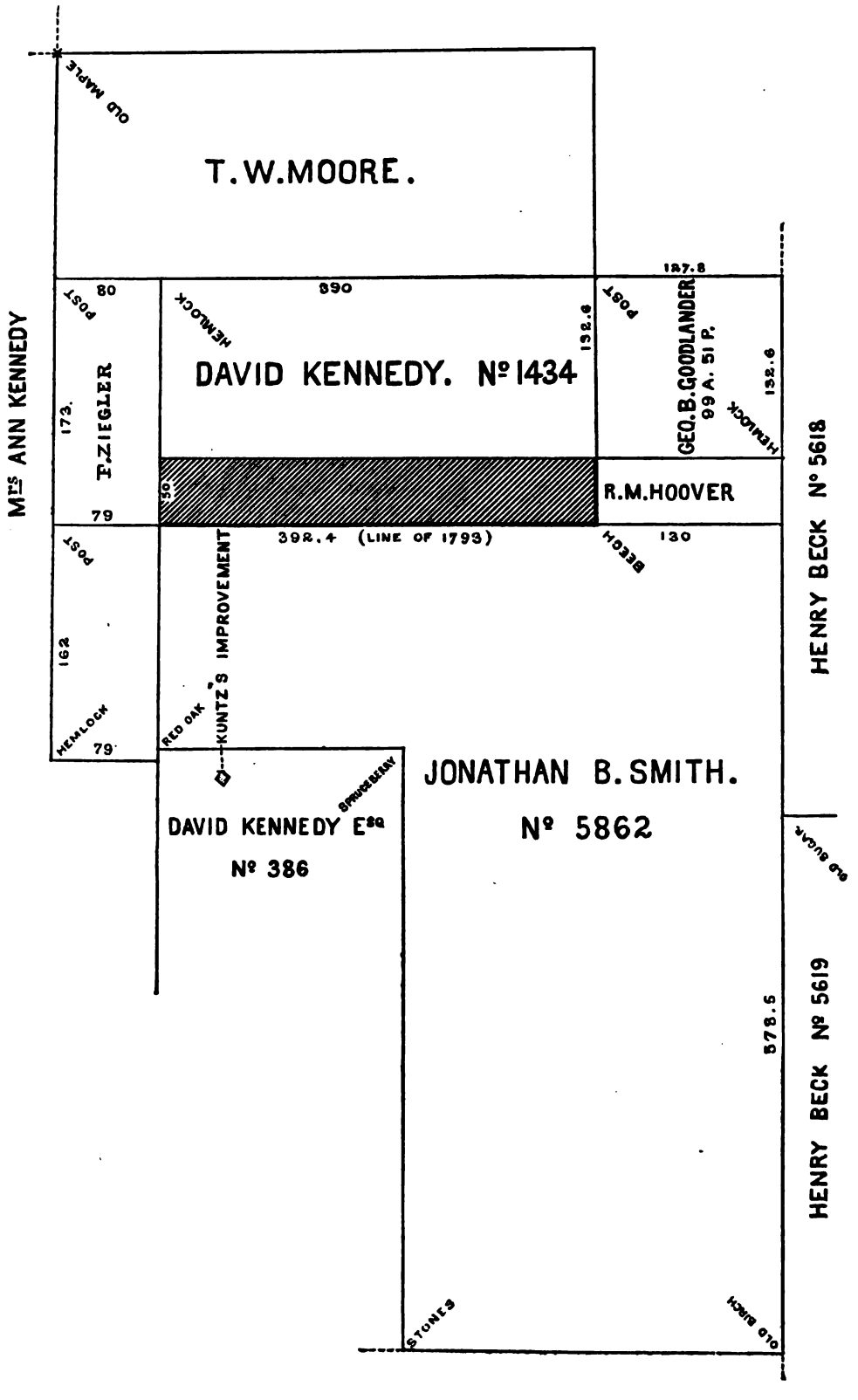

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Sept. 6, 1804, the patent for which was granted January 16, 1845, to J. B. Linton, trustee for the heirs of Samuel Cochran. It called for Kennedy survey, No. 386, on the west and on the north, and for a service-berry corner of that survey in its angle; and for Kennedy survey, No. 1434, on the east, thereby filling up the intervening space. The distance called for in the official draft between the Kennedy surveys was 192 perches. From a birch at its southeastern corner to its western line, its official length was 584 perches. Its *actual* length on the ground, including all of the land in dispute, was $578\frac{5}{10}$ perches. This survey in extending across from No. 386 to No. 1435 had an actual excess of 134 perches over its *official* width; hence, if limited to its official width, a vacant piece of land would have been left between the J. B. Smith and the Kennedy survey, No. 1434, and for this tract accordingly J. B. Goodlander, the plaintiff, took out a warrant as vacant land on September 27, 1870. Survey was made and returned, and patent granted October 31, 1870. The survey makes the tract 130 perches wide from east to west, and 445 perches long from north to south. It calls for the David Kennedy, No. 1434, and the Josiah W. Smith survey on the east, and the Jonathan B. Smith, No. 5862, on the west; also for Frederick Zeigler on the north and Henry Beck on the south. In making this survey a new line was marked by the surveyor as its western boundary, forming the division line between it and the J. B. Smith survey.

This new line was regarded by Goodlander as his western boundary. In the winter of 1872–3 Lentz (Kramer and Bell's jobber), with a crew of men, cut almost all the timber west of that line, and was directed by his employers to cut beyond the line. To this he objected, having heard (as he testified at the trial) that Goodlander claimed up to that line under a recent warrant. Kramer and Bell, however, urged him to proceed, and he accordingly put his men to work on the Goodlander survey, when this suit was brought. The defendants were arrested and held to bail. In the affidavit for a capias, filed 24th March, 1873, plaintiff complained of cutting white timber trees "on tract surveyed in name of George B. Goodlander . . . adjoining No. 1434, etc."

After the bringing of this suit, a careful examination of the country was made, and in August, 1873, one Moore, a surveyor, found a north and south line of 1793 about 173 perches west of the recognized location of the western boundary of No. 1434. This line he at once claimed to be the western boundary line of the David Kennedy survey, No. 1434. The effect of this was to move that survey 173 perches west of its accepted location, and to leave the land it had been supposed to cover unoccupied. For this ground Moore immediately took out a warrant, on which survey was made and returned. Immediately after this, G. B. Goodlander, as owner of No. 1434, adopted Moore's theory, and claimed the line of 1793 as his western boundary. This made the David Kennedy No. 1434 cover all the land in dispute, and brought the western boundary thereof 50 perches west of the west line of the Geo. B. Goodlander survey of 1870. Upon the strip intervening between the old line of 1793 and the west line of the Geo. B. Goodlander survey of 1870, defendants had cut nearly 300,000 feet of the timber in dispute. The Geo. B. Goodlander survey now covered nothing but 99 acres at the south end of 1434. The plaintiff then, on December 31, 1878, filed his narr., declaring against the defendants for cutting upon a "tract of land containing four hundred and thirty acres, more or less, and being warrant and survey No. 1434, in the name of David Kennedy, said tract being owned by said plaintiff."

It further appeared, at the trial, that Jacob Kuntz became the owner of the J. B. Smith survey in 1849; that the owners of that survey always claimed that it extended from No. 386 to No. 1434, giving No. 1434 its recognized location; that upon this location of No. 1434 at the southwest corner where a beech was called for, there was still standing, in 1849, a dead tree, marked as a corner, which Kuntz thought was a beech, and a pitch pine marked as a witness; that there also was a line running from this corner north; that Kuntz bought the south survey as reaching to that boundary, and so claimed and held it. Kuntz also owned the tract No. 386. He put together and used as one body of land a portion of the eastern end of No. 386, and the eastern part of the J. B. Smith survey. This body included all that part of the Smith survey intervening between the two Kennedy surveys. On it was a saw mill, a house, and several acres of cleared land. These improvements were kept up by successive owners. The body of land appeared to have been claimed continuously, and used by the successive owners as one property. In 1859 Kramer purchased the property; he went around the land and saw its boundaries as claimed by the defendants in this suit. He purchased to those boundaries; but it does not appear that the distances were mentioned, or the quantity calculated from actual measurement. The amount mentioned in the deeds and tax books was 735 acres. This body of land was assessed on the seated list for 1862–1863 as 735 acres and saw-mill, and the taxes were paid in the seated lists of those years. The land was on the unseated list prior to 1860, but in that year Kramer put it on the seated list. In 1870 Kramer sold to Bell; a survey was then

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made, and the tract found to contain 1022 acres net measure, which would be 960 acres with the usual allowance. After this the assessment was changed to 960 acres. Before this the parties did not know the number of acres. In 1871, Bell conveyed back to Kramer an undivided half. After this Kramer and Bell continued to hold together.

The defendants requested the Court to charge (*inter alia*)—

(2) The plaintiff's warrant, survey, and patent in his own name in 1870, taking up the excess of the J. B. Smith at the east end, as vacant land, and calling for the D. Kennedy, No. 1434, on the east, and for the J. B. Smith survey on the west, together with his claim under his said survey and patent, were inconsistent with the claim he now makes to the land lying west of the said Goodlander survey, on what was represented on that survey as the J. B. Smith tract. This with the records and other evidence in the case constitutes such a recognition of the J. B. Smith title as to debar plaintiff from recovering double or treble damages under the Act of 1824, for the timber cut west of the Goodlander warrant. It is not such a cutting without the consent of the owner as is contemplated by the Act of 1824. *Refused* (2d assignment of error).

(3) Especially is this true, when it further appears in evidence, that the defendants claimed and held, under color of the J. B. Smith title, the land immediately west of the Goodlander warrant, in connection with another smaller piece of an adjoining survey, as one property; on which they, at and before the time the said Goodlander survey was made, as well as up to the bringing of the suit, had various buildings and from six to twenty acres of cleared land, and a tenant residing there, a part of which improvements were on the said J. B. Smith survey. *Refused* (3d assignment).

(4) Under the facts in evidence, of the character referred to in the last two preceding points, the plaintiff cannot maintain this action for the timber cut by defendants, or under their order, before their suit was brought, west of the line of the G. B. Goodlander survey. *Refused* (4th assignment).

(6) If the location of the David Kennedy survey, as claimed by the defendants, has been recognized as the proper one up to about the time this suit was brought, by surveyors and others whose business or interest led them to look for it, this constitutes evidence bearing on the location of the survey, especially after the lapse of so great a time as to render it difficult to prove the existence of the original landmarks. *Refused* (5th assignment).

(7) If, as testified by George Kramer, in 1862 and 1863, the land in dispute, on which the timber was cut, was within the defined boundaries of a body of land in the seated list held by George Kramer, one of the defendants, upon which body of land there were improvements, and the taxes paid for those years; then this land was discharged from taxes, and George B. Goodlander got no title by the treasurer's sale of 1864, and cannot recover in this suit. *Refused* (6th assignment).

The Court charged the jury (*inter alia*): "A man who cuts timber is bound to know that he is cutting on his own land, or that he has the right or liberty from the owner to cut, otherwise he cuts the timber at his peril. He is bound to know the provisions of this Act of Assembly. It makes no difference whether he thought he was on his own land or not; he is bound to know whether he is cutting his own or not. This is the provision of the Act of Assembly, and it is binding upon you as it is upon me."

The jury found a verdict for the plaintiff for $6,963.18, and judgment thereon. The defendants thereupon took this writ, assigning for error the refusal to charge as requested in their points above stated, and the portion of the charge above given.

McEnally and *McCurdy*, for plaintiffs in error.

The timber was cut with the implied consent of Goodlander. The evidence shows this. It may be alleged that if he consented, it was under a mistake in regard to his title and his rights. This makes no difference. If, as held by the Court below, the man who cuts is bound to know his own land, the law will also apply with equal force to the man upon whose land timber is cut. The Court erred in declining to affirm the second point of defendants below.

I. Greenleaf on Evidence, § 197, a.

The Court erred in instructing the jury that some positive direction or permission by the owner of the land is necessary in order to make out consent under the Act of 1824. As to what is necessary to maintain an action of trespass, see

Boults *v.* Mitchell, 3 Harris, 371.
Weitzel *v.* Marr, 10 Wright, 463.

As to acquiescence constituting consent—

I. Greenleaf on Evidence, §§ 166, 199.
II. Wharton's Law of Evidence, §§ 1146, 1148.
I. Brightly's Digest, pp. 886–889.

The sixth point of defendants below should have been affirmed. Both in this country and in England ancient boundaries are provable by general reputation in a question involving public rights. But in some portions of America, and especially in Pennsylvania, much greater latitude is allowed. Such testimony is admissible here in regard to *private* rights, and also the declarations of deceased persons, such as surveyors or adjoining owners.

Caufman *v.* Presbyterian Congregation, 6 Binney, 59.
Hamilton *v.* Menor, 2 Serj. & Rawle, 70.
McCausland *v.* Fleming, 13 Smith, 36.

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Buchanan *v.* Moore, 10 S. & R. 275.
Wray *v.* Miller, 2 Harris, 289.
Bender *v.* Pitzer, 3 Casey, 333.
Birmingham Borough *v.* Anderson, 4 Wright, 506.

If the taxes on the land in dispute for 1862 and 1863 were paid by Kramer, the sale to Goodlander was void, and the seventh point of defendants below should have been affirmed.

Reading *v.* Finney, 23 Smith, 467.

If the tracts of land contained more or less acres than were designated in the tax books, it is a matter of no consequence. It is the tract which is assessed and not the acres. The acres simply answer the purpose of designation or description.

Williston *v.* Colkett, 9 Barr, 38.
Brown *v.* Hays, 16 Smith, 235.
Reading *v.* Finney, 23 Smith, 467.

Wallace and *Krebs*, for defendant in error.

Kramer knew he did not own the land, and he cut the timber without the owner's consent. He not only cut on the forty-rod strip, but beyond it, and upon the land included in the Goodlander warrant. What Goodlander knew of his own land is not the legal test of the defendant's liability under the Act of 1824. The third section makes the test of liability the doing "without the consent of the owner." It does not matter whether the cutting was within or without the line of the Goodlander warrant; if it was cut on Goodlander's land the defendants are liable, and no act of Goodlander, in mistake of his true rights, can relieve them.

O'Reilly *v.* Shadle, 9 Casey, 489.
Watson *v.* Rynd, 26 Smith, 59.

The mere claim of defendants below as to their location of the survey, unaccompanied by actual possession, was not evidence on the question where the survey really was. Neither the Court, nor defendant in error, contravene the position that declarations of deceased persons having knowledge, is evidence of boundary; but that is not the question in defendant's sixth point.

June 22, 1881. THE COURT. In 1864 the plaintiff purchased the David Kennedy tract, No. 1434, at treasurer's sale, sold for the taxes of 1862 and 1863, assessed as unseated. This tract was warranted in 1792, surveyed in 1793, and patented to Robert Kennedy in 1815. It does not appear that the plaintiff occupied it or ascertained its location until after the alleged trespass by defendants. Before the cutting of the timber, on September 27, 1870, he procured a warrant on which he had a survey, and, in October of the same year, obtained a patent for a tract of land containing 341 acres $16\frac{4}{10}$ perches and allowance; bounded on the west by the Jonathan B. Smith tract and on the east by tract No. 1434. The defendants owned the eastern part of the Jonathan B. Smith tract, No. 5862, warranted in 1804 and surveyed in 1808, one of them having purchased the same prior to 1859. If the testimony on their part is true, they bought and continuously claimed to the same line which the plaintiff made the eastern boundary of his said survey, namely, the west line of the David Kennedy tract. The plaintiff now says he located a new warrant on land which he already owned, and, in ignorance of the facts, fixed the boundary thereof 50 perches east of the line between his and the defendants' lands. He therefore demands, in case the jury find he did own the land prior to said location, three times the amount of actual damages done by the defendants in cutting and converting the timber outside the line of said location.

In view of the foregoing facts, the Court instructed the jury that if they found for the plaintiff for the timber cut between the line of the tract No. 5862 and the line of his said survey, he was entitled to treble damages under the Act of March 29, 1824 (P. L. 152). That statute in plain terms makes one who cuts timber on another's land and converts it without the owner's consent, liable to treble damages, although he had no knowledge that it was not on his own land. Watson *v.* Rynd *et al.* (26 P. F. S. 59). The ruling of the learned Judge was clearly right, unless the plaintiff within the intendment of the statute consented to the cutting and taking of the timber. Consent may be shown by acts as well as words. As the man who cuts timber is bound to know it is on his own land, or that he has the owner's permit, so the owner of timber land is bound to know where it is, and to do no act to mislead an adjoining owner or adverse claimant. He shall not make a line on the ground and ostensibly invite a claimant to cut up to that line and then recover three times the value of the timber. It is not the purpose of the statute to enable him to sell his timber at such prices. Its object is the prevention of wilful or careless cutting of another's timber by at once punishing the wrong done and amply compensating the owner. Had the plaintiff known that tract No. 1434 was located where he now claims, and that the defendants claimed title to the same land, what interpretation would be given to this Act? None other than that he defined his lines and attempted to perfect his title. Had there been a vacancy between tracts 5862 and 1434, as he believed, he would have no right against anybody for cutting timber without the lines of his survey. As respects others, the plaintiff's acts must be treated as if he had known his rights. He who misleads another by positive acts as to the extent of his claim, shall be taken as inviting or consenting, and it makes no difference that he was ignorant of his title or of the location of his land. The

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defendants' second point should have been affirmed. That portion of the charge set forth in the seventh assignment, though correct, should have been accompanied by instruction that the acts of the plaintiff, in connection with the uncontroverted facts, evidenced that he gave liberty to the defendant to cut up to the line that he had marked on the ground. Were these acts not shown by written evidence and other facts virtually conceded, the instruction should have been that if the facts assumed in the second and third points of defendants were true, they were not liable for treble damages.

Although the plaintiff's conduct was equivalent to such consent as in good conscience ought to bar his right under the statute to recover three times the value of the timber, it did not defeat his title to the land, of which the timber was a part. Constructively, the party who has good title is in possession of unimproved land, and the evidence does not take this case out of the rule. The defendants' fourth point was rightly refused.

We think the circumstances of this case required affirmance of the defendants' fifth point, namely, "If the location of the David Kennedy, as claimed by the defendants, has been recognized as the proper one up to and about the time this suit was brought—by the surveyors and others whose business or interests led them to look for it—this constitutes evidence bearing on the location of the survey, especially after the lapse of so great a time as to render it difficult to prove the existence of the original landmarks." The facts in this point are not assumed, and the jury would have been warranted in finding them. A number of surveyors, also persons interested, had had occasion to look for the location of the tract, and if all, not part, including the plaintiff himself, had so recognized its location, it was evidence to consider its strength or weakness depending on the other evidence in the cause. If there were no other evidence, this would determine the location, and would be admissible for the same reason that hearsay of deceased persons is evidence in case of an old boundary. Because there is other evidence this should not be excluded. Except the denial, the remarks of the Court in answer to the point were entirely correct.

We are of opinion that it was error to deny the defendants' seventh point. George Kramer testified that he bought the land as one body, including the eastern part of the Smith survey, No. 5862, and a small part of the David Kennedy tract, No. 386; that the boundaries were described and shown to him by Kuntz and Bailey, and extended to the David Kennedy line on the east, including the land in dispute within his lines; that there were four or five acres cleared, a house, stable, and fruit trees, also a saw-mill on the land at that time; that the improvements were partly on both tracts, and that he held the land together as one property; that in 1860 he changed the land from the unseated to the seated list, and paid the taxes for the years 1861, 1862, and 1863, and for years subsequently. If these were the facts, a sale of part of the land as unseated for the taxes of 1862 and 1863 vested no title in the purchaser. Kuntz owned the land, as he says, for several years prior, had it surveyed by David Ferguson, the east line being where the defendants now claim, and the land now in dispute was within his lines. Both Kuntz and Kramer claimed to the Kennedy tract, No. 1434; they did not include any part of that tract knowingly, and contend that the land in dispute is part of the Jonathan B. Smith tract. The real question is whether the land in dispute was actually included within defined boundaries, the whole being assessed as seated. This would not be alone determined by the number of acres in the assessment, but the quantity would be a fact to consider with other testimony having greater or less weight, according to the circumstances. Very likely the Court was of opinion that if Kramer had mistakenly claimed to the east line of tract, No. 1434, thereby including it in his body of land, that did not make it a part of his seated tract extending only to the west line of No. 1434; and that if said tract is located where the plaintiff claims, it is vested in him by the tax sale and treasurer's deed. Nevertheless, the defendants were entitled to an affirmance of the point; though with full and proper instructions the jury might well have found that the land in dispute is part of the David Kennedy tract, No. 1434, and that said tract was rightly assessed and sold as unseated.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

[See next case.]

May, '80, 187. June 14, 1881.

Kramer and Bell v. Goodlander. [No. 2.]

Evidence — Declarations of deceased surveyors concerning boundaries — When admissible — Effect thereof — Sale of unseated lands — When void.

The declarations of a deceased surveyor, made by him on the ground and at the time of examining a line, are admissible in evidence. The more careful and thorough his examination was, the greater the weight which should be attached to his declarations.

Where a person claims title to real estate under a sale for taxes of an unseated tract, whereof it is alleged to be a part, evidence that said real estate was included at the

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time of sale within the described limits of an adjoining seated tract, whereon taxes had been regularly paid, is admissible to show want of title thereto on the part of the claimant.

Error to the Common Pleas of Clearfield County.

Trespass *vi et armis de bonis asportatis* by George B. Goodlander against George Kramer, W. E. Bell, *et al.*, for breaking close, cutting, and carrying away timber trees from plaintiff's land in Brady Township.

This was the second suit between these parties. This action was brought to recover double and treble damages for timber cut between March 24, 1873, and March 14, 1874.

At the trial before ORVIS, J., the plaintiff claimed to recover as owner of the tract of land known as the David Kennedy survey, No. 1434, upon which the timber was cut, on his title to said tract as set forth in the first case of Kramer and Bell v. Goodlander (above reported). The defense was the same as that in the preceding case.

Jacob Kuntz, one of the former owners of Kennedy survey, No. 386, and the Jonathan B. Smith survey, testified on behalf of the defendants, that he became owner of the tract in 1847, that he employed one David Ferguson to survey it for him, that they started at a red oak at the northeast corner of the David Kennedy survey, No. 386, and ran east to a north and south line pointed out by Zeigler, a proprietor of adjoining lands, that they kept on southward on this line until they reached a corner where they found a dead beech tree. [David Kennedy tract, No. 1434, calls for a beech tree at its southwestern corner, *vide* preceding case.]

That this line was the one defendants in this suit claimed to be their eastern boundary; that this surveying was done thirty or thirty-one years previous to the trial, and that the surveyor, Ferguson, had since died. Defendants then proposed to prove by the same witness "what David Ferguson, surveyor, who made the survey on the ground, since dead, said when on the ground at the time of making the survey for Kuntz, the owner of the J. B. Smith warrant, as to what the beech testified to by Kuntz was, also as to what he said the line on which he found it was, that is, the north and south line; the parties being then on the ground searching for the west line of David Kennedy, No. 1434, as the eastern boundary of Jonathan B. Smith."

The plaintiff objected on the ground that the proof showed that neither surveyor nor witness examined either line, corner, or witness to corner, to ascertain its age, and the means of knowledge being wanting, the testimony was incompetent; that the evidence offered was purely hearsay, irrelevant, and incompetent; that the declarations were merely those of a deceased surveyor employed by an owner of an opposing title, as to a fact of which he had no knowledge, never having been on the ground before that date. Objection sustained. Exception (1st assignment of error).

The defendants requested the Court to charge, *inter alia*. (6) If, as testified by George Kramer, in 1862 and 1863, the land in dispute, on which the timber was cut, was within the boundaries of a body of land in the seated list, held by George Kramer, one of the defendants, upon which body of land there were improvements, and the taxes paid for those years—then this land was discharged from taxes, and George B. Goodlander got no title by the treasurer's sale of 1864, and cannot recover in this suit." *Answer*. "We answer this point as we have instructed you in our general charge. If the assessment on the seated list by Kramer of 735 acres, included this land in dispute, and you find from the evidence that the taxes of 1862 and 1863 were paid before the 13th June, 1864, then the land would be discharged from taxes, and the sale would give no title. If the taxes were not paid until after the treasurer's sale of June 13th, 1864, the purchaser got a good title by that sale, and if the David Kennedy is located where the plaintiff claims it, your verdict should be for the plaintiff."

The Court charged the jury (*inter alia*) as follows: "The defendants allege that they had paid all the taxes upon this land; that they had purchased the old David Kennedy tract, No. 386, and also the Jonathan B. Smith, and that they ran the lines, and in doing so, included this land in dispute, and that the number of acres upon which they paid taxes was 735, and in order to make up that number of acres they would include all this land in dispute. They claim that they have held that body of land, and paid taxes upon each assessment, including that of 1862 and 1863. It is alleged by the plaintiff that there are several hundred acres more than 735 acres within the lines now claimed by the defendants, and that their payment of taxes did not cover the David Kennedy. This is a question you must determine, whether they had this land in dispute assessed on the seated list, and whether the assessment of 735 acres did actually include this part of the David Kennedy, No. 1434."

The jury found for the plaintiff, assessing damages at $4988, and judgment was entered on the verdict. The defendants thereupon took this writ, assigning for error the refusal to admit the testimony of Kuntz as to the declarations of Ferguson; the answer to defendant's sixth point; and the portion of the charge of the Court above given.

McEnally and *McCurdy*, for plaintiffs in

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error, in support of the first assignment of error, cited—

Caufman *v.* Presbyterian Congregation, 6 Binney, 59.
Buchanan *v.* Moore, 10 Serg. & R. 275.
Hamilton *v.* Menor, 2 Serg. & R. 70.
McCausland *v.* Fleming, 13 Smith, 36.
1 Brightly's Digest, pp. 977–988.

The burden of proof is on the claimant under a tax title to show all the requisites necessary to make a tax title good. Among these requisites is this, that the tax has been due one whole year or more, at time of sale, and remained unpaid.

The facts of the case were erroneously presented by the Court to the jury in that part of the charge which is taken as the third assignment of error. The defendants did not contend "that the number of acres upon which defendants paid taxes was 735, and in order to make up that number of acres, they would include all this land in dispute."

Land is assessed in bodies as tracts and not by the acre; acres are given only for the purpose of designation. Such designation seldom agrees accurately with actual measurement, and it is not important whether it does or not.

Williston *v.* Colkett, 9 Barr, 38.
Brown *v.* Hays, 16 Smith, 235.
Reading *v.* Finney, 23 Smith, 467.

Wallace, and *Krebs*, for defendants in error.

The declarations of a surveyor on a question of boundary are competent evidence as a general rule, but where the proof itself shows that the declarations offered were mere guesses, and not founded on examination or professional knowledge of the locality, they are to be treated as all other declarations are—as mere hearsay, and inadmissible. The rule is correctly stated in—

McCausland *v.* Fleming, 13 Smith, 36.

The argument that Kramer thought be owned the land in controversy, and paid taxes on 735 acres, which he thought covered it, is too ideal for these practical days. Such a mode of payment of taxes will not sustain the legitimate expenses of government, or defeat the remedies given to cover payment of taxes for every acre of land within this State.

June 22, 1881. THE COURT. Having proved by the witness, who owned the Smith tract about thirty years ago, that he then employed David Ferguson, a surveyor, to trace the lines, and that said Ferguson is dead, the following offer was made: "The defendants propose to prove by the witness on the stand, Jacob Kuntz, what David Ferguson, a surveyor, who made the survey on the ground, since dead, said when on the ground at the time of making the survey for Kuntz, the owner of the J. B. Smith warrant, as to what the beech testified to by Kuntz was, also as to what he said the line on which he found it was, that is, the north and south line; the parties being then on the ground searching for the west line of David Kennedy, No. 1434, as the eastern boundary of Jonathan B. Smith." This was rejected as purely hearsay, the surveyor not having examined the line or corner to ascertain its age, and never having been on the ground before. Had he ascertained its age what he said respecting the line would have been admissible, yet purely hearsay. From an early day in this State in litigation respecting boundaries, it has been competent to prove, after the death of a surveyor who had examined a line, what he said respecting it at the time and on the ground. The more careful and thorough his examination the greater weight his testimony would have if living, or what he said at the time, if dead. But if he examined the line he is a competent witness, and after his death his statement respecting the line made at the time of the examination may be proved. The offer should have been admitted.

We are of opinion that there was error in the answer to defendant's sixth point, and in the charge upon the same subject. The question presented in the last three assignments is substantially the same as was considered in the preceding case between the same parties upon a similar point. If the land was properly assessed on the seated list a sale of it as unseated was void. It is not a question of payment of taxes before the date of the sale, but whether the land sold was part of a seated tract which was assessed as seated. The defendants did not allege that they included the land in dispute or any part of it, in order to make up 735 acres; but they did allege that they returned, and had assessed as seated a body of land defined by certain boundaries with improvements thereon; that it was bounded on the east by tract No. 1434, and that the land in dispute was included within said bounds. To show that the number of acres named in the assessment exceeded or fell short of the actual number within said bounds, by no means determines the question. If the quantity in the assessment was too great it does not follow that the disputed land was included; nor if not enough, that it was excluded. The quantity returned and assessed would be a fact to consider in ascertaining if the land in dispute was a part of the tract assessed. The defendants claim their tract extended to No. 1434, and that No. 1434 is east of the land in suit.

Judgment reversed and venire facias de novo awarded.

Opinion by TRUNKEY, J.

[See preceding case.]

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Jan. '80, 250. January 10, 1881.

Verrier v. Guillou.

Statute of Limitations—When applicable to claim of set-off—Equitable estoppel—Account rendered—Silence only prima facie evidence of correctness—No bar to running of the statute—Practice—Points reserved.

The Statute of Limitations is a good replication to a special plea of set-off, where the credits claimed as set off were paid more than six years before suit brought.

The mere receipt of an account without returning an objection is only *prima facie* evidence of its correctness; it does not necessarily preclude the debtor from setting up the bar of the statute, and does not amount to an equitable estoppel.

It is error for the Court to reserve a point of law without a finding of facts by the jury, or a statement agreed upon, so that they may appear upon the record.

A., in August, 1868, agreed in writing to pay B. a sum certain in August, 1870. In March, 1875, B. sued A. for this amount. A. set up as a set-off the items of an account of moneys laid out by him to B.'s use, which was presented to B. shortly after the execution of the agreement of August, 1868. He also put in evidence a letter from A. to B., dated Feb. 2, 1869, in reply to a letter received from B., declining to reply, stating that he put his papers in the hands of counsel, and adding, "You would seem to have forgotten that I paid you" certain items charged in the account. He also put in evidence a correspondence of Oct. 1870, between B.'s counsel and A.'s counsel, whereby the former demanded of the latter the sum due under the agreement of August, 1868, and whereby the latter agreed to pay this sum less the items due from B. to A., as per the account rendered, which proposition, however, the former declined. In an action brought in March, 1875, by B. against A. on the agreement of August, 1868:

Held, that there was nothing in the evidence to prevent B. from setting up the bar of the Statute of Limitations against A.'s claim of set-off.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by Edmund V. Verrier against Victor Guillou, executor of Florencio J. Verrier, deceased. The writ issued March 6, 1875. The declaration alleged a special contract, dated August 6, 1868, made by the defendant's testator with the plaintiff, wherein he agreed to pay to the plaintiff, "in August, 1870, the sum of six thousand dollars in gold or silver, or its equivalent, this being the balance of the purchase-money, fixed by special agreement," between the parties for one-ninth of the plaintiff's share in the estate of his father in Cuba. The defendant pleaded non-assumpsit, payment with leave, etc., and set-off, and pleaded specially as set-off the items of an account from May 21, 1863, until August 12, 1868, amounting to $3797.67, for money paid at various times by his testator for account of the plaintiff.

On the trial, before ALLISON, P. J., the plaintiff put in evidence the contract and rested. The defendant, in support of his plea of set-off, put in evidence the account referred to and the following letters:—

Philadelphia, Feb. 2, 1869.

Mr. E. Verrier, Philadelphia.

Your letter of the 28th ult. is so characteristic that I prefer giving it no reply. I place all the papers in the hands of Mr. Guillou, who will see Mr. Biddle.

It would seem that you have forgotten that on Sept. 9, 1867, I paid you $600
Oct. 28, 1867 680
Aug. 5, 1868, your share of testamentary expenses, as per receipt of Esunbanio Pomental 494
And on Aug. 12, 1868, for your various bills, etc., of Antonia's ($56) 521

Total $2295

Yours, etc.,
FLORENCIO J. VERRIER.

Dear Sir: I am instructed by Mr. Edmund V. Verrier to ask for the amount, viz., $6000 in gold, due to him by Mr. Florencio J. Verrier on the 1st of August last, together with interest on the amount due from the date of maturity. Will you be good enough to let me know when I can expect payment of the above amount, in order that I may inform Mr. E. V. Verrier?

Respectfully, yours,
CHAPMAN BIDDLE.
C. Guillou, Esq.,
Attorney of Mr. F. J. Verrier.

Dear Sir: Your favor of the 18th inst., just received; will you be kind enough to inform me of the nature and ground of Mr. Edmund Verrier's claim which you present?

Respectfully, yours,
CONSTANT GUILLOU.
Chapman Biddle, Esq. October 19, 1870.

Dear Sir: The claim of Mr. Edmund Verrier is for the balance of the purchase-money due him for his share of Sta. Victoria, and for which Mr. F. J. Verrier gave his bond.

Respectfully, yours,
CHAPMAN BIDDLE.
C. Guillou, Esq.

Dear Sir: Florencio instructs me to reply that he is ready to pay the purchase-money, $6000, upon reduction being made therefrom of the various sums paid by Florencio to and for Edmund at the latter's request, of which statements have heretofore been furnished him.

Yours, respectfully,
CONSTANT GUILLOU.
Chapman Biddle, Esq.

Dear Sir: I am just in the receipt of your note of this date. The propositions to pay contained in your note are declined.

Respectfully, yours,
CHAPMAN BIDDLE.
C. Guillou, Esq.

The items mentioned in the letter of Feb. 2, 1869, were apparently the same as some of those mentioned in the account, but the amounts differed somewhat. The case falling within the proviso to the Act of 1869, the plaintiff was incompetent to testify. The jury were instructed to find for the plaintiff in the sum of $9163.92, the Court reserving the point whether the defendant was entitled to the set-off. Subsequently the Court entered judgment for the plaintiff on

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the point reserved for $6013.98, thus allowing the set off of those items of the account referred to in the letter of Feb. 2, 1869. Thereupon plaintiff took this writ, assigning for error, *inter alia*, (1) The reserving of a question of law when there was no special finding of fact or case stated; and (2) The allowing of the defendant his set-off to the extent of the items referred to in the letter of Feb. 2, 1869.

J. Percy Keating and *John Samuel*, for plaintiff in error.

There were no facts found by the jury in a special verdict, and there is nothing of record to show upon what facts the question of law arose, nor what the question was. The reserving of a question of law under these circumstances was error.

Clark *v.* Wilder, 1 C. 314.
Irwin *v.* Wickersham, Id. 316.
Ferguson *v.* Wright, 11 Sm. 262.
Miller *v.* Bedford, 5 N. 457.

The doctrine of equitable estoppel has no application to the facts of this case. There is no evidence that the plaintiff ever admitted or failed to deny the correctness of the account, or the letter of 1869. On the contrary, the letter is itself evidence that he had denied the correctness of the account. The subsequent correspondence of counsel further shows that he insisted upon payment of the full amount due under the contract, which he could not have done had he admitted the alleged set-off to be correct. The silence of one who receives an account is only *prima facie* evidence of its being an account stated, and it is not in every case that silence in reference to an account rendered implies a promise to pay.

Sergeant *v.* Ewing, 6 C. 75.
Killam *v.* Preston, 4 W. & S. 14.
Bevan *v.* Cullen, 7 B. 281.

In any event had this been equivalent to an express promise it was more than six years prior to the date of this suit, and could not, therefore, be a subsisting promise at the time of its being put in as a set-off. No subsequent positive acknowledgment of the right is found in the letters of the plaintiff's counsel, and if there were, it would be quite beyond his power to bind his client.

Thomas *v.* Wiltbank, 6 WEEKLY NOTES, 147.

No counsel appeared for defendant in error.

January 24, 1881. THE COURT. The contract is dated August 6, 1868, and recites a transaction on which Edmund J. Verrier had received ten thousand dollars, leaving a balance due him of six thousand dollars, which sum is agreed to be paid by Florencio J. Verrier in August, 1870. As appears in the bill of exceptions, in August, 1868, Florencio rendered an account to Edmund, containing a number of items amounting to $3797.67. On February 2, 1869, he wrote to Edmund as follows: "Your letter of the 28th ult. is so characteristic, that I prefer giving it no reply. I place all the papers in the hands of Mr. Guillou, who will see Mr. Biddle. It would seem that you have forgotten that on September 9, 1867, I paid you $600, on Oct. 28, 1867, $680, Aug. 5, 1868, your share of testamentary expenses as per receipt of Esunbanio Pomental, $494, and Aug. 12, 1868, for your various bills, etc., of Antonia's ($56), $521, total $2295." In the account or letter, it is nowhere stated that the money was paid or received to apply on the contract. All the items were anterior to its date, except one, and that was six days posterior —the whole account was two years before the money became due on the contract, and the letter was written a year and a half before. There is no evidence of an agreement that the account should apply as payment. At most it can only be inferred that the account was correct, because no objections were made within a reasonable time. An account rendered to a party indebted by his creditor, and not objected to in a reasonable time, is *prima facie* evidence against the party to whom it is rendered. The tone of the letter of February 2 is not consonant with Florencio's belief that Edmund had admitted the account correct by silence, or otherwise. But, for the purposes of this case, let it be conceded that he did.

Florencio's right of action existed at and before the time he rendered the account, it accrued more than six years before he filed the plea of set-off, and more than six years before this suit was commenced. Had he brought a suit to recover the account more than six years after the right had accrued, the statute would have been an effectual plea in bar; it is just as effectual when replied to the claim pleaded as set-off. Sending the account to Edmund did not suspend his right to bring suit, or the running of the Statute of Limitations. Mutual demands do not extinguish each other. The letter was written over six years prior to this suit.

Nothing in the correspondence between the counsel for the parties suspended the right of action, or amounted to a promise to pay the account, or constituted an agreement that it should apply as payment on the contract. The mere fact that Mr. Guillou mentioned that statements had been furnished to Edmund, to which Mr. Biddle made no reply, cannot prejudice the client. If it could, there would be no safety in placing a claim in the hands of an attorney for collection. There is not a particle of testimony that Mr. Biddle had authority to admit the account, or that he knew anything about it—his business was to collect the money on the contract, and shortly after it became due he demanded the whole.

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The first demand was Mr. Biddle's letter of Oct. 18, 1870. Hence it is a mistake to say that when the "plaintiff first made demand for the payment of the $6000, a detailed statement of the several sums claimed to be of right deducted therefrom was promptly presented." There is no proof that the plaintiff demanded the $6000 before it became due. As already observed, the detailed statement was sent immediately after the date of the contract, and not a word therein, nor in the letter of February 2, 1869, shows that the account was claimed as a proper payment in reduction of the principal sum named in the bond. Florencio's tart letter was not a request that his claim be applied on an obligation not then due, nor was it a statement that he would so apply it. He awaited no answer, held the plaintiff at arm's length, and gave notice that he placed the papers in the hands of his attorney. How could the plaintiff's silence mislead him? What word or act did the plaintiff utter or do, tending to induce belief that he would apply the account as payment? As we view the evidence, none whatever. We see no ground for application of the equitable principles of estoppel so well stated in the opinion of the learned Judge of the Common Pleas. We think it very clear that he did nothing more than receive the account as sent, without returning any objection, and that only made it *prima facie* evidence against him. It is not pretended that such an act by a debtor thereafter forever estops him from pleading the statute as a bar. In no sense can it operate as an estoppel. The statute runs from the date the account is rendered, if it be then due, as it would against any other simple contract debt. To avoid the statutory bar, the defendant contends that the plaintiff's silence was an admission of the claim of payment, but no claim of payment on this contract was made, the claim was an account of payments to and for the plaintiff only. It is very clear that it is barred, whether the statute runs from the time he made such payments, or from the date he rendered the account.

In this case there is no difficulty in entering judgment upon the verdict, for there is no evidence to warrant the jury allowing the set-off against the bar of the statute. The verdict was subject to the point reserved, whether upon the evidence defendant was entitled in point of law to the set-off claimed by him. Had there been sufficient evidence for submission, this would not be a good reservation of a point (Ferguson *v.* Wright, 11 P. F. S. 258; Wilson *v.* Steamboat Tuscarora, 1 Casey, 317).

Judgment reversed, and judgment is now rendered on the verdict in favor of the plaintiff $9163.92.

Opinion by TRUNKEY, J.

Jan. '81, 72. March 3, 1881.

Wesner v. Stein et al.

Statute of Limitations—What is a sufficient promise to pay to remove the bar of—Sufficiency of evidence to establish a promise.

In a suit on a promissory note, in order to remove the bar of the Statute of Limitations, it is not necessary that that there be an *express* promise to pay, but it is sufficient if a clear, distinct, and unequivocal acknowledgment of the existence of the debt be made to the creditor or his known agent by the debtor, or some one authorized to act for him.

In a suit against an accommodation maker of a promissory note upon which the Statute of Limitations has run, evidence may go to a jury in order to remove the bar of the statute, to show (1) that defendant within six years before suit brought obtained a judgment against the person whom he had accommodated, in order to secure him if he should be compelled to pay the amount of the note, and (2) that within the same time part payment of the debt was made on his behalf, and although not by his direction, yet in his presence and hearing, and without anything on his part to indicate that he did not participate in the transaction.

Error to the Common Pleas of Berks County.

Assumpsit, brought May 2, 1879, by Willoughby Wesner against Moses Stein and Amos Greenawalt. The latter having died before the trial, W. Greenawalt, A. S. Greenawalt, and Alfred S. Greenawalt were substituted as his administrators. Pleas, *non assumpsit*, payment with leave, and *non assumpsit infra sex annos*. Upon the trial plaintiff put in evidence the following promissory note:—

"ALBANY, April 1st, 1870.

"One year after date, I promise to pay to the order of William Wesner, five hundred dollars, with interest, without defalcation for value received.

(Signed,)
MOSES STEIN,
AMOS GREENAWALT."

On the back of the note were the following indorsements:—

Pait the interest on this note in ful from April 1870 til April 1871. $30.00.

Pait the interest on this note in ful from April 1872 in ful $30.00.

Pait the interest on this note in full from April 1 1873 in full $30.

April 1, 1874, pait the interest in full for one year. $30.00.

April 1, 1875, pait the interest for one year in full. $30.00.

April 1, 1876, pait the interest Aprill 1876 in full. $30.00.

April 2, 1876, pait the interest Aprill 1877 in full. $30.00.

April 2, 1878, pait the interest $30.

April 2, 1879, pait the interest fife mont in full.

No judgment was asked for against Moses Stein. It further appeared from plaintiff's testimony given to remove the bar of the Statute of Limitations as to Greenawalt, that Moses Stein having

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become embarrassed, a meeting of his creditors was called on the 9th of November, 1878, at the office of a justice of the peace for the purpose of giving some security to his creditors. From a deposition of the defendant read at the trial it appeared that he was ill at the time, and was unable to attend the meeting, but that he requested his son, Amos, who was going to the meeting to look after a claim of his own, "to ask for a judgment to secure him in case he should have to pay the notes in which he was bail." The son testified that his father said to him "that I should take a judgment for him, that the Wesners won't take a judgment, and you would better take a judgment for bail also." He also testified that he attended the meeting, and took for his father Stein's judgment note for $1511.10, made up of an individual claim of his father's and of two notes on which he was surety, one of them being the note in suit. That he left this judgment, together with several others, in the hands of the justice at whose office the meeting had been held, in order to have it entered up, and that it had since been duly entered up. That after the meeting he told his father that he had "taken a judgment and the bail," and that his father said "yes," or "that it was all right." As evidence of a further recognition of the note David Wesner, a son of the plaintiff, testified that as agent for his father he received from the wife of the defendant and in his presence, he being afflicted with paralysis at the time, an amount equal to interest due on the note, and at the request of the defendant, or his wife, he indorsed the receipt thereof on the note, which appears as the payment made April 2, 1879. To rebut this Amos Greenawalt swore in the deposition above referred to that Mrs. Stein came to his house, and, in his presence, told his wife that she had been to the Wesners to pay the interest on the note, but nobody was home who could receive it except Wesner's wife, who would not take it. She (Mrs. Stein) then told her she would leave it there, and that Mrs. Wesner could send for it. He further swore "Mrs. Stein then asked my wife if she could leave it there, and my wife said yes, and she left it. The same day David Wesner came to the house and asked my wife in my presence if Mrs. Stein had left any money for them (the Wesners). My wife said 'yes,' and went and got the money and counted it out on the table; it was not quite enough to pay the entire interest due, but Wesner said my father can collect the balance from Stein, or perhaps he will make him a present of it."

The defendant (*inter alia*) presented the following point:—

"That the Statute of Limitations does not contemplate any removal of the bar by an acknowledgment or even a new promise. And although such an effect has been allowed to them by the courts, yet it is now everywhere held that "where the bar of the statute is sought to be removed by a new promise, the promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate." Affirmed.

The Court charged the jury (*inter alia*) as follows:—

"Unless there has been a promise made by Greenawalt to pay this note, there can be no recovery against Greenawalt, and such a promise must be clear and explicit. Its terms must be unequivocal and determinate. This is the law, and unless the jury can find that such a promise has been made by Greenawalt himself, there can be no recovery against him in this suit. . . .

"First of all, gentlemen, you will inquire whether there was any authority upon the part of Amos S. Greenawalt, the son, to make any obligation of his father to pay this note, whether he was authorized to bind his father to the payment of this note. If he was not, that is the end of this suit."

Verdict and judgment for the defendant. Plaintiff thereupon took this writ, assigning for error, *inter alia*, the affirming of defendant's point, and those portions of the charge of the Court above cited.

H. G. Kaufman and *Frank R. Schell*, for the plaintiff in error.

Adam H. Schmehl and *Richmond R. Jones*, for the defendant in error.

May 2, 1881. THE COURT. This action was on a promissory note. Suit was commenced more than six years after the note became due. The plaintiff relied on acts and acknowledgments of the defendant to avoid the bar of the Statute of Limitations. The Court charged that nothing less than a clear and explicit promise to pay was sufficient, that its terms must be unequivocal and determinate, and the promise must have been made by the defendant himself.

It is settled that the acknowledgment or admission must be by a clear and unambiguous recognition of an existing debt, and so distinct and expressive as to preclude hesitation as to the debtor's meaning, and as to the particular debt to which it applies, and must be consistent with a promise to pay; but it is not necessary that there be any express promise to pay in order to avoid the bar of the statute. The debt is not destroyed by the Statute of Limitations, but the right of action or remedy is lost. When that is restored, the declaration is still on the original contract, and not on the acknowledgment as a new promise, such acknowledgment is but a waiver of the statutory defence (Suter *v.* Sheeler, 10 Harris, 310). Part payment of a debt within six

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years before suit brought is sufficient to infer a promise to pay, but the payment must be clearly proved (Burr *v.* Burr, 2 Casey, 284; Yaw *v.* Kerr, 11 Wright, 333; Patton's Executors *v.* Hassinger, 19 P. F. Smith, 311). It was said by the present Chief Justice in Barclay's Appeal (14 Id. 69), there can be no more unequivocal acknowledgment of a present existing debt than a payment on account of it, and according to all the authorities, this is all that is required to take a case out of the Statute of Limitations.

The original indebtedness must be established, then a clear distinct and unequivocal acknowledgment of the existence of the debt, made within six years before the commencement of the suit, is sufficient to remove the bar of the statute (Watson's Executors *v.* Stern, 26 Id. 121). In the carefully considered case of Palmer *v.* Gillespie (9 WEEKLY NOTES, 535), decided at Pittsburgh last fall, we reviewed the authorities relating to an express promise, and held it was not necessary if the other essential ingredients are sufficiently proved. The acknowledgment must be made to the creditor or his known agent, and by the debtor himself or by some one authorized to act for him. The second and fifth assignments are sustained.

The plaintiff relies on acts and declarations of the defendant, and in his presence, all of which transpired within six years before suit brought. The note in suit was on its face joint and several, but in fact as between the signers thereof the defendant was surety. He had also signed one other note with Stein in like manner to Jonas Wesner. Stein, the principal debtor, became embarrassed. A meeting was appointed for him and certain of his creditors, to be held at the office of a justice, for the purpose of giving some security to his creditors. The defendant was ill and unable to attend. His son, Amos S., had a claim against Stein, and was going to the meeting to look after it. The defendant testified, "I told my son that he should ask for a judgment to secure me, in case I should have to pay the notes on which I was bail." The son testified his father said to him "that I should take a judgment for him." Again, "my father said the Wesner's won't take a judgment, and you would [had?] better take a judgment for the bail also." He further testified that he attended the meeting in company with several other creditors, that he took for his father of Stein a judgment of $1511.10, which was made up by the claim of his father, and the two claims on which his father was bail. Afterwards, on the same day, he informed his father that he had "taken a judgment and the bail, and his father said yes, or that it was all right."

This and other judgment obligations given at the same time were left with the justice at whose office they were executed, under an agreement that they should all be entered at the same time, and they were so entered of record.

As evidence of further recognition of the debt, a payment was made on the note equal to the interest due, and indorsed thereon on the 2d April, 1879. It was paid at the house of the defendant, and in his presence, to the agent of the plaintiff, who had the note with him and presented it. The defendant was afflicted with paralysis, and his wife handed the money to the agent. The latter swears at the request of either the defendant or his wife, he there indorsed the payment. The contention in regard to this payment is whether it was made by the defendant, or whether it was with money left by Stein with the wife, and she merely handed it over for him. If it was paid by the husband's directions it was evidence for the jury whether it was sufficient recognition of an existing indebtedness of his to create the presumption of a promise to pay. It was therefore error in the Court to say to the jury, as in the tenth assignment, that if the son was not authorized to bind the father to the payment of the note, "that is the end of this suit."

If this payment was not made by the directions of the defendant; but in his presence and hearing, without anything on his part indicating that he did not participate in it, the transaction, as well as his former directions to his son to take the judgment to secure him, were evidence to be submitted to the jury under proper instructions.

We discover no error in the first, sixth, and thirteenth assignments. In so far as the remaining assignments are in conflict with this opinion, they are sustained.

Judgment reversed, and a venire facias de novo awarded.

Opinion by MERCUR, J.

Common Pleas—Equity.

C. P. No. 1. 1880.

Burke v. Myers.

Equity—Special injunction—Equity will enjoin the running of a factory between certain hours, where it causes a noise and concussion to buildings in the neighborhood.

Motion for special injunction.

The bill set forth that the complainant, since January 5, 1876, had been seized in fee of certain premises, situate on the east side of Front

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Street, below Fairmount Avenue, the front portion of which was used as a dwelling-house, and the rear as a store; that sometime in April, 1879, the defendant purchased the adjoining building, which had theretofore been used as a bake-house, and converted the same into a factory, and manufactured in said factory by day and by night washing blue and stove polish, the manufacture of which was attended with great and continuous noise, producing such a concussion as to shake the complainant's buildings to their foundations and to keep them in a constant state of vibration. The bill further set forth that the complainant and his family were greatly annoyed and disturbed by this noise, concussion, and vibration, particularly at night, when they were unable to sleep in consequence thereof; and averred further that, by reason of the said nuisance, the stability of the aforesaid store and dwelling-house was greatly imperilled and their value as real estate diminished.

The prayer of the bill was that the defendant be restrained from carrying on the aforesaid manufacture.

Affidavits were read, supporting the allegations of the bill; and counter affidavits, denying said allegations.

Louis C. Massey and *Christian Kneass*, for the motion.

The following authorities are full to the point that an injunction will be granted in a case like the present:—

Dennis *v.* Eckhardt, 3 Gr. 390.
Farrell *v.* Foster, cited 34 Leg. Int. 88.
Harrison *v.* St. Mark's Church, 3 WEEKLY NOTES, 384.
Briggs *v.* Vottler, 4 Id. 272.
Wallace *v.* Auer, 10 Phila. R. 356.

The last-named case is on all-fours with the case before the Court. Auer carried on the business of a gold-beater in a quiet neighborhood, causing great noise, and a concussion like that complained of here. This Court (ALLISON, P. J., delivering the opinion) held a business of that nature could not be carried on in those parts of the city where persons would be thereby disturbed in the quiet enjoyment of their residences.

Heverin and *Shakespeare*, contra.

The noise created by other factories in the neighborhood, and by the street cars, is greater than that of which complaint is now made. For this reason the injunction should be refused.

July 17, 1880. THE COURT. We will grant an injunction restraining the defendant entirely on Sundays, and on other days between the hours of 8 P. M. and 6 A. M., from working the machinery and carrying on the manufactory in question.

Oral opinion by ALLISON, P. J.

Common Pleas—Law.

C. P. No. 3. Sept. 19, 1881.

Klein v. McGeough et al.

Practice—Pleading—Nonsuit in the absence of plaintiff's counsel—Nonsuit where no issue—Replevin.

Rule to take off nonsuit and strike the case from the trial list.

Replevin, by Klein against McGeough *et al.*, for certain goods distrained for rent alleged to be due and in arrear, and payable by plaintiff to defendant. Defendants having avowed, plaintiff, on Oct. 14, 1879, specially pleaded "*non demisit*," and that he had never attorned to defendant, concluding with a verification. On April 8, 1881, plaintiff filed an additional special plea, setting forth that on January 6, 1879, the rent due from him had been attached in his hands as garnishee in a suit wherein one Kelly was named as defendant. This plea also concluded with a verification. Defendants filed no replication to either plea, but put the case on the trial list. When called for trial, judgment of nonsuit was entered by the Court in plaintiff's absence.

W. A. Husband, for the rule.

The rule should be made absolute; (1) Because when said case was called for trial no issue had been formed, and there was no agreement of counsel that the case should be tried without a replication. (2) Because, if the case had been at issue, the plaintiff therein was not in law subject to a nonsuit by the Court, as in fact he was the defendant.

D. M. M. Collins, contra.

THE COURT. Rule absolute.

C. P. No. 4. Sept. 19, 1881.

Cowperthwait et al. v. Roney.

Practice—Affidavit of defence law—Absence of defendant, and affidavit of stranger—What affidavit should allege in such case.

Sur rule for judgment for want of a sufficient affidavit of defence.

Action on a book account. The affidavit of defence averred that the affiant "is a clerk in the employ of the defendant, and in the absence of the defendant he says that he is informed and believes that the defendant has a just and legal defence," etc. A defence was then set out.

Warren G. Griffith, for the rule.

The affidavit should contain a fuller statement of the cause, place, and time of the defendant's

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absence. To admit it would establish a dangerous rule.

John L. Lane, contra.

The affidavit shows sufficiently that the defendant was absent; it was then necessarily made by the stranger most conversant with his affairs.

C. A. V.

September 24, 1881. THE COURT. The affidavit of defence in this case was made by a clerk of the defendant. The reason assigned in it for its not being made by the defendant was that he was out of town. The objection to the affidavit was that it ought to contain a fuller statement as to the absence of the defendant, and to set forth circumstances to show why the defendant could not himself make the affidavit; for *non constat*, but that the defendant might be only temporarily absent, and that there was no real necessity for the affidavit of a third person, a stranger to the record.

Upon consultation the Court are of the opinion that the objection is well taken, and that it would be a dangerous practice to admit the affidavit of a third person, without setting forth circumstances to show that the defendant had no opportunity to make it himself. A contrary doctrine would enable the defendant to go out of the jurisdiction temporarily for the purpose of offering the affidavit of a third person, instead of assuming the responsibility of making it himself. There is no reason to suppose that this was so in the present instance; but in consideration of the necessity of establishing a uniform rule of practice upon this subject, we must hold the present affidavit to be insufficient in this respect, but we will allow the defendant to put in a supplemental affidavit.

The rule hereafter will be, that when a defendant puts in a stranger's affidavit, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability existed which prevented him from making it, and the circumstances giving rise to the disability.

Supplemental affidavit allowed.

Oral opinion by THAYER, P. J.

C. P. No. 4. Feb. 19, 1881.

Darlington v. Fleischner, defendant, and Goldsmith, garnishee.

Practice—Attachment execution—The fact that garnishee, who is voluntary assignee of defendant, has no funds in his hands subject to attachment is no ground for quashing the writ.

Sur rule to show cause why writ of attachment sur judgment should not be quashed.

The following agreement, signed by counsel, was submitted to the Court: "It is agreed between the counsel for the plaintiff and for the garnishee that the writ of attachment sur judgment is issued against the said Goldsmith, garnishee, as assignee of the defendant under a voluntary assignment for the benefit of creditors, that the deed of assignment was duly recorded, and that the said assignment is still pending, that the said assignee has no property in his hands belonging to the defendant, except the property conveyed to him by the said deed of assignment in trust for the benefit of the creditors of the defendant."

Mayer Sulzberger, for the rule, relied on—

Miller *v.* Rush, 25 Pitts. Legal Journal, 72.

No counsel appeared contra.

THE COURT. Rule discharged.

C. P. No. 4. Oct. 1, 1881.

Wagner v. Wright.

Evidence—Parol evidence to vary terms of written instrument.

Rule to set aside a fi. fa. and levy, and open judgment, and let defendant into a defence.

The defendant gave plaintiff a judgment-note for rent in arrear, dated June 1, 1880, due "one day after date," and waiving "all stay of execution from and after the maturity of the above note." Upon this note the plaintiff entered judgment Aug. 2, 1881, and on Aug. 23, 1881, issued execution, whereupon the defendant obtained this rule, alleging in his affidavit that, at the time of the making of the note, the plaintiff (who was upwards of ninety years old) promised that judgment should not be entered thereon, nor the note used during his (the plaintiff's) lifetime, but that the plaintiff asked for it solely for the use of his executors, upon the faith of which statement defendant signed the note. Depositions were taken in support of the rule; the plaintiff denied the defendant's allegation *in toto*, and the defendant admitted, upon cross-examination, that he had expected to pay, and that the plaintiff had expected to receive the amount of the note during his (the plaintiff's) lifetime.

Jerome Carty, for the rule.

Plaintiff's promise was a part of the consideration; and great injustice will be done if execution is allowed to proceed.

Chas. P. Sherman, contra.

Plaintiff's alleged promise, even if true, could not be set up to vary or reform the judgment-note, in the absence of fraud, accident, or mistake; neither of which is alleged.

Lyon *v.* Miller, 12 Harris, 392.
Heebner *v.* Worrall, 2 Wright, 376.
Collins *v.* Baumgardner, 2 Smith, 461.
Martin *v.* Berens, 17 Smith, 459.

Much less to contradict it.

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Fulton *v.* Hood, 10 Casey, 365.
Harbold *v.* Kuster, 8 Wright, 392.
Hunt *v.* Morris, 1 WEEKLY NOTES, 95.
Davis *v.* Cammel, Addison, 233.
Plankinhorn *v.* Cave, 2 Yeates, 370.
Hain *v.* Kalbach, 14 S. & R. 159.
Barnhart *v.* Riddle, 5 Casey, 92.
Miller *v.* Fichthorn, 7 Casey, 252.

And the burden of the cases admitting parol evidence to vary or reform (not contradict) written contracts is that some material part of the contract was requested by the contractor to be inserted, which, failing to be done, the verbal promise was substituted in the place of such written insertion, which was afterwards fraudulently sought to be avoided by the promisor.

Powelton Coal Co. *v.* McShain, 25 Smith, 238.
Graver *v.* Scott, 30 Smith, 94.

THE COURT. Under the particular circumstances of this case, we will leave the rule open to give defendant an opportunity to offer security for stay of execution.

Oct. 8, 1881. THE COURT. No security having been entered, rule discharged.

C. P. No. 4. September 22, 1881.

Vandegrift v. Redheffer et al.

Partnerships—Practice—Execution against partnership property on judgment confessed by one partner against himself for a debt alleged to be due by the firm is irregular, and will be set aside.

Rule to show cause why judgment should not be opened, execution set aside, and all proceedings stayed.

The docket entries were as follows:—

William R. Vandegrift *v.* Aiman A. Redheffer, Henry P. Vandegrift, and Charles Redheffer, trading under the firm name of Redheffer, Vandegrift & Co.	An action entered by agreement Aug. 17, 1881, with same effect as if a summons had been duly issued by plaintiff against defendants, returnable to first Monday Aug. 1881, and had been served by the sheriff on defendant "Vandegrift," and had been duly so returned and judgment entered against the said Vandegrift, one of the members of said firm, for the sum of $1000, the amount of debt due and owing by said firm to the plaintiff.
Aug. 17, 1881. Specific statement filed.	Aug. 17, 1881. Judgment. Aug. 17, 1881. Fi. fa. exit returnable first Monday Aug. 1881.

It appeared from depositions that the judgment had been confessed under the following circumstances: H. P. Vandegrift, one of the defendants and son of the plaintiff, entered into partnership in May, 1881, with A. A. Redheffer, putting in as capital $1500, Redheffer contributing stock and custom. About June 2, Charles Redheffer was also taken into the firm; and they desiring to extend the business, H. P. Vandegrift borrowed of his father at various times $1000, giving him his individual notes for the money, but with the mutual understanding that the money was to be used for partnership purposes, and that the firm would repay it. The money was so expended; but it appeared from the deposition of Redheffer that there was no entry of the loan on the firm's books, which were kept by Vandegrift, and that the firm had never had business transactions with the plaintiff. The notes not being paid at maturity, H. P. Vandegrift confessed judgment for the amounts loaned as above set forth, without the knowledge of his partners, who knew nothing of it until the sheriff levied upon the firm assets, under an execution directed against all the members of the firm. A. A. Redheffer thereupon took this rule.

Katz (with him *Gibbons*), for plaintiff, showed cause.

The entire property in the partnership effects may be sold for a partnership debt on a judgment against one of the partners.

Harper *v.* Fox, 7 W. & S. 142.
Taylor *v.* Henderson, 17 S. & R. 457.

The fi. fa., if erroneous, may be conformed to the judgment.

Black *v.* Wistar, 4 Dale, 267.
De Haas *v.* Bunn, 2 Barr, 339.

J. C. Redheffer and *R. P. White*, contra.

The judgment confessed can only bind H. P. Vandegrift, and against him only can execution issue. The judgment was entered against all the partners by the inadvertence of the clerk; it should be opened and the case sent to a jury.

September 23, 1881. THE COURT. Ordered that the execution be set aside, and the rest of the rule discharged.

October 1, 1881. THE COURT. [Filing an opinion at the request of plaintiff's counsel.] The judgment confessed by H. P. Vandegrift is a valid judgment as regards him, and no sufficient reason has been shown why it should be opened. So much of the rule is therefore refused. It appearing by the record that both the præcipe for the fi. fa. and the fi. fa. itself are against Aiman A. Redheffer and Charles Redheffer as well as the said Henry P. Vandegrift, when in point of fact there is no judgment against the said Aiman A. Redheffer and Charles Redheffer, and that the execution does not follow the judgment, the Court is of opinion that the joint execution is irregular and unlawful, and for that reason it is ordered that it be set aside. The plaintiff is entitled to issue execution against Henry P. Vandegrift only, he being the only party against whom judgment was obtained.

Opinion by THAYER, P. J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, NOV. 3, 1881.* [NO. 29.

Supreme Court.

May, '81, 182, 183. 1881.

Powell's Appeal.
Appeal of Firey's Executrix.

Married woman—Separate acknowledgment—Act of Feb. 21, 1770 (1 Sm. L. 307)—Act of April 15, 1828 (10 Sm. L. 249)—Act of April 11, 1848 (P. L. 536)—Act of April 26, 1850 (P. L. 581)—Act of April 11, 1856 (P. L. 315)—Assignment— Legacy— Estoppel—Recording Acts.

A legacy charged upon land is not such an interest in realty as requires for its assignment the formalities requisite to pass real estate.

A release of a legacy by a married woman is not under the Act of April 15, 1828 (10 Sm. L. 249), within the recording Acts if the acknowledgment fails to set forth that the contents thereof have been made known to the married woman.

A married woman may assign her choses in action to her husband by an instrument without acknowledgment and without his joinder, his consent being presumed by his request.

If, however, such assignment be executed without consideration and without knowledge on the part of the married woman as to what she is signing, it will be void as to the husband and his judgment creditors standing on a footing with him.

As to judgment-creditors, however, who have been induced to advance their money to the husband by reason of the existence of the assignment, the wife is estopped from setting up its invalidity.

No such estoppel follows in case there is no evidence that the judgment-creditors loaned their money on the faith of the assignment.

When interest is not recoverable on a legacy.

Appeals of Joanna Powell and Anna M. Firey, Executrix of Solomon Firey, deceased, from a decree of the Court of Common Pleas of Franklin County, distributing the fund produced by the sale of certain real estate by B. F. Winger and A. F. Schafhirt, assignees for the benefit of creditors of Benjamin M. Powell.

The matter was referred by the Court to an auditor, W. F. Patton, Esq., before whom the following facts appeared—

In 1854 Daniel Stahl died seised, *inter alia*, of a certain farm, which, by the terms of his will, he directed his executors to sell charged with the sum of $3000, the interest whereof was to be paid annually to his wife during her life and the principal of which was on her death to be divided equally among such of testator's children as should then be alive.

Stahl's executors accordingly, in 1856, sold the farm to Benj. M. Powell charged as aforesaid. On November 4, 1868, the widow of Daniel Stahl died. At her death two children of testator were alive, viz., Malinda Catharine, who was unmarried, and Joanna, intermarried with said Powell. In 1869 Powell paid to Malinda Catharine the sum of $1500, being her interest in the charge upon the farm. He did not pay to his wife her share nor did she ask for it.

Subsequently the following judgments were entered up against Powell, which took effect as liens upon the said farm in the following order:

Elizabeth Powell	$231 00
Rebecca McKee	500 00
A. L. Irwin	550 00
H. S. Stoner	100 00

On October 28, 1875, Joanna Powell executed a release to her husband of her interest in the land. The following was the certificate of a justice of the peace annexed—

"Before me the subscriber . . . . personally appeared the within-named Joanna Powell, and acknowledged the foregoing written instrument of consent signed by her to be her act and deed, and that the same was done without any coercion of her husband, Benjamin M. Powell, and desired that the same might be recorded as such; and I certify that the same was done and executed before me, before the signing or execution of the written indenture, release or deed of conveyance; and further the said Joanna Powell acknowledged the release separate and apart from her said husband. In testimony whereof, etc. JOHN G. WALLECH, J. P. [L. S.]"

The release was the same day duly recorded. As to the execution of this release Mrs. Joanna Powell who, although incompetent by reason of the fact that Benj. M. Powell, her husband, had previously died, was by consent of the parties permitted to act as a witness, testified as follows:—

"This is my signature to paper [release]. My husband said I should take the paper to Col. B. F. Winger. Said I should give the paper to him. He said I should sign it; it would be all right; I gave Col. Winger the paper in his office. I don't remember signing the paper. I don't remember Squire Wallech being in Mr. Winger's office the same day. I don't remember of Col. Winger reading the paper over to me. I don't remember seeing that paper afterwards. If I released my share of that dower that day I know nothing about it. If I did release that day I never understood anything. My husband never paid me any part of that dower. I never got any money on account of my share of that dower—before I signed the paper—at that time—nor afterwards. My husband did not tell me who.

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had written the paper. He gave me no reason why he wanted me to sign the paper. He did not tell me what was in the paper."

As to the joinder by her in a deed made by her husband for thirtyacres of said farm, witness also testified, "Mr. Powell told me when I signed the deed that if I did not sign it I might look out for myself."

John G. Wallech testified as to the release: "I know Mrs. Joanna Powell. I took her acknowledgment. The acknowledgment is in my handwriting. She appeared before me personally. She came, I think, to my office and asked me to come to Winger's office. Her husband was not with her. I examined her separate and apart from him and her attorney. Before taking the acknowledgment I made known the contents. I commenced and read to her until I saw the import of the release, and she said to me, while I was reading, that it was not necessary, that she understood it all. This occurred in Col. Winger's back office. We came out of the back office and then she signed it in the presence of Col. Winger. She said to me, while separate and apart from every one, that she signed the same of her own free will and accord, and without any coercion or compulsion on the part of her said husband."

The auditor found as a matter of fact that no consideration was given to Mrs. Powell for the release, and that the same was not intended by her as a gift to her husband.

Subsequently the following judgments were entered against Benj. M. Powell in the following order, taking effect as liens on the said farm.

E. B. Winger	$400 00
John S. Grove	359 45
James R. Wilson	486 00
Solomon Firey's Executrix . .	992 53
Samuel McCleary	599 93

As to the judgment of Firey's executrix, it appeared that the sums represented by it had been advanced to Powell after the recording of the release.

As to McCleary's judgment, it appeared that McCleary had advanced to Powell part of the sum for which it had been recovered expressly on the representation of the latter that his wife had released to him her interest in his farm.

Subsequently Powell assigned all his property to Winger and Schafhirt as assignees for the benefit of creditors. The farm in question was sold by them for $5791.21, and this fund was paid into Court constituting the fund in dispute.

The auditor was of opinion that the release was null and void by reason of the omission of the acknowledgment thereof to state that the contents were made known to Mrs. Powell, also that she was not estopped from setting up her claim as against her husband's judgment-creditors subsequent to the release. He therefore awarded from the fund first, the costs of audit; second Joanna Powell's claim with interest to the date of confirmation of the sale, viz., $2317.50, and the residue to the judgments in the order of their priority, as far as the fund went, awarding to the Wilson judgment only $65.93 on account.

To this report exceptions were filed by Firey's Executrix and McCleary on the ground that the auditor erred (1) in allowing any part of the fund to Joanna Powell, (2) in allowing her interest on her claim. The Court (ROWE, P. J.) was of opinion that the release was efficacious notwithstanding the defect in the acknowledgment, but that being neither intended as a gift nor founded on any consideration, it was void as between Powell and his wife. As against subsequent judgment-creditors like McCleary, who had advanced their money on the faith of the release, the Court held, however, that Joanna Powell was estopped from asserting her claim. As to other judgment-creditors who were not shown to have so acted, the Court held that no such estoppel could be set up. The Court also disallowed Joanna Powell's claim for interest. The matter having been recommitted to the auditor for a redistribution in accordance with the views of the above opinion, he deducted $817.50 from the award to Joanna Powell, being the interest erroneously allowed thereon, and after deducting therefrom the costs of reaudit distributed $453.36 thereof to satisfy the residue of the Wilson judgment, and $334.14 on account of the judgment of Firey's executrix.

He also deducted from the remaining sum of $1500, awarded to Joanna Powell, the sum of $303.57, the amount with interest found to have been advanced by McCleary to Powell on the faith of the release, which sum was awarded to McCleary.

This report was duly filed and confirmed by the Court.

Joanna Powell thereupon appealed, assigning for error the refusal to allow her interest on her claim, and also the deduction therefrom of the sum paid to McCleary.

The executrix of Solomon Firey also appealed, assigning for error the refusal of the Court to allow Joanna Powell interest on her claim and the refusal to deduct from such claim the amount of the Fiery judgment and award the same to his executrix in full.

J. M'D. Sharpe, for Joanna Powell.

Joanna Powell's interest in the land was in the nature of an interest in realty. Ejectment would have lain to enforce it.

Kensinger *v.* Smith, 9 WEEKLY NOTES, 312.
Bear *v.* Whisler, 7 Watts, 144.
Perry *v.* Scott, 1 Smith, 124.
Watters *v.* Bredin, 20 Smith, 235.
Soper *v.* Guernsey, 21 Smith, 220.

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It was like a mortgage.

Being an interest in realty, a defect in the separate acknowledgment of the release thereof is fatal to its validity.

Moore *v.* Cornell, 18 Smith, 320.
Watson *v.* Bailey, 1 Binn. 470.
McIntire *v.* Ward, 5 Binn. 301.
Shaller *v.* Brand, 6 Binn. 435.
Evans *v.* Comm. 4 S. & R. 271.
Thompson *v.* Morrow, 5 S. & R. 287.
Watson *v.* Mercer, 6 S. & R. 48.
Steele *v.* Thompson, 14 S. & R. 92.
Jourdan *v.* Jourdan, 9 S. & R. 273.
Miller *v.* Wentworth, 1 Norris, 280.
Hornbeck *v.* Bld. Ass'n, 7 Norris, 64.

Defects in the certificate cannot be supplied by parol evidence.

Jourdan *v.* Jourdan, 9 S. & R. 274.
Watson *v.* Bailey, 1 Binn. 470.
Barnet *v.* Barnet, 15 S. & R. 72.
Williams *v.* Baker, 21 Smith, 481.
Heeter *v.* Glasgow, 29 Smith, 82.
Singer Mf'g Co. *v.* Rook, 3 Norris, 445.
Hornbeck *v.* Bl'd Ass'n, 7 Norris, 64.

The release being improperly executed and acknowledged, Mrs. Powell could not be estopped by it.

Glidden *v.* Strupler, 2 Smith, 400.
Dunham *v.* Wright, 3 Smith, 167.
Kirk *v.* Clark, 9 Smith, 479.
Graham *v.* Long, 15 Smith, 383.
Colburn *v.* Kelly, 11 Smith, 314.
Williams *v.* Baker, 21 Smith, 476.
Quinn's Appeal, 5 Norris, 453.

The same requisites exist as to the acknowledgment, if the release be of a legacy under the Act of April 26, 1854, § 24.

McCleary stood upon the footing of Powell and as the release was void as to the latter, it was also void as to the former.

Cover *v.* Black, 1 Barr, 493.
Reed's Appeal, 1 Harris, 478.
Morris *v.* Zeigler, 21 Smith, 453.
Dimm's & King's Appeal, 9 Norris, 367.
Shrewsbury Savings Inst's Appeal, 9 WEEKLY NOTES, 166.

The representations made to McCleary by Powell cannot bind Mrs. Powell by way of estoppel.

Powell having retained his wife's money is liable for interest thereon.

May *v.* May, 12 Smith, 213.

Brewer and *Winger*, for the Executrix of Solomon Firey.

The release executed by Joanna Powell was undoubtedly valid and effectual.

Her interest was not an interest in land.

Pierce *v.* Gardner, 2 Norris, 211.

It was simply a chose in action assignable by a *feme covert* without her husband's joinder.

Bond *v.* Bunting, 28 Smith, 210.
Braine's Appeal, 9 WEEKLY NOTES, 310.

The acknowledgment, though insufficient under the Act of Feb. 2, 1770, was unnecessary under the Acts of April 11, 1848, and May 14, 1874.

McCleary's right is clear because he advanced his money on the faith of Powell's representations as to the release.

Peltz *v.* Struthers, 6 Harris, 278.
Brown's Appeal, 9 WEEKLY NOTES, 329.

But the right of Firey's Executrix is equally clear. She advanced her money on the faith of the record.

Pepper's Appeal, 27 Smith, 373.
Peltz *v.* Struthers, 6 Harris, 278.
Water's Appeal, 11 Casey, 523.
Freeman *v.* Cooke, 2 Exch. 661.
Coates *v.* Gerloch, 8 Wright, 46.

Mrs. Powell is estopped by her laches from claiming interest.

Hamill's Appeal, 7 Norris, 363.
May *v.* May, 12 Smith, 206.

October 3, 1881. THE COURT. It was contended that the release of Joanna Powell in her husband's favor for the one half of the legacy of $3000 charged upon his land was invalid for the reason that it was not properly acknowledged. The acknowledgment was made before a justice of the peace, who certified that before him personally appeared the within-named Joanna Powell, and acknowledged the foregoing instrument of . . . . signed by her to be her act and deed, and that the same was done without any coercion of her husband, Benjamin M. Powell, and desired that the same might be recorded as such . . . . and further the said Joanna Powell acknowledged the release separate and apart from her said husband." It is true the justice does not certify that the contents of the paper were made known to Mrs. Powell as required by the Act of Feb. 21, 1770. That this omission is a fatal defect in conveyances of real estate is decided in numerous cases. I cite only two of the recent ones: Miller *v.* Wentworth (1 Norris, 280); Hornbeck *v.* The Building Association (7 Id. 64). This, however, was not the case of a conveyance of land. Mrs. Powell had no dower in her father's estate and could have had none. What she held was a mere legacy. That it was charged upon the land makes no essential difference. A release of a legacy charged upon land is within the Recording Acts. The Act of 15 April, 1828, authorizing such releases to be recorded requires that they should be executed "before at least two competent subscribing witnesses." The present release has but one subscribing witness, and does not come within the Act. (Hellman *v.* Hellman, 4 Rawle, 440.) The 24th section of the Act of 26 April, 1850 (P. L. 581), authorizes the recording of such releases only when they "shall have been duly acknowledged, or the execution thereof proved by the existing laws for the acknowledgment and proof of the execution of deeds or other instruments of writing concerning any lands or tenements," etc. As the release of Mrs.

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Powell was not so acknowledged it is manifest the Act of 1850 does not apply. Nor is the case affected by the Act of April 11, 1848. The acknowledgment by the wife referred to in said Act is where the husband seeks to convey or encumber her separate estate. The first section of the Act of 11 April, 1856 (P. L. 315), repeals so much of the Married Woman's Act of 1848 as provides that the acknowledgment of a deed or mortgage conveying the separate estate of a married woman may be made differently from her acknowledgment when joining her husband in conveying his real estate.

This release is not void, however, because not so acknowledged as to bring it within the Recording Acts. As before observed, it was not a conveyance of an interest in lands. It concerned personal property, was a mere chose in action, and as such within her own control with the consent of her husband. As this release was made to her husband, at his request, and for his benefit, his consent is to be presumed. It was held in Bond *v.* Bunting (28 P. F. S. 210) that a married woman, her husband joining therein, could assign her choses in action without acknowledgment of any kind, and the distinction is there pointed out between a chose in action and a mortgage; the latter though a security for money, is also a conveyance of land.

This release is sufficient in form, however defective the acknowledgment may be. It was said to be invalid, however, for the reason that it was not executed by Mrs. Powell of her own free will; that she did not know what she was signing, and that she received no consideration therefor. And it was urged that if the release was invalid as to her husband it was equally so as to his judgment-creditors, who merely stand upon the foot of their debtor.

The only witness called to attack the release was Mrs. Powell herself, who, although incompetent, was permitted to testify by agreement. Giving entire credit to what she says, she fails to show any fraud practised upon her in the acknowledgment, or any coercion on the part of her husband prior thereto. The substance of what she says is that she did not receive any money, that her husband told her to sign the release, and that it would be all right. It is true the learned auditor finds that her husband told her if she did not sign it "she must look out for herself." In this the auditor made a mistake. The words referred to had reference to a deed of 30 acres of land her husband desired to convey, and not to this release. Mrs. Powell took the release to the justice, unaccompanied by her husband, and executed and acknowledged it in the presence of the former. The justice was examined and testified that she acknowledged the release voluntarily, and that when he commenced to explain to her the contents of the paper she interrupted him, and stated she understood it; that it was a release of her dower. Mrs. Powell does not essentially contradict him otherwise than by the convenient "I don't know." There is not a scintilla of evidence to show fraud or coercion on the part of her husband, yet if Mrs. Powell is believed there was no consideration for the release. There certainly is no proof she ever received the $1500, and the auditor does not find she intended it as a gift. We must, therefore, hold the release invalid as to her husband. Is it so as to his judgment-creditors?

We think it very clear that so far as such creditors have loaned their money upon the faith of the release, they are entitled to priority over Mrs. Powell in the distribution of this fund. It is true a judgment-creditor stands upon the foot of his debtor so far as title is concerned, but this rule has no application where a third person has misled the creditors as to the condition of the title, and thereby induced him to lend his money on the faith of it. Samuel McCleary had actual knowledge of the release, and took one of his judgments, and loaned the money on the faith of it. As to him Mrs. Powell is estopped from setting up her release. It is true she was a married woman, and the general rule undoubtedly is that the doctrine of estoppel does not apply to such persons.

But there are exceptions. The rule rests upon the fact that a married woman cannot contract. It follows logically that what she cannot pass by contract she may not pass by estoppel. But when the law clothes her with the power to contract, to the extent of that power she is bound precisely as other persons are bound. The law gives her the right to dispose of her personal estate with the assent of her husband. In doing so she has no more power to injure and mislead others than if she were *sui juris*. To hold otherwise would enable her to continue her operations with her separate estate so long as they were profitable, and then make reprisals for her losses upon those who had trusted her. Brown's Appeal (9 WEEKLY NOTES, 329) distinctly recognized this principle. There a married woman who held a judgment against certain real estate agreed in writing that the lien of her judgment should be postponed to the lien of a subsequent judgment. After the money had been loaned on the faith of her agreement she attempted to repudiate it on the ground of her coverture. This Court held that as she had the absolute control of her judgment, and could satisfy it at will, she could also postpone, and as an innocent party had acted upon the faith of her conduct, she was estopped from claiming a first lien.

It does not appear that any of the other creditors loaned their money upon the faith of

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the release, nor that they had knowledge of it. Not having been duly acknowledged it must be treated as an unrecorded paper. Hence, no question arises as to constructive notice to the creditors, and actual notice is not pretended.

We see no error in the refusal of the Court below to allow interest on Mrs. Powell's claim. The authorities cited by him are sufficient to sustain his ruling. See May *v.* May (12 P. F. S. 206); Bachman *v.* Killinger (5 Id. 414).

The decree is affirmed and the appeals dismissed at the costs of the respective appellants.

Opinion by PAXSON, J.

May, '81, 175. May 10, 1881.

Fishburn's Appeal.

Will—Legacies—When a charge on land—What necessary to create a charge—Executors and administrators—Presumption as to use of funds by them.

Where land is devised at a valuation or price to be paid by the devisee, the title passes subject to the charge or lien for the price if the devise be accepted.

A. devised a tract of land to B. "at such valuation as shall be put upon it by three disinterested parties, ... he paying such valuation to testator's executors." Testator also devised to C. a tract of land specifically charged with the payment of a certain sum. He then bequeathed certain general legacies, and devised and bequeathed the residue of his estate to B. and others in equal shares, nominating B. and D. as his executors. B. elected to accept the land devised to him and acted as executor, D. having had letters granted to him jointly with B., but taking no part in managing the estate except signing an executor's account, whereby B. and D. charged themselves with the amount of the valuation of B.'s tract. There was no evidence of B.'s having actually paid to himself as executor the amount of this valuation. He had paid out large sums to discharge the debts of A.'s estate, but could have done so from other funds belonging to the estate in his hands. Subsequently judgments were entered against B., who made an assignment for the benefit of creditors. The assignee sold the tract of land in question. In a contest between judgment creditors of B. and A.'s legatees for the proceeds of said sale:—

Held, that the terms of A.'s will made the legacies bequeathed by him a charge on the land devised to B, that the presumption was that B. in paying the debts of A.'s estate had first exhausted the funds derived from other sources before touching the valuation fund, that there was nothing to show that any part of the charge or lien on the land was satisfied, and that A.'s legatees were entitled to the fund in preference to the judgment creditors of B.

Appeal of John Fishburn, from a decree of the Common Pleas of Cumberland County, confirming the report of an Auditor in the matter of the distribution of the assigned estate of J. E. B. Graham.

The material facts of the case were as follows: John Graham died in June, 1866, leaving to survive him nine children—five sons and four daughters—having by his will bequeathed certain pecuniary legacies, and devised, *inter alia*, as follows:—

"Fourth.—I devise the farm on which I live, and which contains about one hundred and five acres, to my son John E. B. Graham and his heirs *at such valuation* as shall be put upon it by three disinterested persons chosen by the sons or a majority of them, *he paying such valuation to my executors.*

"Fifth.—The *residue of my land*, to wit: The twenty acres, the road leading to it, and the nineteen acres purchased of Brandon, *I direct shall be sold* by my executors as soon after my death as may be convenient, if I do not sell it in my lifetime.

"Sixth.—After the payment of the legacies to my daughters and my son John E. B., I direct that *all the residue of my estate be equally divided* between my four sons, Alfred, Thomas B., John E. B., and Geo. M. Graham, share and share alike."

By the third clause of his will the testator devised a tract of land to his son, William J. Graham, in trust for himself and other purposes, subject to the following charge:—

"And inasmuch as the property herein devised and bequeathed to my said son in trust is in value greater than the portion that I can set apart for any of my other children I do hereby *charge* the same with the payment of two thousand five hundred dollars to my executors as of the date of the probate of my will."

The testator appointed his sons, J. E. B. Graham and George M. Graham, executors, to whom letters testamentary were granted.

Appraisers were chosen, who, on September 8, 1866, estimated the tract of land devised to J. E. B. Graham, at $7980, and he elected to take it at the valuation. In June, 1867, the executors filed their account, in which they charged themselves with the valuation money and interest thereon to date of filing. Exceptions to the account were filed by a legatee on the grounds that the executors had confused real and personal estate in their account, and that the valuation of the J. E. B. Graham tract was inadequate. No suggestion was made that the valuation money had not been paid to them as executors. The exceptions were dismissed, and the account was duly confirmed by the Orphans' Court.

J. E. B. Graham thereupon entered into possession of the farm. During the years 1870 to 1879, he contracted debts for which judgments were recovered which became liens on the farm. A debt to John Fishburn, the appellant, for $440, was contracted in 1878, and judgment duly obtained therefor in the same year.

On January 6, 1879, J. E. B. Graham made an assignment for the benefit of creditors, and the sale of his assigned estate produced a fund for distribution of $9409.43, of which the sum of $7692.74 represented the proceeds of the above-mentioned farm, and some personal property of the assignor.

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Before the auditor appointed to audit the account of the assignee, and to report distribution of the fund produced by the sale of the said farm it was claimed by Fishburn *et al.*, judgment creditors of the assignor on the one hand, and on the other hand by certain of the legatees and devisees of John Graham, deceased, the latter claiming that the valuation money directed by the will of John Graham to be paid by J. E. B. Graham, to his executors, was a charge on the land devised to and accepted by him, out of which valuation money their legacies were entitled to priority of payment.

The evidence taken before the auditor showed the following facts: J. E. B. Graham was the sole acting executor under his father's will, his brother and co-executor, George M. Graham, who resided in another place, taking no part in the administration of the estate other than signing the executors' account. The latter never received the valuation money due by J. E. B. Graham, and there was no evidence, other than the charge in the executors' account, that J. E. B. Graham, as devisee, had paid it to himself as executor. He had made payments as executor on account of debts and legacies of over $10,000, but it was shown that he had sufficient assets of the estate to make all these payments without applying any part of the valuation money, except to set off a portion of it to satisfy his own share.

The auditor reported, (1) That the testator, John Graham, did not in his will *intend* to charge the valuation money on the farm devised to J. E. B. Graham, and that the legacies were not therefore charged on the land or its proceeds. (2) That the fact that the executors had charged themselves with the valuation money in their account, and the confirmation of the account was conclusive evidence of its payment by the devisee, and that no trust, resulting or otherwise, existed in favor of the legatees; that George M. Graham, the co-executor, having charged himself with the valuation money, cannot in this collateral proceeding deny its payment, and again claim the fund.

The auditor therefore awarded the fund first to the judgment creditors of the assignor, and, secondly, to the unsecured debts and legacies *pro rata*.

Exceptions filed to this report by the legatees were sustained by the Court, and the report referred back to the auditor, to amend the distribution in accordance with the following opinion of the Court by HERMAN, P. J.:—

In Hart *v.* Homiller (11 Harris, 42), it is said that "where land is devised 'at a valuation' or a price to be paid by the devisee, the title passes subject to the charge or lien for the price, if the devise be accepted. This proposition," says Mr. Justice LOWRIE, "is so plainly a mere repetition and application of the principle of all transfers of title, that it is hard to see how a different view could be thought of, except where the search after analogous precedents has diverted the mind from the direct principle of the case." In a will no precise form of words is necessary to create a condition. Any expression denoting such an intention will have that effect (Hoover *v.* Hoover, 5 Barr, 351). . . . I think it is very clear that the testator intended that the valuation money should be paid by his son John to the executors, and form part of the fund for distribution among his sons and daughters, and that the payment of the valuation money was a condition upon which the devisee was to take the land. He was to have it at the valuation—"he paying such valuation to my executors." In accordance with the provisions of the will, the land was valued at $7980, and the devisee accepted it at the valution. According to Hart *v.* Homiller, the title passed to him, subject to the charge or lien for the price or valuation, at which he accepted the devise. I cannot agree with the auditor, in holding that the testator did not intend to charge the valuation, or any part of it, on the land. On the contrary, I think the natural and necessary implication of the language of the devise is that the land was intended by the testator to be subject to, and chargeable with, the amount of the valuation. It is true, that upon the land devised to William, the testator expressly charges the payment to his executors of the sum of $2500, for the purpose of reducing the value of the devise to him, and preserving equality among his sons; but I do not think this is enough to evince a contrary intention as to the land devised to John, for the devise to the latter, as we have seen, is in such language as naturally and necessarily to imply that a charge or lien upon the land was intended.

Has John paid the amount of the valuation at which he accepted the farm devised to him? The Auditor finds that he paid it to the executors, as directed in the will, but in this I think he is mistaken. . . . Being devisee and executor, it cannot be said that John paid the money to himself and thus discharged his land, and the evidence is uncontradicted that he did not pay it to his co-executor.

I cannot see how the presumption can arise that, as executor, John squandered or misappropriated the funds of the estate that came into his hands from other sources, and that thus he exhausted the whole amount of the valuation put on his farm, by the payments he made. The presumption is just the reverse—that he first exhausted the funds derived from other sources in the payment of debts and legacies, before touching the valuation fund. I can discover no evi-

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dence to show or to found a presumption upon, that any portion of this fund was ever actually paid to any one. There is nothing to show that any part of the charge or lien was ever released or satisfied. I have no doubt that what remained of the other assets after deducting the payments made by him, John retained, on account of his own share, and supplied the deficiency by setting off a portion of the valuation fund to pay himself in full, but the balance, most certainly, still remains unpaid; and as this balance was the first lien upon the land, it should have been first paid out of the proceeds of the land charged. The fund arising from the sale of the land in question, now in the hands of the assignee, will be insufficient to pay the unpaid balance of the principal and interest of the valuation charged upon the land devised to John E. B. Graham by the will of John Graham, deceased, and this should be awarded to George M. Graham, the co-executor.

And now, to wit: 30th April, 1881, the auditor's report is re-committed to the same auditor, with instructions that he modify and correct the scheme of distribution reported by him, in accordance with the foregoing opinion.

The auditor having filed a supplemental report, in accordance with the foregoing opinion, whereby he awarded the balance of the fund ($7692.74) to George M. Graham, executor of John Graham, deceased, the Court entered a final decree confirming the supplemental report. John Fishburn took this appeal, assigning for error, *inter alia*, the decree of the Court as above.

W. Trickett (with him *W. F. Sadler*), for the appellant.

E. B. Watts (with him *H. Hepburn, Jr.*), for the appellee.

May 23, 1881. THE COURT. We affirm the decree upon the opinion of the learned President of the Court below. The case is clearly ruled by Hart *v.* Homiller (11 Harris, 42). It was not a devise to John E. B. Graham, he paying or to pay, certain legacies, but it was a devise to him on condition that he should pay the price at which it was valued to the executors. Until paid, that price or valuation was a charge on the land. Had he refused to take it, it would have fallen into the residue, when, being blended with the personalty, it would necessarily have been charged with the payment of the legacies, according to the well settled rule upon the subject.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

PER CURIAM.

Jan. '81, 264. March 31, 1881.

Hagerman v. The Empire Slate Company.

Foreign corporation—Service thereon—Acts of 21st March, 1849, § 3, P. L. 216, and of 22d April, 1874, §§ 1 and 2, P. L. 108, and § 5, Art. XVI. of the Constitution of 1874—Corporation which has failed to comply with the provisions of the Act of 22d April, 1874—How service can be made on such corporation—Sheriff's return—Practice.

If a foreign corporation fails to comply with the requirements of the Act of April 22, 1874 (P. L. 108) providing that no foreign corporation shall do business in this State before filing in the office of the Secretary of the Commonwealth a statement showing, *inter alia*, its location and the name of its authorized agent, a service made upon it in accordance with the Act of 21 March, 1849, § 3 (P. L. 216), will be good.

Per MERCUR, J. Undoubtedly, it is illegal for a corporation to do business in this State without having complied with the provisions of the Act of 1874; but, if it actually has done so, it cannot reap the benefit and avoid its liability. Sec. 5 of Art. XVI. of the Constitution of 1874, and the Act of April 22d of the same year did not supersede the Act of 21 March, 1849; a foreign corporation which has failed to comply with the provisions of the former Act, is still subject to the provisions of the latter Act, and therefore service on any agent of the corporation is good.

Liblong *v.* Kansas Fire Ins. Co., 1 Norris, 413, distinguished.

Error to the Common Pleas of Northampton County.

Scire facias sur mortgage, by F. H. Hagerman against the Empire Slate Company. The sci. fa. recited an indenture of mortgage made in 1879, "between the Empire Slate Company, a corporation organized under and pursuant to the laws of the State of New York, party of the first part, and F. H. Hagerman, party of the second part," whereby certain lands in Northampton County, were conveyed in mortgage to plaintiff as trustee for certain bondholders of the corporation. The sheriff's return to the writ of sci. fa. was—

Made known by giving J. E Long, agent for the Empire Slate Company, the within-named defendant, notice of the contents and a true and attested copy of the within writ personally on November 16, 1880. So answers

JAMES YOUNG, Sheriff.

Defendant took a rule to set aside the sheriff's return, under which depositions were taken, from which it appeared that the company had not filed in the office of the Secretary of the Commonwealth of Pennsylvania a statement in accordance with the provisions of the Act of April 22, 1874. It further appeared, therefrom, that the corporation was engaged in the manufacture of slate in the borough of Bangor, in Northampton County; J. E. Long was called and testified that he had

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been asked by the president of the company to look after their business there, to attend to the shipment of slate, and to look after the royalty and matters generally; he had agreed to do so, and had subsequently sent to the company statements of his doings, and he was in the habit of receiving rents and giving receipts therefor in his name as agent. The Court made the rule absolute and set the service aside, whereupon plaintiff took this writ, assigning for error the said action of the Court.

J. S. Stewart, for plaintiff in error.

The record shows that the defendant was a foreign corporation, and the service made was, therefore, authorized.

Act of 21 March, 1849, § 3 (P. L. 216, 1 Purd.'s Dig. p. 287, pl. 30).

This Act has not been repealed, and the service was in strict conformity with its provisions.

Kennard *v.* R.R. Co., 1 Phila. 41.
Flick *v.* Troxsell, 7 W. & S. 67.
Retterly *v.* Howe Machine Co., 4 WEEKLY NOTES, 525.

W. S. Kirkpatrick (with him *M. Kirkpatrick*), for defendant in error.

It does not appear, except from the depositions, that the defendant has not complied with the provisions of the Act of 1874; from the same source it appears that it does not do business and has no office in this Commonwealth. The Act of 1849 plainly contemplates a corporation doing business in the State. Besides, that Act has been repealed by section 5 of article XVI. of the New Constitution and the legislation under it. The Act of 22d April, 1874, forbids foreign corporations from doing business here without first complying with certain requirements; and the effect of this provision is to prevent a foreign corporation from having any existence here until it has complied therewith. Such is the very object of the Act.

Liblong *v.* Insurance Co., 1 Norris, 413.
Kennard v. Railroad, 1 Phila, 42.

June 13, 1881. THE COURT. The mortgage on which this scire facias issued shows the defendant to be "a corporation organized under and pursuant to the laws of the State of New York." It is, therefore, a foreign corporation holding lands in Pennsylvania covered by the mortgage.

The third section of the Act of 21st March, 1849, *inter alia*, declares that in the commencement of any suit against any foreign corporation, the process may be served upon any officer, agent, or engineer of such corporation, either personally or by copy. The Act is silent as to the character or grade of the agent.

In the present case, the sheriff returned endorsed on the writ, that he had "made known by giving J. E. Long, agent for the Empire Slate Company, the within named defendant, notice of the contents, and a true and attested copy of the within writ, personally, on November 16, 1880." The statute authorizes a service on the agent, either personally or by copy. This return shows it was served on the agent personally and by copy. Why then is not the service good?

It is contended that the Act of 1849 is superseded by section 5, article XVI. of the Constitution of 1874, and the Act of 22d April of the same year. The former does declare that no foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served. After substantially re-enacting this section, the Act further requires such corporation, before it shall do any business herein, to file in the office of the Secretary of the Commonwealth a statement showing the title and object of the corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein, and imposes a penalty on any person, agent, officer, or employé of such corporation who shall transact business herein therefor, without the provisions of the Act having been complied with.

Undoubtedly it is illegal for a foreign corporation to transact business in this State without having complied with the requirements of the Constitution and the Act of Assembly. Yet when it has actually done so, and received a substantial benefit from the transaction, whether it can retain the whole fruits thereof and avoid its liability resulting therefrom, presents a different question. Hence, although a corporation cannot hold lands in Pennsylvania without a license by law, yet the Commonwealth alone can object to its want of capacity. (Leazure *v.* Hillegas, 7 S. & R. 313; Goundie *v.* Northampton Water Co., 7 Barr, 233.) So where a corporation executed a mortgage on lands in which it had a qualified interest only, and its title was inalienable, it was held to be no defence to a scire facias on the mortgage. The question of title would arise with the purchaser. (St. John's Church *v.* Steinmetz, 6 Harris, 273.) Such title as the corporation had was pledged.

When a foreign corporation transacting business in this State, has failed to establish an office and report the name of its agent to the Secretary of the Commonwealth, but has some person residing therein who acts as its agent, it must be presumed that the corporation has substituted such agent as one on whom service is authorized to be made, to the extent at least of its unfinished business in this State.

It is further argued that the service in the present case is bad under the authority of Lib-

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long *v.* Kansas Fire Ins. Co. (1 Norris, 413). The facts of that case are very different from the facts in this. There the corporation had appointed an agent according to the Act of Assembly. Here none such was appointed. There having complied with the statute and furnished a general agent, on whom service could be made, it was held that service was not good on one whose authority was limited to effecting insurances and receiving premiums therefor, under the directions of the agent designated by the statute. The strength of that case rested on the fact that inasmuch as the corporation had provided an agent under the Act of Assembly, on whom service could be made, that it ought not to be made on an agent who was not so designated. In this case, the company had not appointed an agent under the statute.

It may be conceded that a return which omits to set forth the character of the agent served, is not conclusive that he possesses the necessary qualifications; yet where the Act authorizes the service on an agent of the corporation without imposing any further qualifications, a return of service in the words of the Act, is *prima facie* evidence of a good service. Hence, in this case the service on Long was presumptively good. The evidence taken on the rule to show cause why the return of service should not be set aside, did not rebut that presumption. The business of the company was the manufacturing of slate in the borough of Bangor. The quarry was let to one who was to manufacture the slate and give the company a royalty payable in slate. It is not shown that Long was appointed agent by any resolution of the company, yet he acted as such for several years. He testified that the president of the company requested him to look after the shipment of slate, and the royalty and things generally around the quarry; that he did so; that he shipped and sold slate for the company; let its house and barn; paid taxes; gave receipts in its name as agent; sent statements to the company at different times, and accounted to it for money he received; when the writ was served on him he supposed he was the agent of the company; continued to so act after the service, and has no notice that his authority has ended. Although no slate was manufactured during the preceding year, yet he continued to receive rents for the property every month.

Thus it appears in fact he acted as an agent of the company. His place of business was about one-fourth of a mile from the quarry, and he appears to have been the only agent of the company residing within this State. Under all the facts proved, we think he was shown to be such an agent as to make the service on him valid. The learned Judge, therefore, erred in setting aside the return thereof and in making the rule absolute.

Judgment reversed, rule discharged, return of service reinstated, and a procedendo awarded.

Opinion by MERCUR, J.

July, '80, 122. January 11, 1881.

McConn v. Lady.

Principal and agent—Where latter acts without authority may be treated as principal—Liabilty of master for acts of servant.

Where a person assuming without authority to act as agent for another, enters into a contract either in his own name or in that of his alleged principal, the party with whom he contracts is not confined on discovering the lack of authority to an action in tort against him, but may elect to consider him as the principal in the contract, and hold him liable thereon.

Where a master directs a servant to write a letter in terms capable of a double construction, he is bound to see that the servant has, in writing the letter, placed such a construction on his orders as the master intended. If the master fail to do this, he will be bound by a contract entered into by him in such letter, even though the opposite construction of his orders to what he intended has been placed upon them by the servant in writing the letter.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by John B. Lady to the use of Thomas Verner against John McConn, to recover for a 15-horse power heater, sold and delivered to defendant. Pleas: "Non-assumpsit, payment, with leave, etc."

Upon the trial before YERKES, J., the following facts appeared:—

Previous to February, 1872, the Allentown School Board had constructed a school building for the Sixth Ward of the city of Allentown. The heating apparatus had been furnished by Colt & Spence, under special contract. It proved defective, and they were notified to remedy the defects. Mr. Colt then consulted Mr. Sidney, the architect of the school-house, who advised him to employ an expert, and named John McConn. Mr. Colt authorized Mr. Sidney to take Mr. McConn to Allentown, and make arrangements with him to make the heating apparatus effective. Mr. Sidney and Mr. McConn went to Allentown, and, after measuring the rooms of the building, Mr. McConn said he could remedy the evil by putting in a new boiler. Mr. Sidney explained to him that there might be some trouble about the money; that he, McConn, must look to Colt & Spence for his pay; that the school board would not recognize any one but the contractors. Mr. McConn also called on C. M. Runk, the president of the school board, and was informed by him that they would not interfere with any one employed by Colt & Spence, and that the board

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would not be responsible for any work or materials. Mr. Sidney then procured an order from Colt & Spence, in favor of McConn, on the school board, and delivered it to him. McConn then called on John B. Lady to inquire the price of a boiler for the school-house. Their conversation resulted in the submission in writing of several propositions, addressed to "John McConn," and in the following reply thereto :—

PHILADELPHIA, February 13, 1872.

JOHN B. LADY, ESQ. :

Proprietor of Phleger's Steam Boiler Company, No. 3029 Chestnut Street. I propose to accept your proposition of furnishing me with a 15-horse power boiler, with all the articles mentioned in your estimate to me for six hundred and seventy-five dollars ($675).

Respectfully yours,
JOHN MCCONN.

This letter was written by McConn's clerk, who testified: "I done the writing out of my own head; he, McConn, did not read it. He wanted me to write acceptance, and to send boiler to Allentown School Board. Mr. Sidney wanted to accept for school board. McConn had nothing to do with it. It was for the school board. I am not a great scholar. He directed me to write and order for the Allentown School Board. He had nothing to do with it."

The letter was admitted in evidence under objection and exception by defendant. (1st assignment of error.)

The boiler was shipped to Allentown, and erected by Lady's men under McConn's direction. McConn claimed to have done other work for the school board, and rendered a bill containing, among other items, a charge for the boiler. Some time after this Lady went to Allentown with McConn. They saw the school board, and Lady said that he would take his boiler out if he was not paid. The board remained silent. Then McConn gave Lady the following order :—

"PHILADELPHIA, October 22, 1872.

"$584.23. The School Board of Allentown will pay to the order of John B. Lady, five hundred and eighty-four dollars and twenty three cents. This sum being due him by the board for putting in a boiler in the school-house of the sixth ward of Allentown, Pa.

"JOHN MCCONN.

"To C. M. RUNK, ESQ,
President."

Lady gave McConn the following receipt :—

"PHILADELPHIA, October 22, 1872.

"Received of John McConn an order for $584.23, on the Allentown School Board, for putting in boiler for said board. This will satisfy all claims that I have against John McConn.

"JOHN B. LADY."

Lady transferred this order at once to Verner, who had bought his interest in the boiler business. Verner and the bookkeeper called on McConn and notified him of the transfer, and to pay no one but Verner. McConn replied that he would only pay to Mr. Verner. The order was presented to C. M. Runk, the president of the Allentown School Board, and acceptance refused. He said they did not know McConn. Mr. McConn was notified of the refusal of the school board to accept his order; he promised then to pay, and frequently promised to pay it afterwards.

The Court charged the jury, *inter alia*, as follows :—

"Now, the next question is, the question of the receipt. It does not strike me as being a receipt in full. If there was not a pre-existing debt, that is, if the school board did not owe McConn, it would be a nullity, and would not be a payment. On the other hand, an order from McConn for the money due would be good. The receipt does not indicate by its terms that it is a receipt in full, but that this 'shall satisfy all demands.' So I do not think the receipt is of any conseqence."

(2d assignment of error.)

The defendant presented the following points :

(1) "That if defendant, John McConn, stated to John B. Lady that the boiler was for the school board of Allentown, and, as Lady saw the school board on the subject of payment for the work done, he could have no action against McConn for furnishing the boiler, and the plaintiff, who was a former partner of Lady, occupying his place, cannot recover."

Answer. "I cannot affirm this point as stated. If, in addition to facts assumed, the jury found that the boiler was furnished to the school board and accepted by it, then the point is true in law."

(3d assignment of error.)

(2) "That Lady knowing that defendant McConn was acting for the school board, and having agreed to take an order on the board for the money, saying he would either get the boiler or the money, and having given a receipt in full of all claims against McConn, he can have no claim, and the plaintiff cannot recover."

Refused. "The point asserts what is to be found by the jury, the disputed fact as to how McConn dealt. It also asserts an erroneous construction of the receipt of October 22, 1872."

(4th assignment of error.)

(4) "If the plaintiff accepted the order and gave the receipt, indicating that he abandoned any claim that he might have against McConn, this election will bind him, and he cannot recover against McConn."

Refused. "I do not agree as to construction of the receipt."

(5th assignment of error.)

Verdict for plaintiff and judgment thereon; whereupon the defendant took this writ, assign-

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ing for error the admission of the letter in evidence, the charge *ut supra*, and the answers to the defendant's points.

S. G. Thompson, for the plaintiff in error.

The acceptance of the proposition to furnish a boiler should not have been admitted, for the evidence showed that McConn did not see it nor authorize the form in which it was sent.

Whether or no Lady at the time knew that the boiler was for the school board is of no moment, for he learned it afterwards, and looked to them for payment. Having made his election, he is bound by it.

Paterson *v.* Gandesequi, 15 East, 68.

The receipt is on its face an absolute release, and confirms the election.

J. D. Bowman, for the defendant in error.

McConn procured the letter of acceptance to be written and mailed. Lady did not know that it was written by an agent, but acted on it; McConn is therefore bound by it.

The release is not absolute. The use of the word "*will*" implies that the release will be absolute when the draft is paid.

The order is in the nature of a check issued by McConn on a bank in which he had no money. A release given upon such an order is void.

If McConn dealt with Lady as the agent of the Allentown School Board without authority, he would still be liable for the price of the boiler.

The statement that the boiler was for the school board would not make the latter liable. The question of authority and agency was fairly left to the jury.

January 24, 1881. THE COURT. It was a question of fact submitted to the jury, whether the plaintiff in error had authority from the Allentown School Board to make the contract as their agent. The jury found that he had not. He was personally liable, whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract. There was evidence that the letter of Feb. 13, 1872, was written and sent by McConn's order, and he was bound to see that it was according to instructions. At all events, there was no error in admitting it, whatever might be the effect of it under the evidence.

Judgment affirmed.

PER CURIAM. GREEN, J., absent.

Jan. '80, 175. March 28, 1881.

Heath et al. v. Gardner.

Ejectment to enforce payment of purchase-money — Vendee's default — Conditional verdict — Referee's award — Act of April 6, 1869 — Creation of new county of Lackawanna after entry of judgment — Transfer of record from old to new county — "New County" Act of April 17, 1878 — Practice — A conditional verdict in ejectment providing for a sale in case of vendee's inability to pay, a more equitable remedy than that by writ of habere facias possessionem.

In ejectment for purchase-money a referee under the Act of April 6, 1869 (P. L. 726), may file a report having the same effect as a conditional verdict.

Where the part of the county wherein the real estate as to which said report is made is subsequently erected into a new county, a certified copy of the record may be transferred to the Court of Common Pleas of such new county, under the Act of April 17, 1878 (P. L. 17), and proceedings taken therein to enforce the conditions of the report as fully as in the Court wherein the action of ejectment was originally instituted.

In ejectment for purchase-money a conditional verdict or report of a referee may be entered, providing that on failure of defendant to comply with the terms therein stipulated, the plaintiff shall be entitled to a sale of the real estate in question in order that from the proceeds he may realize the balance due him.

Where a sale of property takes place in pursuance of an order of the Court founded upon a provision in the original decree that on the occurrence of a certain contingency such order shall be made, the power of the Court to make such decree or order cannot be inquired into on error to the action of the Court in confirming the sale.

Error to the Common Pleas of Lackawanna County.

Ejectment, by John Gardner against William H. Heath, and William H. Keim, terre-tenant, to recover a lot of ground in the Fourth Ward of the city of Scranton.

Plea, not guilty.

On Dec. 30, 1872, John Gardner contracted to sell to William H. Heath a house and lot in the Fourth Ward of the city of Scranton, the consideration being $1400, the vendee agreeing to pay $500 down in cash, and the balance in four equal annual payments from Dec. 30, 1872. The down payment and first instalment were paid according to the contract. Heath in the mean time assigned to William H. Keim, terre-tenant, who refused to pay the subsequent instalments on the ground of an alleged deficit in the measurement. On Jan. 12, 1875, this action of ejectment was brought in the Mayor's Court of the city of Scranton to enforce payment of the purchase-money. Subsequently, by agreement of the parties the case was referred to a referee under the Act of April 6, 1869 (P. L.

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726). On July 15, 1878, the referee filed his report in which he found that the plaintiff was entitled to judgment for the land described in the writ, but that this judgment should be released on condition that the defendant pay to the plaintiff the costs of suit and the sum of $284.62, with interest from May 31, 1878, on Dec. 1, 1878, being one-third of the purchase-money; a like sum of $284.62 and interest thereon from June 1, 1879, and the balance of $284.62 and interest thereon on Dec. 1, 1879; that a deed should be executed to the defendant pursuant to the contract, to be deposited with the Prothonotary of Luzerne County on receipt of the first payment, and to be delivered to the defendant on his making the last of the above payments, and finally, that on failure by the defendant to make any or either of the said payments, the plaintiff should apply for an order of sale of the premises described in the writ.

On August 21, 1878, the new county of Lackawanna was created out of part of the county of Luzerne, and on the 21st October following the Courts of the new county were established. On Jan. 20, 1879, an exemplification of the record was taken by virtue of section 14, of the New County Act of April 17, 1878 (P. L. 17), from Luzerne County to the Common Pleas of Lackawanna County. On Feb. 7, 1879, upon affidavit of default in the first payment required to be made in the judgment, the Court entered a decree of sale of the premises.

On June 7, 1879, the said lot was sold to John Gardner, and on July 28 the sale was confirmed *nisi*. The defendants filed, *inter alia*, the following exceptions to this confirmation.

(1) The judgment in the above case is a conditional verdict in ejectment, and the proper proceeding is by writ of habere facias possessionem instead of a sale, and (2) the proceedings being founded on a decree of a Court of Equity of Luzerne County, the Courts of Lackawanna County have no jurisdiction and no authority to make a sale.

These exceptions the Court overruled, confirming the sale. The defendants took this writ, assigning for error the action of the Court in dismissing their exceptions and confirming the sale.

J. H. Burns and *L. W. Bunnell*, for the plaintiffs in error.

Ejectment to enforce payment of purchase-money is an equitable action.

Russell *v.* Baughman, 9 WEEKLY NOTES, 284.
Coolbaugh *v.* Pierce, 8 S. & R. 418.
People *v.* Reading, 8 Id. 483.
Peacock *v.* Freeman, 1 W. & W. 1.

A decree in equity for the payment of money cannot be transferred from one county to another for purposes of lien and execution.

Brooke *et al. v.* Phillips, 4 WEEKLY NOTES, 327.

The proceedings in ejectment for purchase-money take the place of a bill in equity to compel specific performance of a contract, and the conditional verdict is equivalent to a chancellor's decree. The judgment here is not ripe for execution till the condition is broken, and the fact is in some way brought to the Court's notice. An attempt was made, under the Act of April 17, 1878, to bring the proceedings to Lackawanna County. But it has been held by Courts of the latter county, that the section only authorizes the transfer of judgments for lien and execution. The section was intended simply to apply to and allow the enforcement of liens by execution. Here the judgment was not a lien at all. The holder of the legal title had an estate and not a lien, and his remedy for condition broken was by habere facias possessionem.

E. Merrifield, for defendant in error.

The result in all actions of ejectment must be a judgment, and in no case a decree.

The vendor retains an equitable lien against the vendee.

Irvine *v.* Campbell, 6 Binn. 118.

No proceedings could be taken in Luzerne County to enforce a judgment against a defendant in Lackawanna County, after the creation of the latter county.

Act of April 17, 1878, secs. 13 and 14.

A sale on a conditional verdict is held good in—

Bradley *v.* O'Donnell, 4 Wr. 479.
Hewitt *v.* Huling, 1 Jones, 27.

The plaintiff had a judgment in his favor by the referee's report. This judgment was entered in the Common Pleas of Luzerne County two months before the creation of the new county of Lackawanna. Under the Referee Act of 1869, sec. 51, it is provided that the report of the referee shall have the same force as if tried before a jury. It is then a verdict. Sec. 14 of the New County Act of 1878 provides that the lien of all judgments and verdicts shall not be affected, and authority is given to *proceed* on the judgments, mortgages, etc. We contend that we have a judgment in the highest sense, and are entitled to the fruits of the judgment, and order of sale in compliance with the conditions of the judgment. Our mode of procedure is consistent with the ruling in—

Bradley *v.* O'Donnell, 4 Wr. 479.

May 2, 1881. THE COURT. It cannot be doubted that the report of the referee, and judgment thereon July 18, 1878, had the same force and effect as a judgment of the Court on a conditional verdict. The Referee Act of 1869, under which the report was made, substantially provides that such shall be its effect (P. L. 726). The record of the case was, therefore, clearly within the letter as well as the spirit of the

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"New County" Act of April, 1878 (P. L. 17), which declares that the lien of all mortgages, judgments, mechanics' liens, verdicts, and all records which shall have been made and entered in the original county up to and including the day the Courts of the new county are organized, shall not be affected by the establishment of said new county, but to proceed thereon certified copies thereof shall be made by the prothonotary or other proper officer, which shall be entered by the like officer of the new county, and like proceedings had thereon as in the original. A certified copy of the record was taken, and entered in Lackawanna County, and the right of the plaintiff to proceed thereon as he might have done on the original, in case the county had not been divided, is too plain for argument.

The regularity and validity of the judgment, as originally entered, has never been called in question. The complaint is that "the Court erred in overruling defendant's exceptions and confirming the sale." This is the only specification of error, and not being assigned according to rule it might well be treated as a nullity; but waiving that irregularity and turning to the exceptions themselves in another part of the record, we find that they relate not to the validity of the original judgment, but to the proceedings thereunder.

The first exception will be considered hereafter in connection with the sixth. The second is that "the proceedings being founded on a decree of a Court of Equity in Luzerne County the Courts of Lackawanna County have no jurisdiction and no authority to make a sale."

The action was ejectment by the holder of the legal title against the equitable owner to enforce payment of purchase-money, and the judgment was substantially in favor of the plaintiff for the land described in the writ, to be released on payment of the residue of purchase-money within two specified dates, and deed to be delivered to defendant on making last payment, with the further provision that upon default in payment of either instalment, the plaintiff should apply for an order to sell the land. While the judgment is in the nature of a decree in equity, and was designed to enforce equitable principles in a common law action, it is not technically the decree of a Court of Equity, but if it were, the Act of 1878, which specifies "all mortgages, judgments, mechanics' liens, verdicts, and all records," is sufficiently comprehensive to embrace the record of any proceeding in equity, and doubtless it was the intention of the Legislature to authorize the transfer to the new county of all judicial proceedings affecting real estate within the limits thereof. As has been already stated, the record was properly transferred under the provisions of the Act from the old to the new county, and thus the judgment became as effective there for execution and all other purposes as if it had been originally obtained in the new county. The principle announced in Brooke *v.* Phillips (2 Norris, 183) has no application to the facts of this case. We have no doubt therefore that the Common Pleas of Lackawanna County had complete jurisdiction of the case.

The third and fourth exceptions are without merit and therefore require no special notice. There is nothing on the record to show that the property was not regularly advertised and sold. Any interest therein not bound by the decree cannot be affected by the sale.

The sixth exception, that "the sale is illegal and void" rests mainly on the ground disclosed in the first and principal exception, viz., that "the proceeding is by writ of habere facias possessionem instead of a sale." This presents the only question of any importance in the case. Can the verdict of a jury or the award of a referee in an action of ejectment to enforce payment of purchase-money be so framed as to provide for a sale of the land in case default is made in the payment on which the verdict or award is conditioned, or is the writ of habere facias possessionem the only remedy? If the latter is the only process, the interests of the vendee under articles of agreement and those holding under him, may be sacrificed, as they frequently are, by reinvesting the vendor with full and complete title to the land after he has received the greater part of the purchase-money. It sometimes happens that the vendee after paying nearly all the consideration is so circumstanced that he cannot make the payments required by a conditional verdict and the result is that he is dispossessed and loses all. If the conditional verdict can be so framed that in the event of the vendee's inability to pay, the land may be sold, and after paying the vendor in full the residue may be paid to the vendee or his creditors, an equitable result will be attained, which in many cases is not reached by putting the vendor in possession, and wholly depriving the vendee of the payments he has made on account of the purchase. We are fully aware that the general practice in this State has been to resort to the writ of possession, but as the object of the action is to do equity between the parties, no valid reason exists why that practice should be exclusively followed, especially in cases where a sale would be manifestly more just and equitable. It has always been in the power of the vendor to proceed by action of covenant on his articles of agreement and sell the land. A conditional verdict in ejectment, which provides for a sale as the means of satisfying the debt, practically accomplishes the same result. The mere fact that the vendor has chosen, perhaps for sufficient

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cause, to proceed by action of ejectment instead of covenant furnishes no valid reason why the vendee should have it in his power to compel him to take the land in satisfaction of the unpaid purchase-money. While, on the one hand, as we have seen, circumstances may exist in which it would be inequitable to permit the vendor to take the land absolutely, so on the other hand, circumstances may arise in which it would be equally unjust and inequitable to compel him to take the land. It is the unpaid purchase-money that the vendor is entitled to, and the object of a suit in either form is to enforce the payment thereof. We see no reason why this cannot be better accomplished by recognizing the right of the jury in actions like the present, to so frame their verdict as to provide for a sale of the land in case the purchase-money is not paid as required by their verdict. In Hewitt *v.* Huling (1 Jones 27), it is strongly recommended that instead of framing the conditional verdict in ejectment, brought to compel the payment of purchase-money, so as to vest the absolute title in the vendor on failure of the vendee to pay at the time fixed, it should contain the alternative of a decree of sale on such failure, by the sheriff or a master for the benefit of the vendor and vendee and all others having an interest in the proceeds.

There is no reason why the practice in many cases, at least, should not conform to this recommendation.

But aside from all this, as already intimated, there is nothing on the record calling in question the regularity and validity of the original judgment. It was properly transferred to the new county. The order of sale was provided for in the judgment and is fully supported thereby, and there is no such defect or irregularity in the subsequent proceedings as would justify a reversal. Judgment affirmed.

Opinion by STERRETT, J.

July, '79, 3. March 7, 1881.

Ruth's Appeal.

Taxes and taxation—Local tax laws—Cities of the third class—County Commissioners of Luzerne County powerless to assess, levy, and collect a tax for county purposes within the city of Scranton—Charter of the city of Scranton—Act of April 23, 1866, sect. 42, not repealed by Act of April 7, 1877—Illegal assessment and levy by collector appointed by Commissioners of Luzerne County—Constitution of Penna., Art. III. sect. 3—Title of Act—Act of April 7, 1877, unconstitutional—Subject of the Act not clearly expressed in the title.

The Act of April 23, 1866, sect. 42 (P. L. 1349), which provides that the taxes within the city of Scranton shall be collected by the city authorities and at the expense of the city, is not repealed by the passage of the Act of April 7, 1877 (P. L. 83). Hence, assessors appointed by the County Commissioners and not by the city authorities are incompetent to levy a tax within the city limits.

Art. 9, sect. 1, of the Constitution, requiring uniformity in the imposition and collection of taxes, did not become immediately operative. The Legislature must provide general laws for uniform taxation and harmonize all parts of the State by repealing local and special provisions now in existence.

The Act of April 7, 1877 (P. L. 83), entitled "A further supplement to an Act to incorporate the city of Scranton," which provides for a repeal of a clause in a special Act relating to the collection of taxes in said city, is unconstitutional and void, because it does not clearly express the subject thereof in the title.

Appeal from the Common Pleas of Luzerne County.

Bill in equity, filed Jan. 7, 1878, by C. F. Mathers, as well for himself as for the other citizens and taxpayers of the city of Scranton, against Israel Ruth.

The bill alleged (1) that the complainant was a citizen of the city of Scranton and the owner of real estate in said city; (2) that the defendant, by virtue of pretended authority from the Commissioners of Luzerne County, was attempting to collect from him $24.15, county taxes for the year 1877; (3) that the complainant was informed that the assessment of his property for county purposes was made by certain assessors, who derived their authority from the Commissioners of Luzerne County, and not from election by the people of said city, or any ward or district thereof; (4) that at the municipal election for said city held in February, 1877, an assessor was elected in each of the twenty wards of the said city, who had been at all times ready to perform their legal duties, and that during the year 1877 an adjusted valuation of city property, for city purposes, was made by the proper authorities, and that such valuation could have been had by any persons authorized to require the same; (5) that the city of Scranton, on April 4, 1877, became subject to the Act of May 23, 1874, entitled "An Act dividing the cities of the State into three classes," etc., and its supplements; that the plaintiff believed that the above assessment for county purposes was not made in the manner prescribed by said Act; that the plaintiff was informed that all county taxes within the limits of the said city were required to be collected by the city authorities and for the benefit of the city, and that the county of Luzerne had no legal right to collect county taxes from the taxpayers of the city of Scranton. The bill prayed for an injunction to restrain the defendant from collecting the tax. A preliminary injunction was granted in accordance with the prayer of the bill. Subsequently, by leave.

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of Court, the bill was amended so as to include the taxes levied for the year 1878.

Defendant then filed an answer. He admitted that the first, second, third, and fifth sections of the bill were true, but denied that the fourth and sixth sections were true, and alleged that the levy of the county tax was made in conformity with law, and was uniform with the levy of county taxes in other parts of the county. He denied that the seventh section was true, and averred that the authorities of Luzerne County had the right to levy the tax in the said city, and to give the collector appointed by them the power to collect the county taxes from the complainant and other taxpayers of the city. The answer concluded with a general denial of all matter, cause, or thing in the bill not therein sufficiently answered, traversed, or denied, and a prayer that respondent might be dismissed with costs.

Upon the filing of this answer, the Court, after argument, continued the injunction, HANDLEY, J., delivering the following opinion:—

"'This case presents a question of great importance to every citizen and taxpayer of the city of Scranton. The law provides that the County Commissioners shall make an estimate of the probable expense of the county for the ensuing year. (2 P. D. 1358, sect. 1.) This the Commissioners did; but it must be borne in mind that the estimate thus made, and the levy afterwards assessed, did not include the property of the citizens of Luzerne County, situated in the city of Scranton. The forty-second section of the Act of 1866 (P. L. 1049) provides, 'That hereafter all taxes within the said city of Scranton shall be collected by the city authorities, and at the expense of the said city. All county taxes assessed and collected within the limits of said city, together with the taxes uncollected within the same for the year one thousand eight hundred and sixty-six, shall be collected for the use of said city, and paid into the treasury thereof; and said city shall not be required to pay any sum of money to the county of Luzerne in lieu of county taxes.'

It is plain that under this law the city of Scranton is not bound to pay county tax to Luzerne County.

When and how was this law changed? It is contended by the defendant that the Act of 1877 (P. L. 83) repeals the 42d section of the Act of 1866.

The Act of 1877 provides that so much of the forty-second section of the Act of Assembly, approved the twenty-third day of April, Anno Domini one thousand eight hundred and sixty-six, entitled 'An Act to incorporate the city of Scranton,' which provides 'that hereafter all . . . county taxes assessed and collected within the limits of said city . . . shall be collected for the use of said city, and paid into the treasury thereof, and such city shall not be required to pay any sum of money to the county of Luzerne in lieu of county taxes,' be and the same is hereby repealed so far as any county tax *hereafter* to be levied is concerned.

The Act of 1877 expressly states upon its face that the forty-second section of the Act of 1866 is repealed only so far as any county tax hereafter to be levied is concerned.

Now, the tax for 1877 was levied prior to the approval of the repealing Act of 1877. It is contended on the part of the Luzerne County Commissioners, however, that real estate omitted to be assessed at the triennial assessment may afterwards be assessed under the same regulations as if done at the regular time.

The reading of the statute on this point is thus: 'Whenever any taxable real estate shall be omitted to be assessed at the triennial assessment, the assessor, on notice thereof, shall forthwith assess and return the same to the proper officer, which assessment shall be subject to appeal, and shall continue until the next triennial assessment, and its proper proportion of all taxes to which such real estate is liable, levied after such assessment shall be laid thereon.' (2 P. D. 1360, sect. 19.)

This section of the tax laws of this Commonwealth presupposes several matters before it can be put in operation when property liable to taxation is omitted. In the first place, the property omitted must not be omitted because of some law which says it shall not be assessed or taxed. In the second place, there must be an assessor duly qualified to value the assessment.

It cannot be said that the Act of 1877 repeals that portion of the Act of 1866 which provides 'That hereafter all taxes within the said city of Scranton shall be collected by the city authorities, and at the expense of the said city.' (See P. L. 1866, p. 1349, sect. 2.) How, then, can a collector appointed by the Commissioners, deriving all his authority from their official act, collect the tax in question within the city of Scranton?

If the city of Scranton can escape the payment of county tax, say the Commissioners, then Article IX. section 1, of the Constitution is violated: because it is there provided that all taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax; and that cities are deemed to be part of the county in which they are situated. But neither of these propositions will help the Commissioners out, because the Act which provides that every city shall be deemed and taken to form part of the county in which it is or may be situate, contains a clause saving to each city and to the citizens thereof, all and singular the rights, privi-

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leges, and immunities granted by the respective charters and by the laws of this Commonwealth. One of the rights and immunities granted to the people of Scranton is the exemption from the payment of county tax to Luzerne County. And notwithstanding this is a special exemption, the adoption of the Constitution of 1874 does not deprive the people of this city of the benefit thereof.

It has been expressly ruled by the Supreme Court of this State, in the case of the Lehigh Iron Co. *v.* Lower Macungie Township (31 P. F. S. 482), that section 1, Article IX. of the Constitution is not immediately operative. The Legislature must provide general laws for uniform taxation, and harmonize all parts of the State by repealing local and special provisions that are now in existence. Since this decision was rendered, we have had several others on the same question, but which it is unnecessary for us to cite in this opinion.

The assessment for the tax in question was not made by the regularly elected assessors in the several wards of the city, nor by persons appointed to fill vacancies, but by three gentlemen appointed by the County Commissioners for the city at large.

Now it is well understood that County Commissioners can only appoint assessors to fill vacancies. (2 P. D. 1401, sect. 8; Commonwealth *ex rel.* Leslie *v.* The County Commissioners, 5 Rawle, 79; Street *v.* The Commonwealth, 6 W. & S. 209.) Scranton is now a city of the third class, since the fourth day of April, 1877; hence, under the forty-fifth section of the Act of 1874 (P. L. p. 256), she is entitled 'to elect one assessor . . . at the municipal election on the third Tuesday of February, annually . . . and in case of any vacancy . . . the Court of Quarter Sessions of the said county shall fill the vacancy.' This section transfers the power of appointment, in a city of the third class, from the County Commissioners to the Courts of Quarter Sessions of the county wherein such city is located. It is clear, therefore, that no county tax for Luzerne County was assessed and levied according to law for the years 1877 and 1878.

We have now reached another very important question in this case, namely, is the Act of the 7th of April, 1877, constitutional? The plaintiff contends that the Act is unconstitutional, because the subject is not clearly expressed in its title.

The Constitution of 1874, Article III. section 3, provides that 'No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.'

The title to the Act of 1877 reads, 'A further supplement to an Act to incorporate the city of Scranton.'

It cannot be denied but that there is but one subject expressed in the Act in question. The object of the Act was to repeal the law prohibiting the county of Luzerne from collecting county tax in the city of Scranton, and to allow her to collect such tax thereafter. But how is it about the title to the Act in question? The subject of the Act is certainly not clearly expressed in the title. To give Article III. section 3, of the Constitution full force, all its parts must be complied with. Blood *v.* Mercelliott (3 P. F. S. 391) was a close case, and was sound because it was not probable that a case exactly similar would again arise. Dorsey's Appeal (22 P. F. S. 194) arose under the old Constitution, and yet it was held in that case, that a restriction in a title to an Act of Assembly, which tends to mislead, is fatal. The purpose of this amendment in the old Constitution, was to prevent a number of different and unconnected subjects from being gathered into an Act; another purpose was to give information to the members or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill. The title should be so certain as not to mislead. If the title seems to mean one thing, while the enactment as clearly refers to another, it cannot be said to be clearly expressed. (See, also, Beckert *et al. v.* The City of Alleghany *et al.*, 4 WEEKLY NOTES, 530; Alleghany City *v.* Morehead, 31 P. F. S. 438.)

In the case of Craig *et al. v.* Trustees of Church (6 WEEKLY NOTES, 421), where the title to an Act under consideration was brought in question, it was held that when the supplement to the Act is germane to the subject of the original Act, the title is clearly expressed. But the title to that supplement satisfied the requirements of the Constitution.

It first stated that it was a supplement to a certain other Act, and then named the Act and stated when the original Act was approved; and also added the object and nature of the bill. No more beneficial grant could have been allowed to the people of Scranton by the law-making powers, than to exempt them annually from the payment of county tax. It was a matter in which every taxpayer and property owner of the city was deeply interested. But what person could have told by the reading of the title to the Act of 1877, that this great privilege was about to be taken away? Not one. If the title clearly expressed the subject of the bill, it should read in this manner: 'A further supplement to an Act to incorporate the city of Scranton, and to repeal the forty-second section of the Act approved the

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23d day of April, 1866, exempting the said city from the payment of county tax,' such a title would satisfy the requirements of the Constitution. We must therefore hold, first, that the county tax assessed and levied in the city of Scranton, for the years 1877 and 1878, cannot be collected by the collector appointed by the Commissioners of Luzerne County; and, second, that the title to the Act of the 7th of April, 1877, is in violation of Article III. section 3, of the Constitution, and hence void.

Motion to continue injunction allowed, thereupon Court order the injunction heretofore granted in this case continued until the further order of Court."

The defendant took this appeal, assigning for error the decree of the Court continuing the injunction.

Allan H. Dickson and *Thomas H. Atherton*, for the appellant.

The remedy for an irregular or illegal assessment is not by suit in equity but by appeal, as provided by the Acts of April 15, 1834, sects. 9, 10, and 13, and by Act of April 20, 1876 (P. L. 44), which by the Act of March 21, 1806, sect. 13, is to be strictly pursued.

Wharton *v.* Borough of Birmingham, 1 Wr. 371.
Hughes *v.* Kline, 6 C. 227.

The collector was at least a *de facto* officer, acting under color of law, and therefore his right to collect the taxes cannot be inquired into collaterally by a bill in equity.

Cunningham *v.* Mitchell, 17 Sm. 78.
Locust Mt. Coal and Iron Co., *v.* Curran, 3 Luz. Leg. Reg. 193.
Cooley on Taxation, 190.
Burroughs on Taxation, § 106.

The mere allegation of illegality in the tax is insufficient to sustain the injunction.

Dows *v.* City of Chicago, 11 Wallace, 108.
State Railroad Tax Cases, 2 Otto, 575.
Youngblood *v.* Sexton, 32 Mich. 406.

There is no allegation of irreparable injury.

But assuming for the sake of argument that the Court has jurisdiction, we contend that the 42d sect. of the Act of April 23, 1866, was expressly repealed (1) by the Act of April 7, 1877. The Act of 1877 is not in violation of Art. III. sect. 3, of the Constitution, for there is nothing in the title calculated to mislead or that is not germane to the subject.

Mauch Chunk *v.* McGee, 31 Sm. 433.

Sect. 42 of the Act of 1866, was repealed *ipso facto* by the adoption by the city of Scranton, on April 4, 1877, of the Act of May 23, 1874, entitled "An Act dividing the cities of this State into three classes, etc.," and its supplements.

Local tax laws inconsistent with the Constitution remain in force until the Legislature passed laws to carry the Constitution into effect.

Lehigh Iron Co. *v.* Lower Macungie Township, 31 Sm. 482.

To hold that a provision in the previous charter repugnant to the new Constitution still remained in force after the adoption by the municipality of its new charter, would be to give to public municipal corporations higher rights and immunities than could be obtained by private corporations.

Iron City Bank *v.* Pittsburgh, 1 Wr. 340.

Art. IX. sect. 1, of the Constitution provides "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The rule of uniformity in taxation applies not merely to the rate of taxation or to the mode of assessment; it is the law of taxation. If the real estate in the city of Scranton is relieved from the payment of county tax to the county of which it forms a part, the burden is of necessity greater upon the remaining property in the county wherein the city of Scranton lies, the taxpayers of said city being *pro tanto* relieved. The Act is, therefore, void, because it violates the principle of uniformity of taxation.

O'Kane *v.* Treat, 25 Ill. 557.
Wilson *v.* Supervisors of Sutter County, 47 Cal. 91.

Nor can there be any defence on the ground of classification.

Knowlton *v.* Supervisors of Rock Co., 9 Wis. 423.

The subject of practical exemptions by improper classification was clearly in the mind of the convention framing the new Constitution, and it was their endeavor to prohibit them.

Article IX. sect. 1, clause 2, provides that taxes shall be levied and collected under general laws.

But the Act of 1866 is a *local* and *special law* and hence void.

J. H. Burns and *E. N. Willard*, for the appellees.

An injunction is the proper remedy where the power attempting to tax has no jurisdiction, or where the property is exempt, or where the taxing authorities are acting contrary to law.

St. Clair School Board's Appeal, 24 Sm. 252.

This Court has not in any case decided that Art. IX. sect. 2, and the Act of May 14, 1874, act as a repeal of all exemption laws. On the contrary, they refused to consider that question in—

German Society *v.* Philadelphia, 3 WEEKLY NOTES, 483.

The question is, however, not raised here, for it is not an exemption from taxation in the sense in which "exemption" is used in the Constitution, because the burden of taxation is not lifted but only transferred or equalized. A local tax law is one that regulates in a particular way the levying or collecting of taxes or the equalization

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of the burden of taxation; while an exemption law is one that relieves certain property entirely from taxation and places the burden on other property.

Northampton Co. *v.* Lehigh Coal and Nav. Co., 25 Sm. 463.

Article IX. sec. 1, of the Constitution does not immediately operate to repeal local laws.

Lehigh Iron Co. *v.* Lower Macungie Township, 31 Sm. 463.

It cannot be seriously urged that the 42d sect. of the Act of 1866, was repealed by the adoption of the charter for cities of the third class. The new charter expressly provides that—

"No such acceptance shall be construed to be a *repeal* or surrender of any rights, powers, privileges, or franchises heretofore by law conferred on such city not inconsistent with the provisions of this Act."

The acceptance of such charter for cities of the third class does not repeal a special law not inconsistent therewith.

Williamsport *v.* Brown, 3 Nor. 438.

It is submitted that defendant cannot support his claim of repeal by the Act of April 7, 1877.

In defence of the unconstitutionality of the title of the repealing Act, it is submitted that it conflicts with Art. III. sec. 7, "The general assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts, or incorporating cities, towns, or villages, or changing their charters."

The Act of April 7, 1877, is a *special* law, regulating the affairs of a city and a county and changing the charter of a city. The whole aim of the makers of the Constitution was to prohibit special legislation, which had become an intolerable evil.

Directors *v.* Comm., 37 Leg. Int. 94.

But even if the Court is not with us in our view of the case there are other insuperable objections. The assessment was irregular and invalid. The jurisdiction of adjudging valuations and the general assessing power was vested in the authorities of the city of Scranton, and the Commissioners of Luzerne County had no jurisdiction. By Act of March 30, 1867, the assessing power for the city of Scranton was vested in the city authorities, and that statute was never repealed. There can be no legal tax without an assessment by an officer having at least a color of authority. Of the necessity of an assessment, no question can be made. Taxes by valuation cannot be apportioned without it. It is the first step in the proceedings against individual subjects of taxation, and is the foundation of all that follows it. Without an assessment they are nullities.

Cooley on Taxation, 259.
McCall *v.* Lorimer, 4 W. 351.
Miller *v.* Hale, 2 Casey, 437.

Assessment is a judicial act, which cannot be performed by an improper officer. It is not a ministerial act which can be done by a deputy. If an assessment is made by parties who have not even the color of a title to their office, the tax is clearly invalid. We maintain that they were not even *de facto* officers because there were no offices they could fill.

Allan *v.* County Comm. of Luzerne Co., 5 WEEKLY NOTES 229.

The assessment was of no avail, because their commissions were so much waste paper.

March 21, 1881. THE COURT. We think the learned Court below exercised rightly its discretion in granting and continuing the injunction until further order.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

Jan. '80. March 7, 1881.

Minnequa Springs Improvement Company v. Coon et al.

Water-course — Dams — Destruction of lower dam by breaking of upper — Defective construction of upper dam — Evidence — Matters of opinion — Competency of non-experts to express opinions on facts within their knowledge — Expert testimony, admissibility of — Damages — Competency of testimony to prove each and every item of property destroyed — Measure of damages — Compensatory damages — Indirect evidence, doubtful competency of — Proximate cause.

Witnesses who testify to facts within their own knowledge may be permitted to express their opinion based on such facts.

Where a witness produced as an expert is asked to give his opinion upon a hypothetical state of facts the question of his competency is for the Court, and the exercise of its discretion will not be reviewed when it appears that the witness had any claims to the character of an expert. The weight of his opinion is wholly for the jury.

In an action for the loss of a mill, alleged to have been destroyed by reason of the careless construction of defendant's dam, evidence is admissible on behalf of the plaintiff to prove the original cost of each and every item of property destroyed. But in such case the damages to which plaintiff is entitled are to be measured by the value of the property destroyed at the time of the loss.

Where in such case the defence is that the loss was occasioned by a violent and unprecedented storm, swelling the creek whereon defendant's dam was situate, such as he was not bound to provide against, evidence is inadmissible to show that other neighboring creeks were at the same time violently and unprecedentedly swelled by the same storm.

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In such case evidence on behalf of the plaintiff, by a resident of the neighborhood, that in his opinion the storm was not unusually violent, is admissible.

Error to the Common Pleas of Bradford County.

Case, by G. M. Coon and A. B. Braine, trading as Coon & Braine, against the Minnequa Springs Improvement Co., to recover damages for the destruction of defendant's dam and mill on Mill Creek, alleged to have been caused by the negligent construction of defendant's dam at a point higher up on the said creek, which was swept away during a storm on the night of August 5, 1878, whereby the loss of plaintiffs' property was alleged to have been caused.

On the trial before MORROW, P. J., the plaintiffs called several witnesses, who were either experts or were familiar with the construction of the dam, to give their opinion as to the insufficiency of the material of which the reservoir was constructed and as to the insufficiency of its construction and strength. Objected to. Objection overruled. *Exception.* (First, second, third, fourth, fifth, sixth, seventh, eighth, and ninth assignments of error.)

The plaintiff then called G. M. Coon and other witnesses for the purpose of itemizing and giving the value of each specific item of machinery in their mills at the time of the loss, on the basis of the original expense of constructing them. Objected to. Objection overruled. *Exception.* (Tenth assignment of error.)

On cross-examination these witnesses all gave further evidence as to the original cost of constructing the mill and of the machinery therein.

The defendant offered to prove by Charles B. Ellis and other witnesses, that the rain-storm of August 5, 1878, passed over various other creeks in the neighborhood of Mill Creek, all of which streams were flooded by the same rain-storm to an extraordinary height, causing in them an extraordinary and unusual flood. Objected to. Objection sustained. *Exception.* (Eleventh and twelfth assignments of error.)

In rebuttal, the plaintiffs called H. B. Parsons, who testified that he had known the stream to have been higher on several occasions, that he had known greater floods, that he did not think the freshet on the night of August 5 was an unusual and extraordinary one, aside from the wave coming from the breaking away of the reservoir, and that what he meant by an extraordinary flood was one that was not usual in the stream, nor common, and not frequent. Objected to. Objection overruled. *Exception.* (Fourteenth assignment of error.) The defendant submitted the following points.

"Fifth. That the breaking away of defendant's reservoir in conjunction with an extraordinary and unusual flood, and also in conjunction with the breaking away of the plaintiffs' dam, thereby precipitating such a large quantity of water upon the plaintiffs' mill below, are such circumstances as ordinary diligence and foresight would not have been likely to have anticipated." *Refused. Exception.* (Fifteenth assignment of error.)

"Sixth. When there is involuntary negligence, and a second and third agency and force are put into action, which combined agencies and forces cause the damages complained of, such damages are too remote to be recovered in law." Affirmed as a legal proposition, but whether the cause of injury to plaintiffs' property was too remote is submitted to the jury. *Exception.* (Sixteenth assignment of error.)

"Seventh. If the jury believe in this case that there was an extraordinary and unusual flood in the creek upon which the defendant's reservoir was erected at the time of the breaking away of said reservoir, and that plaintiffs' dam broke away in conjunction therewith and the combined force of this large quantity of water caused the damage complained of or the greater part of it, then there is such a combination of circumstances causing the damages complained of in this case, that ordinary diligence and foresight would not have been likely to have foreseen the results thereof. And there can be no recovery of damages, even if the defendants were negligent in constructing and maintaining their reservoir." *Refused. Exception.* (Seventeenth assignment of error.)

"Ninth. If the plaintiffs' dam was negligently constructed and was negligently maintained, both or either, and for that reason broke away and added force to the agency that caused the damages complained of, then the plaintiffs cannot recover." *Refused. Exception.* (Eighteenth assignment of error.)

"Tenth. That in no event can the plaintiffs recover a greater sum of money than the damages done to plaintiffs' dam above." *Refused. Exception.* (Nineteenth assignment of error.)

The Court in the general charge instructed the jury substantially that if plaintiffs' dam gave way first and their property was destroyed in whole or in part before the water from defendant's dam touched it, plaintiffs could not recover. That defendant was bound to construct the dam with only reasonable knowledge and skill, and not so as to provide against uncommon and extraordinary floods. That therefore if the flood during which the loss occurred was uncommon and extraordinary plaintiffs could not recover. That if the negligence of defendant was remote not proximate, which question was for the jury, defendant was not liable, and finally that in any event plaintiffs were entitled

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only to the value of the property destroyed at the time of the loss.

Verdict for plaintiffs for $8451 and judgment thereon. The defendant took this writ, assigning for error the admission of plaintiffs' offers of evidence, the refusal of defendant's offers of evidence, the answers to defendant's points, and the charge of the Court *ut supra*.

Williams & Angle, for the plaintiff in error.

The construction of a dam requires the exercise of judgment and skill, which is only acquired by experience and by acquaintance with the best methods of construction and material to be so used. It is absurd to say that reliance can be placed upon the opinions and judgments of men of only ordinary skill in such matters.

Before a witness can be called as an expert he must have experience in a specialty. The word "expert" implies this. The expert gives the result of a process of reasoning which can be mastered only by special scientists.

Wharton's Evidence, sec. 434.

A person having a mere vague superficial knowledge of a specialty ought not to be permitted to lay down its laws.

Carr *v.* Northern Liberties, 11 Casey, 324.

It is submitted that, at least, there must be some knowledge gained by experience or study of the specialty under inquiry before the Court has the right to admit the opinions of witnesses in evidence, otherwise there would be no limit to permitting the ignorant and unlearned to give in their opinions in evidence.

The true measure of damages was the difference between the value of plaintiffs' property before and after the flood. This could not be arrived at by evidence as to the cost of the construction thereof.

Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411.

In the 10th and 11th assignments of error the defendant endeavored to prove that on the same night, and by the same rain-storm, there was an extraordinary and unusual flood of water in several of the streams near at hand. It was clearly relevant to establish the character of the flood in Mill Creek, and the defendant was clearly entitled to prove by collateral facts his theory or hypothesis of the general extraordinary character of the flood.

Wharton on Evidence, § 20.
Miller *v.* Stem, 2 Jones, 386.

As there was a reasonable and natural inference to be drawn from the offer that there was an uncommon, unexpected, and extraordinary flood in Mill Creek, and taken in connection with other evidence in the case, it was error to reject the offers.

Rodgers *v.* Stophel, 8 Casey, 114.
Pratt *v.* Richards, 14 Sm. 58.

The rule "*causa proxima non remota spectatur*" is applicable to this case, for the proximate cause here was the unusual and extraordinary flood. The breaking away of the reservoir was a second agency and cause for which the defendant is not liable.

R. R. Co. *v.* Kerr, 12 Sm. 353.
Fairbanks *v.* Kerr, 20 Id. 86.
Hoag *v.* R. R. Co., 4 Nor. 293.

The plaintiffs were not entitled to recover, as their dam was carelessly and defectively constructed, and they were guilty of contributory negligence.

Seely *v.* Alden, 11 Sm. 302.

Delos Rockwell and *J. H. Shaw*, for defendants in error.

Where witnesses offered have any claims to the character of experts, the Court will not reverse on the ground that their experience is not sufficiently special.

Delaware & Chesapeake Steamboat Co. *v.* Starrs, 19 Sm. 41.
Tucker *v.* Mass. Central R. R., 118 Mass. 546.

If the witnesses were not experts they should be permitted to give their opinions as evidence. An opinion may be given by a person, not an expert, as to matters with which he is specially acquainted.

Porter *v.* Pequonnoc Manufacturing Co., 17 Conn. 249.
Com. *v.* Fairbanks, 2 Allen, 511.
Brown *v.* Corly, 7 Wr. 506.
P. R. R. Co. *v.* Henderson, 1 Smith, 321.

The plaintiffs clearly had a right to show, by competent evidence, the value of the property swept away, so that the jury might know the real damages they received. How the defendants could be injured by such evidence it is difficult to see.

The only fact as to damage that was proven was what was the damage to the plaintiffs by reason of the destruction, loss, and injury to the property as it was on the night of Aug. 5. This was clearly within the rule laid down in—

Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411.
Hermits of St. Augustine *v.* Co. Phila., 4 Clark, 12.

The Court properly confined the parties in this case to the question whether there was an unusual and extraordinary flood.

To have shown that on the same night the water in several other streams was very high, would have proved nothing. Such evidence would not have satisfied the jury.

In the 14th assignment of error, the witness called had lived thirty years in the vicinity of the stream, and was surely competent to inform the jury if the flood in question was unusual as compared with other high waters on the same creek.

Whether the breaking of the defendant's dam was the remote or proximate cause of the injury to the plaintiff was properly for the jury.

It is idle to raise the question of negligent maintainance and construction of the plaintiffs' dam in view of the evidence in this case, for it cannot be contended that there is any duty on

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the plaintiffs' part to build or maintain his dam to resist floods of water coming like tidal waves from a broken reservoir.

The defendant in this case was bound to know, when it built its dam, that, if it broke away, the waters would come down upon the plaintiffs' property. With such knowledge the law holds them responsible for all the damages resulting from the direct cause of the break.

May 2, 1881. THE COURT. The several assignments of error relating to the character of the testimony that was admitted for the purpose of proving the defective construction, insufficiency of the material used therein, and the consequent weakness of the reservoir dam, and also the proper construction and strength of the dam belonging to plaintiffs below, are not sustained. Without referring specially to the testimony bearing on the subject, it is sufficient to say that each of the witnesses, whose testimony is complained of, appears to have been competent to testify, as he did, either from personal knowledge of the dams in question, their location, construction, etc., or from previous knowledge and experience in building dams or both combined. As a general rule, in matters of opinion, witnesses who testify to facts within their own knowledge may be permitted to express their opinions based upon such facts, but, when a witness, produced as an expert, is asked to give his opinion upon a hypothetical state of facts, the question of his competency is for the Court in the first instance. If they think he is *prima facie* qualified, it is then for the jury to decide whether any, and if any, how much weight should be given to his opinion. The admission of such testimony is very much within the discretion of the Court below, and if it appears that the witness had any claims to the character of an expert, this Court will not reverse on the ground that his experience is not sufficiently special. (D. & C. Steam Towboat Co. *v.* Starrs, 19 P. F. S. 36.) We are satisfied that the discretion was wisely exercised in this case. The opinion of some of the witnesses appears to have been based upon adequate skill and experience, and that of others upon sufficient facts, within their own knowledge, to justify the expression of their opinion as to whether the dam in question was properly constructed and of sufficient strength to withstand the force of the floods that might ordinarily be expected to occur in Mill Creek.

There was no error in admitting the testimony complained of in the tenth assignment. Its purpose and tendency were to show the extent of the damages sustained by the plaintiffs. To this end it was competent for them to prove each and every item of property destroyed by the breaking of the company's dam, as well as the value thereof, so that the jury might have the *data* from which to form an intelligent judgment as to the amount of damages actually sustained. Besides, a large proportion of the property was personalty, and it was strictly proper for the plaintiffs to prove the several items thereof and their value at the time of the loss. Much of the testimony specially complained of was drawn out by cross-examination, and for this, so far as it may have been incompetent, the plaintiff below was not responsible. The question of damages was fairly submitted to the jury. The learned Judge instructed them that the true measure was the value of the property lost or destroyed, to be determined from a consideration of all the testimony as to its value at that time. The subject of complaint in the eleventh and twelfth assignments is the refusal of the Court to permit the defendant below to prove that several mountain streams in the vicinity of and running parallel with Mill Creek, but not tributary thereto, were swollen and flooded to an extraordinary and unusual degree, at the same time and by the same rain-storm that raised the waters of Mill Creek. This was offered for the purpose of showing that the flood in Mill Creek by which the dam was swept out was of a like extraordinary and unusual character.

If the inference sought to be drawn from the facts embodied in the offers is a reasonable and necessary one, the testimony should have been received, but it is by no means clear that it was. It is a fact well attested by experience, that local storms in a mountainous region are usually confined to a very narrow belt of country, and, as a general rule, the track of those in which the rain-fall is most sudden and extraordinary, is the narrowest. The mountain streams referred to in the offers might be swollen to a very extraordinary height, and yet there might be no unusual rise in Mill Creek. The rapid and extraordinary rise of each must necessarily depend on the depth and suddenness of the rain-fall within the limits of the water shed of each stream. The material allegation of the defendant was, that at the time in question, there was an unprecedented flood in Mill Creek. If such was the fact, it was certainly susceptible of direct proof without resorting to indirect evidence of at least very doubtful competency.

There was no error in permitting the witness, Mr. Parsons, to testify that on several occasions he had seen the waters of Mill Creek higher than they were on the night the dam broke. It tended to show that the freshet at that time was not unusual. In the same connection he testified that, aside from the wave occasioned by the breaking of the reservoir, the freshet was not extraordinary for that stream, and then explained what

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he meant by an extraordinary flood, viz., "one that is not usual in the stream, not common, not frequent."

The remaining assignments are not sustained. The fifth, seventh, ninth, and tenth points of the defendant below, as presented, were rightly refused, and there is no error in the qualified affirmance of the sixth point. The charge of the learned Judge contains a clear and accurate statement of the law applicable to the case, as disclosed by the testimony, and the facts were fairly submitted to the jury.

Judgment affirmed.

Opinion by STERRETT, J.

Common Pleas—Equity.

C. P. No. 2. Sept. 22, 1881.

Independent Saving Fund v. Dillon.

Equity practice—Bill to set aside fraudulent conveyance by decedent—When such bill will lie.

Sur demurrer to bill.

Bill in equity, filed by the Independent Saving Fund and Loan Association of Manayunk against Mary Dillon and Ann Dillon in her own right, and as administratrix of the estate of Patrick Dillon, deceased. The bill set forth that the said Patrick in his lifetime, being indebted to the complainant in the sum of $2923.45, and being the owner of a house and lot in the Twenty-first Ward, fraudulently conveyed the same to the defendants, who were his sisters, without consideration.

The prayers were: (1) That the deed of conveyance be declared null and void as against the complainant; (2) That the premises be sold by a trustee, and the complainant's debts and costs be paid from the proceeds of such sale; and (3) That the defendants be restrained from selling, mortgaging, etc.

The defendants demurred on the ground, *inter alia*, that the Orphans' Court had exclusive jurisdiction over the question in controversy, and the plaintiff had an adequate remedy therein.

Pierce Archer, for demurrer.

R. P. White, contra.

In the case of Fowler *v.* Kingsley (6 Norris, 449) the Supreme Court sustained the jurisdiction of a chancellor in a proceeding precisely similar to the present.

THE COURT. Demurrer overruled, with leave to answer.

Common Pleas—Law.

C. P. No. 3. June, 1881.

Fox v. Ketterlinus.

Ground-rent—Judgment—What constitutes payment and what an assignment of a judgment—Equitable assignment—Mechanic's lien—Omission of name of owner—Lien against a property in possession of a tenant who has a right to purchase within a limited time—Act of June 16, 1836, § 9—How the curtilage may be defined—Power of Auditor appointed to distribute a fund in court, and not specially appointed to define the curtilage—Time of application.

Sur exceptions to the report of Charles F. Corson, Esq., an Auditor appointed to distribute the proceeds of certain real estate sold as the property of Eugene Ketterlinus.

From this report it appeared that for several years prior to June, 1875, W. K. Barclay was the owner of a lot of ground situate at the southwest corner of Tenth and Callowhill Streets. On June 1, 1875, he entered into a written agreement by which he leased this lot to R. Rogers, for the term of five years. Rogers agreed to build a theatre, costing at least $17,500, in one year from the date of the lease. Rogers was to pay a rental of $8840 a year, but the rent of the first year was to be refunded in consideration of his building the theatre. By the terms of the agreement, Rogers had the option to buy the property at any time during the lease, Barclay, however, having the privilege, if Rogers did not buy for two years, upon giving Rogers sixty days' notice, to sell to any one who would buy. Under this agreement Rogers went into possession of the lot, and erected at the southwest corner of Tenth and Callowhill Streets, a building now known as "The National Theatre," and upon the extreme western end of the Callowhill Street front, he also erected a small stone building, which was used as a real estate office. He also commenced the erection of seven small houses on the Carleton Street front of the lot. The

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fund in court for distribution, to wit, $15,489.18, arose from a sale of the above property upon a judgment obtained for arrears of a ground-rent to which the lot was subject. There were three classes of claimants upon the fund: I. Claimants upon judgments for arrears of ground-rent. II. Mechanic's lien creditors. III. W. K. Barclay, as owner, who claimed a portion of the fund.

I. The claimants for arrears of ground-rent. There were two judgments for arrears of ground-rent, amounting respectively to the sums of $2049 and $979. After these judgments had been obtained by Fox, who was the ground-rent landlord, Grier and Wainright, with their own money, and on their own behalf, paid the amount of these judgments with interest and costs, to J. W. Paul, Esq., attorney for Fox, who gave them control of the judgments, but declined to mark them to their use on the record, as it might interfere with the collection of subsequent arrears of ground-rent. Barclay was in no way interested in their purchase. It was contended before the Auditor by the counsel for the mechanic's lien creditors, that the effect of the payments made by Grier and Wainright was to extinguish the judgments.

The Auditor, however, reported that the facts made out a purchase of the debts, and an equitable assignment of the judgments to the purchasers (Lighcap *v.* Wilt, 4 Phila. 64; Brice's Appeal, 9 WEEKLY NOTES, 227; Guthrie and Byles' Appeal, 37 Leg. Int. 435; Bispham's Eq., sec. 167); and that though the judgments were not marked to the use of Grier and Wainright on the record, the assignments thereof were perfectly good, except as against a second purchaser without notice. (Fisher *v.* Knox, 1 Har. 622; Gaullagher *v.* Caldwell, 10 Id. 300; Campbell's Appeal, 5 Casey, 401.) He was of opinion that the said judgments were therefore valid liens upon the fund, and being for arrears of ground-rent, were entitled to be paid in full.

II. The mechanic's lien creditors. The Auditor reported that "the agreement of June, 1875, had received a judicial interpretation by the Supreme Court in the case of Barclay *v.* Wainright (5 Norris, 191), where it was decided that this agreement was more than an improvement lease, that it fell within the category of a building contract, and that the estate of Barclay was bound by the mechanic's liens for work done and materials furnished at the instance of Rogers, the lessee."

The mechanic's lien claims presented before the auditor were of two classes: (*a*) Nineteen claims filed against W. K. Barclay, owner, and R. Rogers, contractor. Fifteen of these were against the theatre building and four against the office on Callowhill Street, and the cellars on Carlton Street. These claims were all allowed by the Auditor. (*b*) Four claims filed against R. Rogers, owner, or reputed owner, and contractor. Three of these claims were for work done, etc., to the theatre building, and one for stone furnished for the cellars on Carlton Street. The mechanic's lien creditors of the first class denied the right of these claims filed against Rogers only, to participate in the fund for distribution. The mechanic's lien creditors of the second class contended, however, that these claims were properly filed without naming Barclay as owner, and entitled to distribution out of the fund, because by the terms of the lease from Barclay to Rogers, the latter had an option to buy the property upon certain fixed terms within a certain time.

The Auditor reported, *First*, that the mechanic's lien creditors of the first class had a right to object.

Second. That the name of the owner being a statutory requisite, and one of the conditions on which the lien is given, it was necessary to the validity of the lien, and that naming Rogers as "owner or reputed owner," as well as contractor, was not sufficient. (Knabb's Appeal, 10 Barr, 186; Norris's Appeal, 6 Casey, 122.)

Third. That Rogers, having never exercised his option under said agreement, and all his right, title, and interest in said lease and property having been entirely divested by a sheriff's sale on a judgment recovered against him, if these claimants had a lien by virtue of their claims, such liens were divested by said sale, and said claimants must resort for payment of their claims to the funds produced thereby. All of these claims, to wit, those filed against Rogers only, the Auditor held not to be liens upon the present fund for distribution, and he therefore disallowed them. (Noll *v.* Swineford, 6 Barr, 187; Knabb's Appeal, 10 Id. 186; Act of June 16, 1836, Purd. Dig. 1032, pls. 39 & 40; Lauman's Appeal, 8 Barr, 478; McCay's Appeal, 1 Wr. 125; Smith's Appeal, 6 WEEKLY NOTES, 162.)

III. On behalf of Barclay four propositions were submitted to the Auditor. (1) That the fund in court, after the proper deductions for costs, should be awarded to Barclay, the owner of the land sold. (2) That if the Auditor should be of a different opinion, that then it was his duty to define the curtilage of the buildings against which the claims had been filed, under the provisions of the ninth section of the Act of June 16, 1836 (Purd. Dig. 1026, pl. 9), and to apportion the fund accordingly. (3) That from that fund, there should be awarded to Barclay a due proportion representing the proceeds of so much of the property as was not comprised in the curtilage aforesaid. (4) That though the proportion of the fund in court thus claimed for Bar-

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clay was subject to its share of the expenses of the audit, yet that it was not to be diminished in any way by claims of material men, for labor or materials furnished to that part of the real estate which is exclusive of the theatre and the curtilage whereon it stands.

The first proposition the Auditor overruled, under the authority of Barclay *v.* Wainright (5 Norris, 191).

As regards the second and third, it was contended on behalf of some of the lien creditors that the Auditor had no power to act under the ninth section of Act of June 16, 1836. First, because he was not specially appointed for that purpose; and secondly, because the application of Barclay came too late.

The Auditor decided that neither ground of objection was well taken (Mechanic's Lien Act of 1806; Browne *v.* Smith, 2 P. A. Browne, 229, note; Pennock *v.* Hoover, 5 Rawle, 291; Keppel *v.* Jackson, 3 W. & S. 320); and accordingly defined the curtilage, and fixed the value of the theatre building, the office on Callowhill Street, and the unfinished houses on Carlton Street.

Under the fourth proposition, the counsel for Barclay contended, that the written agreement between Barclay and Rogers did not provide for the erection of any other buildings than the theatre, and that therefore only those claims which relate to the theatre ought to be paid out of the fund.

The Auditor reported, that exclusive of the written agreement, the testimony before him showed clearly that the office on Callowhill Street, and the houses on Carlton Street, were built by virtue of a parol contract between Barclay and Rogers, and that therefore the claimants who furnished materials and performed work for said office and houses were entitled to participate in the fund appropriated thereto. (Hall *v.* Parker, 8 WEEKLY NOTES, 325.)

The Auditor then annexed a schedule of distribution, whereby, after payment of costs and of the ground-rent judgments, such part of the fund remaining as was proportioned to the value of the buildings and curtilages thereto appertaining was applied to the payment *pro rata* of such mechanics' claims as the auditor found to constitute valid liens. The residue of the fund was awarded to Barclay as owner.

The exceptions filed by counsel on behalf of the different claimants were substantially as follows:—

(1) On behalf of those creditors whose claims were filed against Barclay, owner, and Rogers, contractor: (*a*). In allowing the two claims for arrears of ground-rent. (*b*) In deciding that the entire lot sold was not necessary and not intended for the use of the theatre. (*c*) In not awarding the whole fund, after payment of expenses, etc., to the mechanics' claims filed against Barclay, owner, and Rogers, contractor. (*d*) In awarding to Barclay any portion of the fund. (*e*) In reporting certain values for the theatre building and lot, etc.

(2) On behalf of those creditors whose claims were filed against Rogers, as owner and contractor: (*a*) In disallowing their claims and deciding that they had no lien upon the fund for distribution.

(3) On behalf of Barclay: (*a*) In reporting that under his lease from Barclay, Rogers erected the office on Callowhill Street, and commenced the erection of the seven small houses on Carlton Street. (*b*) In reporting that the written agreement between Barclay and Rogers had received a judicial interpretation by the Supreme Court. (*c*) In not awarding the fund in court, after the proper deduction for costs, to Barclay. (*d*) In reporting that claims of material men against that part of the real estate which was exclusive of the theatre and curtilage whereon it stands, should be allowed out of the fund. (*e*) In not allowing the fund representing the Callowhill Street lot, as also the Carlton Street lot, to Barclay, after deduction of costs and charges.

J. W. Paul, for Messrs. Grier and Wainright.

R. P. White, and others, for those creditors whose claims were filed against Barclay, owner, and Rogers, contractor.

R. H. Hinckley, and others, for those creditors whose claims were filed against Rogers as owner, or reputed owner and contractor.

W. W. Wiltbank, for W. K. Barclay.

C. A. V.

July 2, 1881. THE COURT. Exceptions dismissed and report confirmed.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, NOV. 10, 1881.* [No. 30.

Supreme Court.

May, '81, 162. May 20, 1881.

Commonwealth v. Gloucester Ferry Co.

Taxes and taxation—Corporations—Taxes on capital stock of foreign corporations doing business in the State—What constitutes doing business in the State—Acts of May 1, 1868, and June 7, 1879.

The capital stock of a foreign corporation doing business in this State is, under the Acts of May 1, 1868 (P. L. 108), and June 7, 1879 (P. L. 112), liable to taxation.

A ferry company, incorporated by the laws of New Jersey to run steam ferry-boats to and fro across the river Delaware from New Jersey to Pennsylvania, which company holds its corporate meetings in New Jersey, has its ferry-boats registered in New Jersey, and has no real or personal property in Pennsylvania other than the lease of a slip or dock, absolutely necessary for the accommodation of its ferry-boats, is to be deemed to do business within the State of Pennsylvania, so far as to render the capital stock thereof liable to taxation under the laws of Pennsylvania.

GREEN, J., dissents.

Error to the Common Pleas of Dauphin County.

Appeal by the Gloucester Ferry Company from the decision of the Auditor-General and State Treasurer, imposing a tax on the said company for the years 1865 to 1879 inclusive, based upon the appraised value of its capital stock, under the Revenue Act of June 7, 1879 (P. L. 112), which is substantially a re-enactment of the Act of May 1, 1868 (P. L. 108), and which provides, *inter alia*, as follows:—

"Section 4. That every company or association whatever, now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State or territory of the United States or foreign government, and doing business in this Commonwealth . . . . shall be subject to and pay into the treasury of the Commonwealth annually a tax, to be computed as follows, namely:" etc.

The following case stated was presented for the judgment of the Court:—

The "Gloucester Ferry Company" was duly incorporated by Act of the General Assembly of the State of New Jersey, approved 9th March, 1865, with a capital stock of $50,000, divided into shares of $50 each, to erect a steamboat ferry from some point in the town of Gloucester, in the township of Union, in the county of Camden, State of New Jersey, to such place or places in the city of Philadelphia as should best secure the public convenience and interest of said corporation, and for that purpose, with power to purchase or lease real estate, erect wharves, piers, slips, buildings, and all other necessary appendages, and to build steamboats, vessels, and ferry-boats, and with further power to make contracts with other corporations and with individuals for transporting or carrying any kind of goods, merchandise, freight, or passengers.

By the said charter it is provided that the president and directors might, from time to time, make such dividends of the net profits of their business as they might deem prudent. Stockholders' meetings were directed to be held in the said county of Camden, and notice of the said meetings is directed to be published in one or more newspapers printed in the county of Camden. The company has never had any charter from the State of Pennsylvania.

Since the year 1865 the said corporation has maintained a ferry between said town of Gloucester and city of Philadelphia, across the river Delaware, leasing or owning steam ferry-boats for such purpose. At each of said places it has rented, until recently, a slip or dock. Within a year it has purchased the real estate in the county of Camden needed for its purposes. It still continues to lease that used by it in the city of Philadelphia.

It has never transacted any other business saving that of ferrying passengers and freight across said river between said town and city.

It has never owned any real or personal property located in the city of Philadelphia.

Its property consists exclusively of real estate as aforesaid in the county of Camden, certain steamboats engaged in said ferryage, and a lease of a wharf slip or dock in the city of Philadelphia. It has never consisted of anything additional. The boats now owned by it are registered at the said port of Camden, and it has never owned any boats registered in any port of the State of Pennsylvania. No boats used by it have ever been allowed to remain in any portion of the last named State, saving so long as has been necessary to receive and load passengers and freight thus ferried or to be ferried.

The Auditor-General and State Treasurer stated an account against said company on the 7th July, 1880, of taxes on its capital stock, based upon the appraised value thereof, for the years from 1865 to 1879, both inclusive, finding the amount of $2593.96 to be due to the Commonwealth.

The present case is an appeal, duly entered from said account stated.

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If the Court be of the opinion, under the above statement of facts, that the company is liable to the Commonwealth for a tax upon its capital, then judgment shall be entered in favor of the Commonwealth against said company for the amount of said statement, viz., $2593.96, with interest, costs, and commission of Attorney-General from 7th July, 1880; but, if it be of the opinion that the said company is not liable to pay a tax on said capital stock, then judgment is to be entered in favor of the said company.

Either party is to be allowed an appeal or writ of error.

The Court, after argument, entered judgment on the case stated in favor of the Gloucester Ferry Company, PEARSON, P. J., delivering the following opinion, after stating the facts:—

[The ferry and its company was never in any manner recognized by the laws of Pennsylvania, nor by its State officers, until the year 1880, when it was for the first time taxed. Have we any law imposing a tax on this company? If so, for how much?]

It is conceded by the Attorney-General on the argument that there was none prior to that on the first day of May, 1868, the 4th section of which, it is contended, enabled the officers to impose a tax under these words: "That the capital stock of all companies whatever, incorporated by or under any law of this Commonwealth, or incorporated by any other State and lawfully doing business in this Commonwealth, shall be subject to pay a tax into the treasury of the Commonwealth annually at the rate of one-half mill for each one per cent. of dividend made or declared by such company; and in case of no dividend being made or declared by such company, then three mills upon a valuation of the capital stock of the same made in accordance with the second section of this Act." That valuation was to be made under oath by the officers of the company, and if the State officers were dissatisfied with the valuation, then to be made by themselves. Was this New Jersey corporation doing business in this State according to the meaning and intention of that statute? Was it subject to a taxation on the whole value of its capital stock as imposed? If not on the whole, on what part? Was the defendant exempt from taxation on the ground of trade and commerce between the States?

It may be conceded that this New Jersey corporation was doing some business in this State. Its boats stopped at a wharf or slip daily in landing its freight and passengers. For the most part passengers stopped on and off at that point. [The company had no office and owned no land.] Did the Legislature intend by such a transaction of business that this company should be taxed on its whole capital stock, or even on the half of it? For if it can be taxed on the half it can on the whole. If the Northwestern Railroad, with a capital of forty millions, incorporated under the laws of Illinois or Wisconsin, should occasionally land a car load of grain in Pennsylvania, our officers could lawfully tax it at the rate of three mills on its whole capital stock, although there was not a dollar of its stock held in this State nor any of its stockholders residing here, or any office or warehouse opened within our borders. With quite as much plausibility could the whole stock of the Erie Railway be taxed in Pennsylvania because that road passed through twenty-six miles of our territory, or the whole stock of the Lake Shore and New York Central, including the Lake Shore Road from the city of New York to Chicago, be taxed because the road ran through the triangle. Such a system of taxation was never practised in Pennsylvania. We tax in proportion to the capital employed or ground used in our State, not in proportion to the whole capital stock. Some appraisement is always made, and regard had to the use made of the occupancy. But it is urged that one-half of the river ferried over belongs to Pennsylvania. The river is one of the great highways of nature, and no State has a right to the water. Any State, or the nation at large, has an equal right of navigation. No one can claim an exclusive right. Vessels from Maryland or Virginia have an equal right to sail on its waters with those from Pennsylvania or New Jersey, even to the margin of low water. We are referred by the Attorney-General to the case of the Trenton Delaware Bridge Company, reported in 9 Am. Law Register, 298, to show that this company can be taxed to the value of one-half of its capital. We are unable to see the slightest analogy between the cases. That company was incorporated by both States, the bridge was authorized by both; it was a permanent and solid structure, erected equally over the soil of each, and although the most of the stock may have been held in New Jersey, that was unimportant. The structure was on the territory of each, and this State would have the same right to tax that part within her borders that she would a tract of land improved by New Jersey capital. The mere right of navigation over public waters is different from building permanent structures by authority of our laws. New Jersey neither asked nor was required to ask for leave to navigate the river, nor had it any necessity to ask for leave to land its passengers. It had that right by the comity of nations and the navigation laws, and our State could not prohibit it.

In a case where the State undertakes to tax, it must show jurisdiction over the person or the property. Here it has none over either. [How can it tax the stock? It has no jurisdiction over it, as it is no wise held in this State.] The

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Legislature might impose a tax on wharves, ships, etc., but it probably never has, and if it might so do, or has so done, this tax has not been so imposed. It would be by valuation, or by the trip, and it is held that it may charge for the use of wharves, etc., a reasonable sum, but not by the tonnage of the vessel. (20 Wallace, 577, 582.) And ships may be taxed to the owner, like other property, at his residence. (9 Otto, 283–4.) These vessels are all registered at their port in New Jersey, where the owners and masters reside, and it is clearly settled that they cannot be taxed by reason of going into, landing, or trading in any other port in the United States. Therefore where a vessel was registered in New York it could not be taxed for trading in Mobile, or any of the ports of California or Oregon. (Hays *v.* The Steamship Company, 17 Howard, 596; 23 New York, 227.) It would interfere with the commerce of the States if the vessel could be taxed at every port where it landed. (16 Wallace, 475.) The property is there for a temporary purpose, and does not become incorporated with that of the State. (Idem, 476.) And touching at a port, and trading there did not render the vessel liable to be taxed there. (Idem, 478–9.) Congress has the power to regulate the commerce of the country, and the States cannot impose a tax on it otherwise or greater than that imposed by Congress, nor can the effect be changed by changing the name, or taxing the occupation of the master. Per GRIER, J., in the Passenger Cases. (7 Howard, 458.) The State cannot tax the landing of passengers. (Idem.) [Our State can neither tax nor prohibit this New Jersey corporation from landing its passengers in this State, for if we can tax we can prohibit, as was declared by Chief Justice MARSHALL in several of the early cases, and the principle is fully recognized in Crandall *v.* The State of Nevada (6 Wallaec, 35)]. The State cannot change the effect by taxing the bill of lading instead of the registered vessel, or its freight. (Almy *v.* The State of California, 24 Howard, 169.) All taxation must relate and be limited to persons, property or business within the State, all must apply to one or the other. (15 Wallace, 300.) [In the present case our State cannot lawfully impose this tax, it is not on the person or property, all of which is situated in New Jersey, nor can it on the business, for that is protected for the benefit of trade, there being none other conducted than the landing and receiving of passengers. This is part of the commerce of the country. The passengers are secured in going and coming by the Federal Constitution, nor can these principles be evaded by attempting to impose the tax on the stock of the company; it is a mere change of names and cannot change the effect. We are, therefore, clearly of opinion that the whole of this tax is illegal and assessed without authority, and even if our statute would bear the construction put on it by the State officers it would be in violation of the laws and Constitution of the United States.]

Here our opinion might end, but as there is a reviewing Court we will notice some erroneous items. There is no law authorizing the assessments of 1865, '66, and '67, and we are not aware of any authorizing six mills on the stock for 1875, 1876, and 1877. When the officers came down to 1874, they appraised one-half of the stock at 32,000. The same for 1875–6–7 and 8, and for 1879 at 50,000. Nothing has been shown, or even suggested, to authorize these changes, but as this is a case stated, we may be going beyond our power in suggesting all of this doubling over.

The Court gives judgment in favor of the defendant on the stated case.

The Commonwealth took this writ of error, assigning for error the portions of the above opinion enclosed in brackets, and the entry of judgment for the company defendant.

Lyman D. Gilbert, Deputy Attorney-General (with whom was *Henry W. Palmer*, Attorney-General), for the plaintiff in error.

This is a tax on the capital stock of the corporation, not on its property in which the capital may be invested, nor on the passengers or freight transported by it. It therefore clashes with none of the following decisions relied on in the opinion of the Court below.

Cannon *v.* New Orleans, 20 Wallace, 577, 582.
Transportation Co. *v.* Wheeling, 9 Otto, 273, 283, 284.
Morgan *v.* Parham, 16 Wallace, 471, 475, 476, 478.
Hays *v.* Steamship Co., 17 Howard, 596.
Hoyt *v.* Commissioners, 23 New York, 227.
The Passenger Cases, 7 Howard, 283.
Almy *v.* California, 24 Howard, 169.
Crandell *v.* Nevada, 6 Wallace, 35.

The character of this tax on capital stock is one of the oldest forms of corporate taxation, and is found in all our laws which raise revenue from corporations. It is expressly authorized by the Act of June 7, 1879 (P. L. 112), not only on domestic corporations, but on all those "incorporated by any other State . . . and doing business in this Commonwealth." The company comes within this clause for the following reasons. A State has the power to exclude foreign corporations from its limits, or prescribe the conditions of their entrance.

Augusta *v.* Earle, 13 Peters, 519.

It crosses the Delaware River, the bed and channel of which, *ad medium aquæ filum*, belong respectively to Pennsylvania and New Jersey.

Bennett *v.* Boggs, Baldwin's Rep., 72.
Vattel, § 266.

It leases an office and wharf in Pennsylvania,

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and is dependent thereon for the doing of its business. It thus comes into our jurisdiction with its capital stock, which is part of its organic faculty, and does business within our limits with the same powers and attributes it possesses in New Jersey. It thus accepts the conditions of our laws which expressly or impliedly permit it to do business here, imposing the liability to taxation on its capital stock. The tax is not upon the shares of stock in the hands of individual holders, and we do not require to have jurisdiction over them.

Field on Corporations, § 516.

A somewhat similar tax was imposed on the Erie Railway Co. and the Delaware and Hudson Canal Co., when they sought admission to and passage over our soil.

The tax is not obnoxious to the Constitution of the United States as a tax on commerce any more than is a tax on gross receipts of inter-State railroad companies. That it may indirectly increase the cost of transportation is no objection to the validity of the tax.

State Tax on Gross Receipts, 15 Wallace, 284.
Erie Railway Co. *v.* Pennsylvania, 21 Wallace, 492.
Delaware Railroad Tax, 18 Wallace, 206.
Railroad Co. *v.* Commonwealth, 16 Sm. 73.

John G. Johnson, for the defendant in error.

The Gloucester Ferry Company did not "do business in this Commonwealth." It navigated a navigable river, and stopped at the boundary line of the State, there landing its passengers. Where one of the termini of a ferry company is at a city in another State, it is not taxable under a law taxing boats "*within* the city."

St. Louis *v.* Ferry Co., 11 Wallace, 430.

The company is not within the taxing *intent* of the Act of 1879, which intent was to tax only the capital employed in the business done in the State. This is apparent from the provision taxing the capital employed "in the name of any other company," etc.

The company is not within the taxing *power* of the Commonwealth. The right to tax depends on the duty of protection, and no protection is given in this case. The right of navigating the navigable rivers of the United States, including landing on the shores, belongs to all its citizens. It is not competent for a State to tax foreign shipping or passengers landing on our shores in the course of trade, nor indirectly to tax the corporation owing such ships. The same principle applies to foreign ferry corporations.

The railroad-tax cases cited do not apply, as the railroad companies had obtained rights to the soil, and the tax was only laid on the capital employed within the State.

October 17, 1881. THE COURT. In this case a single question is presented for our consideration. Did the defendant do business within the State of Pennsylvania during the period for which the tax in controversy was imposed? If it did, then it came within the provisions of the Acts of May 1, 1868, and June 7, 1879, and was subject to the tax therein prescribed.

In the discussion of this case it must not be forgotten that a corporation has no natural rights; that it is but a legal entity, an artificial person, and that its rights spring either from legislative enactment or from comity. Within the State of its creation it has no powers but those conferred upon it by the legislative act which called it into being, and whether it shall or shall not perform any of its functions in a foreign State depends wholly upon the will of such State, expressed either by statute or implied under that general law known as international comity. (Bank of Augusta *v.* Earle, 13 Peters, 519.)

From this view of the case it becomes obvious, that the Legislature may not only tax foreign corporations doing business in this State, but, if it so chooses, as was done by our Act of March, 1810, in regard to foreign insurance companies, altogether prohibit the transaction of such business. It follows that there has been a good deal of learning wasted in this case in the endeavor to assimilate the rights of this corporation to those of individual citizens, when, in fact, they are entirely dissimilar, and based on principles totally different.

Returning, then, to the only question in this case, the inquiry is, Did this ferry company do business in the State of Pennsylvania? But this question may be readily solved by the answer which must necessarily be given to another question; that is, Where were its principal, or for that matter, only points, of operation? The answer is, at Gloucester and Philadelphia. Its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf in Philadelphia to its wharf in Gloucester. At each of these points it had a place, that is, a wharf, where its main business, namely, its receipt of freight and passengers, was transacted, and, for that business, it was just as much dependent upon the one place as upon the other. Again, a wharf or landing place was necessary at each end of its route; the one it occupied at Gloucester was owned in fee, and the one in Philadelphia it held under a lease, but as it could hold by purchase, in New Jersey, only by virtue of the power derived from the statutory will of the Legislature of that State, so it could hold by lease in Philadelphia only by the implied consent of the Legislature of this Commonwealth. It thus appears that the defendant was dependent equally, not only for its business, but its power to do that business, upon both States, and might, therefore, be taxed by both.

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We may here state that, with the Court below, we cannot understand by what authority the assessments for the years 1865, 1866, and 1867 were made. Nevertheless, as the case stated provides for no modification, in this respect, of the action of the taxing officers or of the judgment which may be entered against the defendant, we do not feel ourselves justified in making such an attempt, and this the more so since we have been furnished with no data by which a modification or correction can be made.

The judgment of the Court below is now reversed, and it is ordered that judgment on the case stated be entered for the Commonwealth, and against the defendant, in the sum of $2593.96, with interest from July 7, 1880, Attorney-General's commissions and costs.

Dissenting opinion by GREEN, J. In my judgment the fundamental question in this case is, whether the Legislature of Pennsylvania possesses the lawful power to impose the particular form of taxation sought to be enforced. The subject matter of the proposed taxation is capital stock of a foreign corporation. The corporation defendant is established and exists by the laws of New Jersey. Its entire capital is there held by persons who reside in that State. Its place of business, its offices, and all its property are within that jurisdiction. It has never received or claimed the benefit of any legislation of this Commonwealth. Have we the right in these circumstances to tax its capital stock?

In the case of the State tax on foreign-held bonds (15 Wallace, 300) it was held that "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imports, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them the taxation may be exercised in a great variety of ways." Now in the present case the proposed tax is levied upon a form of property, capital stock. It is not a tax upon persons natural or artificial. It is not specifically a tax upon business. By the case stated it is declared that it is a tax upon the capital stock of the corporation defendant, and it is agreed that if the Court shall be of opinion that the defendant is not liable to pay a tax on its capital stock, judgment shall be entered in its favor.

In view of these considerations the question recurs, How can this tax be sustained? It is directly and specifically a tax upon capital stock which is neither in fact nor in law within the jurisdiction of the State of Pennsylvania. In the case of Maltby *v.* Reading & Columbia R. R. Co. (2 P. F. Smith, on p. 146) this Court said: "It is undoubtedly true that the Legislature of Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." . . . . "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but where the property is within our jurisdiction and enjoys the protection of our State government it is justly taxable, and it is of no moment that the owner who is required to pay the tax resides elsewhere." See also St. Louis *v.* The Ferry Co. (11 Wall. on p. 430). It is clear to my mind that, viewed as a tax upon property which is not within the jurisdiction of this Commonwealth, the proposed tax is invalid.

But it is claimed that the corporation defendant does business within the Commonwealth, and therefore comes within the words of the fourth section of the Act of May 1, 1868, which imposes taxation upon the capital stock of all companies incorporated by the law of this Commonwealth or of "any other State and lawfully doing business in this Commonwealth." The conclusion is drawn that because the defendant does business within our limits, the tax upon its capital stock is lawful for the reason that the statute authorizes it. It will be perceived that this conclusion is not legitimate unless, as to this particular case, the statute is a valid exercise of legislative power. Without that element the words of the statute, as to the present controversy, are merely nugatory and hence we are at once and necessarily remitted to the inquiry, Can the Legislature lawfully impose such a tax? It may be conceded that, as a general rule, if the particular business done, is done by virtue, or indeed by permission of legislative authority, the right to tax exists. For then there is a subordination of the corporate action to the legislative will which carries with it the power of prescribing the terms upon which the corporate action shall be exercised. This would certainly apply to all cases in which the right to come within the territorial limits of the State, and construct buildings or works of any kind and carry on business, is conferred upon foreign corporations. When such corporations accept such privileges they of course become subject to the jurisdiction and supervision of the legislative authority from which those privileges are obtained. But this doctrine fails of application if the particular business done does not depend upon either the express or implied consent of the legislative authority of the territory where it is conducted. This leads us to consider the character of the business done by the corporation defendant. In the case stated the subject is thus described. "It

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(the defendant) has never transacted any other business saving that of ferrying passengers and freight across said river between said town and city." The points between which this carriage of freight and passengers transpires are the town of Gloucester, in the State of New Jersey and the city of Philadelphia, in the State of Pennsylvania, and the space traversed is the water of the river Delaware, and the means employed are steam ferry-boats. The waters of the river Delaware at the port of Philadelphia constitute one of the highways of nature, and the commerce of all the States, indeed of all the world, may traverse them without the necessity of obtaining the consent of the Legislature of Pennsylvania. When the ferry-boats of the defendant touch the territory of Pennsylvania at their landing place in Philadelphia they are in contact with our soil but they have not traversed any portion of it. The surface of the river being that of a public navigable stream does not belong to the conterminous States in the sense of exclusive ownership whatever may be the title to the bed underneath. In the case of St. Louis *v.* The Ferry Co. (11 Wall. 423) it was held that the ferry-boats of a corporation incorporated in one State and carrying passengers and freight forward and backward across a river to a city situate in another State, are not taxable under a law taxing boats within the city, in a case where the relation of the boats to the city was simply that of contact as one of the termini of the voyage. In this case the boats plied between East St. Louis in the State of Illinois, where the Ferry Co. was incorporated, and the city of St. Louis, in the State of Missouri. On p. 431, in speaking of the relation of the boats to the city, the Court say, "their relation to the city was merely that of contact there as one of the termini of their transit across the river in the prosecution of their business." This being so it is evident that in traversing the river the boats of the defendant are not to be regarded as in the use and occupancy of any part of the soil of the State. Is then the discharge and receipt of passengers and freight on and from the wharf at Philadelphia such a transaction of business within our territory as subjects the parties engaged in it to State taxation for the exercise of the privilege? In other words, may a State impose taxation either directly or indirectly upon traffic between the States? I am clear that such a power does not exist, because it would be in direct contravention of at least two distinct provisions of the Federal Constitution; 1st, that which declares that "no State shall without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." 2d, that which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

It cannot be questioned that the transportation of freight and passengers, over navigable waters, in vessels, is commerce in its most essential features. In Brown *v.* The State of Maryland (12 Wheat. 419), Ch. J. MARSHALL, in defining commerce, said: "Commerce is intercourse; one of its most ordinary ingredients is traffic." Again, in Gibbons *v.* Ogden (9 Wheat. 1), he said: "Commerce, undoubtedly, is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." . . . "The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it." . . . "The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word, 'commerce.'" . . . "The subject to which the word is next applied is to commerce 'among the several States.' The word 'among' means intermingled with; a thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior." These judicial definitions are sufficiently precise to establish that the word "commerce," as used in the Federal Constitution, imports, and includes intercourse and traffic between the States of the Union over navigable waters, as well as between the States and foreign countries. It follows, as was held in the cases cited, and in other cases, that the power to regulate inter-State commerce, resides in the federal government and not in the States, and therefore the right to conduct this commerce or traffic does not depend upon the will of the States, but may be exercised altogether independently of them. Ch. J. MARSHALL further said, in the case last cited: "The power of Congress then comprehends navigation, within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition, now under consideration, applies." While it is undoubtedly true that commerce among the States is a subject of Congressional regulation and control, it is also true that a great variety of legis-

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lation by the States may lawfully be applied to it. These are ordinarily called police regulations, and are known as inspection laws, quarantine laws, health laws, and others of a similar character, and they are clearly defined by AGNEW, J., in the opinion of this Court, in the case of Craig *v.* Kline (15 P. F. Smith, 399). But the power to impose taxation in any form upon inter-State commerce has been uniformly held, by the Supreme Court of the United States, and by several of the State Courts of last resort, to reside in Congress alone. Accordingly, in whatever form the question has arisen, and with whatever degree of indirectness State taxation has been imposed upon either foreign or inter-State commerce, it has been always rejected by the supreme judicial authority of the land as an incompetent exercise of legislative power by the States. In the case of McCulloch *v.* The State of Maryland (4 Wheat. 316), it was held that the Legislature of Maryland had no power to impose taxation upon the circulation of the Bank of the United States, which had established a branch in that State. The following propositions, among others, were ruled in that case:—

The Bank of the United States has constitutionally a right to establish its branches or offices of discount and deposit within any State.

The State within which such branch may be established cannot, without violating the Constitution, tax that branch.

The State governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

The States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the National Government.

In the case of Brown *v.* The State of Maryland (12 Wheat. 419), it was held that an Act of a State Legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale, or package, etc., to take out a license, for which they shall pay fifty dollars, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the Constitution of the United States, which declares that "no State shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes." It will be perceived that the Act in question, of the State of Maryland, simply required importers of foreign goods to take out and pay for a State license before selling their imported goods. But it was held that the license fee was, in practical effect, the equivalent of a duty on imports, and that it was also a restriction upon foreign commerce, and therefore came in conflict with both the constitutional prohibitions above stated. The Chief Justice reasoned thus: "There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold—no object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." It seems to me that this reasoning is entirely applicable to the case at bar. If the business done by the defendant may be used as a means of imposing a tax not otherwise lawful, and yet this business is not subject to the taxing power of the State, then all inter-State commerce, and indeed foreign commerce also, becomes dependent upon the will of the States, and may be controlled and even prohibited by them, though in clear violation of the constitutional provisions. If Pennsylvania may impose a tax on the capital stock of a foreign navigation company, because one of its vessels touches at one of her ports and there discharges and receives passengers and freight, then every other State at whose ports the vessels of the same company may transact the same kind of business, may impose the same tax. Or if the same vessel touches at different State ports on our coast the entire capital stock of the company owning her may be taxed at each port, and thus the whole commerce conducted by such company may be destroyed.

The case of Brown *v.* Maryland, above cited, proves that it is not at all necessary to show that such results have followed or will follow, it is enough to show that they are possible. In discussing the clause relating to the regulation of commerce, Ch. J. MARSHALL further says: "if the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another for the purpose of re-exportation" . . . "or from taxing the

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transportation of articles passing from the State itself into another State for the purpose of traffic?"

Here is a direct denial of their right to do the very thing which is sought to be done in the present case, to wit, taxing the transportation of articles from State to State. It matters not that it is indirectly done. The result is precisely the same as if done directly. It cannot be that a State may tax the capital stock of a corporation *because* it does a certain kind of business, when the business itself is not within the power of State taxation. In the case of McCulloch *v.* Maryland, before quoted, the Chief Justice said: "That the power to tax involves the power to destroy, that the power to destroy may defeat and render useless the power to create, that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other with respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied."

In the case of Gibbons *v.* Ogden (9 Wheat. 1) the following propositions were declared:—

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States.

The power to regulate commerce is general, and has no limitations but such as are prescribed in the Constitution itself.

The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State.

The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers.

Ch. J. MARSHALL in the course of his opinion says: "Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress." In Cooley's Constitutional Limitations (p. 591) the writer says, "Congress is empowered to regulate commerce with foreign nations and among the several States; and whenever a river forms a highway upon which commerce is conducted with foreign nations or between States, it must fall under the control of Congress, under this power over commerce."

In the Passenger Cases (7 Howard, 283), it was held that a State law which requires the masters of vessels engaged in foreign commerce to pay a certain sum to a State officer, on account of every passenger brought from a foreign country into the State, or before land ng any alien passenger in the State, is inoperative by reason of its conflict with the Constitution and laws of the United States.

This was a much contested case, and there was a wide difference of opinion among the Judges who decided it. Several of them, regarding the laws in question as police regulations and health laws, dissented, and held them to be within the power of the State, but the decision of the majority was the other way, and has received the assent of the bench and bar of the country to the present time.

MCLEAN, J., in delivering the opinion of the majority said: "Commerce is defined to be an 'exchange of commodities.' But this definition does not convey the full meaning of the term. It includes 'navigation and intercourse.' That the transportation of passengers is a part of commerce is not now an open question." The decision of the cause was put upon the ground that the transportation of passengers was a part of commerce and therefore it was subject to federal control and regulation, and it was not competent for a State to impose taxation upon it in any form.

In the case of Hays *v.* Pacific Mail Steamship Co. (17 How. 596) it was held that an ocean steamer owned and registered in New York, and regularly plying between Panama and San Francisco and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive passengers and cargo, and in Benicia only for repairs and supplies, is not subject to taxation by the State of California.

One of the reasons for the decision is thus stated in the opinion of the Court: "Now, it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax."

In the case of Crandall *v.* State of Nevada (6 Wall. 35) it was decided that a special tax on railroad and stage companies for every passenger carried out of the State by them is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel, and while it was not a tax on the business of the companies, and was not in conflict with the provision in the Constitution forbidding a State to lay a duty on exports, nor with the provision conferring on Congress the power to regulate commerce, yet it was void under the Federal Constitution as interfering with the rights both of the United States to have the attendance of citizens at all points where the functions of government are to be performed, and of the citizens themselves to enjoy the free right of transit by the ordinary means of travel through the several States.

It will be observed that in this case the tax was a local one, imposed upon local companies within the State jurisdiction and upon business done

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within the State. There was no express provision of the Federal Constitution with which the Legislature imposing the tax conflicted. Nevertheless it was held void, because it was indirectly, though not directly, a tax on the privilege of free transit through the several States. MILLER, J. (on p. 46), reasons thus: "But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States, covering the only practicable routes of travel from east to west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."

On page 49, Justice MILLER quotes and adopts the following portion of the dissenting opinion of Chief Justice TANEY, on a point not disputed in the passenger cases. "We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in our own State. And a tax imposed by a State for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

In the case of the State Tax on Railway Gross receipts (15 Wall. 284) it was conceded throughout the opinion of the majority of the Court, that if the taxation there in question had been upon the transportation of freight from one State to another, it would have been invalid. STRONG, J. (on p. 292) said: "We have recently decided in another case between the parties to the present suit, that freight transported from State to State is not subject to State taxation, because thus transported. Such a burden we regard as an invasion of the domain of Federal power, a regulation of inter-State commerce which Congress only can make."

In the case of Cannon *v.* New Orleans (20 Wall. 577) it was held that any duty or tax or burden imposed under the authority of the States, which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity, is a tonnage tax within the meaning of the Federal Constitution, and therefore void.

The ordinance in question in this case imposed "levee dues" on all steamboats mooring or landing at the port of New Orleans, and measured the amount by the tonnage of the vessels. It was decided that although the levee dues were imposed as a compensation for the commercial facilities afforded by the city, and did not purport to be a duty on tonnage, yet the practical effect of their imposition was to create such a burden, and as the privilege of arriving and departing was the real basis of the claim for dues, the ordinance was declared void as being contrary to the Federal Constitution.

Thus we see that in whatever manner or by whatever devices the right to transport passengers or freight from one State to another has been made the subject of State taxation of any kind or for any purpose, such taxation has been declared void as contrary to the Federal Constitution. The validity of such taxation cannot depend upon the character of the person exercising the right of transportation in question. It has been repeatedly held that a corporation is a citizen of the State by whose law it is created. But whether the person exercising the right of transportation under consideration be natural or artificial, the applicability of the constitutional prohibition must be the same in either case.

It is equally immaterial that a wharf is leased in Philadelphia by the defendant on which its business of discharging and receiving passengers and freight is conducted. The use of such a wharf is a mere incident to the business, and can in no sense suffice to remove the fundamental invalidity of the proposed taxation. That taxation is void because the State has no power to impose it upon anybody or in any circumstances, or for any cause.

I cannot assent to the position that the defendant becomes subject to a right of taxation by the Legislature of Pennsylvania because it exercises its functions within our territory by implication under the law of international comity. Such implication might justify a taxation which could be lawfully imposed, but it cannot suffice to remove the taint of absolute invalidity. A right to tax cannot exist by mere implication when it could not be exercised by direct legislation. If our Legislature should pass a law imposing a tax upon the transportation of passengers and freight between the States of New Jersey and Pennsylvania, it would undoubtedly be void as contrary to the Federal Constitution. No such power exists in the States. But if a State cannot impose such taxation by express enactment, of course it cannot do so by any species of implication.

I am of opinion that the taxation sought to be imposed in the present case cannot be sustained, because:—

First. As a tax upon capital stock specifically it is invalid for want of jurisdiction.

Second. As a tax upon capital stock by reason of business done within the Commonwealth, the particular business done being the transportation of freight and passengers over public navigable waters from one State to another is not within

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the power of State taxation, and hence our Act of 1868 is inapplicable to the case.

For these reasons I feel obliged to dissent from the opinion of the majority of the Court reversing the judgment of the Court below.

A petition for reargument was subsequently filed by the plaintiff in error on the ground that the attention of the Court had not been called to a contract entered into between the States of Pennsylvania and New Jersey in 1771, whereby it was agreed that the river Delaware should be and remain a common highway free to both contracting parties.

Act of Penna. March 9, 1771, 1 Sm. L. 322.
Act of N. J., Dec. 22, 1771, Allinson's Laws, 347.

October 31, 1881. THE COURT. Petition for rehearing refused.

Jan. '80, 190. March 8, 1881.

Ward v. The Lebanon Mutual Ins. Co.

Insurance—Untrue representations—Warranty—When breaches of warranty are not waived—Effect of assessments on policy, part of which has become, by fire, a chose in action.

Untrue representations, made a warranty, avoid a policy of insurance.

A perpetual policy of insurance covered a hotel and contiguous dwelling-house. The hotel was burned, and suit was brought on the policy. The insurer discovered that a warranty in the application was untrue, and defended on that ground. Pending the action, the insurer treated that portion of the policy covering the dwelling-house as still in force, by levying assessments on it for two successive years, which were paid:

Held (sustaining the judgment of the Court below), that whether the contract was entire or not, the rights of the parties were fixed on the occurrence of the fire; and the levy of assessments did not impose upon the insurer any new liability, *quoad* the subject-matter of the suit, nor estop it from availing itself of the effect of the false warranty.

Error to the Common Pleas of Bradford County.

Debt, on a policy of fire insurance by John O. Ward against the Lebanon Mutual Insurance Company. Pleas: Nil debet, payment with leave, etc.

The cause was tried in February, 1879, and the facts developed, the findings of the jury, and the points reserved, sufficiently appear in the following opinion of the Court below, per MORROW, P. J., on the motion for judgment *non obstante veredicto*.

"On the 2d of December, 1871, C. T. Smith obtained an award of arbitration against John O. Ward for $650. It was appealed from December 19th, but remained a lien until February 10, 1873, when it was paid.

"On the 27th of February, 1872, Ward conveyed to C. B. Porter, for the consideration of $6000, a portion of the building covered by the policy in this case. It included all the land and first story of the building, twenty-five feet on Main Street and sixty feet deep on Poplar Street. About a month after this purchase Porter went into possession, and remained in possession until the entire building burned, September 8, 1876.

"Ward made application December 20, 1872, to the defendant for an insurance of $3000 on the hotel property and $2000 on his dwelling, situate directly in the rear of the hotel building. The rate on the hotel was sixty cents per $100 and forty cents on the hundred dollars on the dwelling-house. The policy covering both properties was issued the 24th of the same month, and was to continue in force until annulled by the defendant. Assessments were made and paid until the fire occurred. The dwelling was but slightly injured by the fire, to wit: $4.25, as found by the jury. The hotel building was entirely destroyed.

"In the years 1877 and 1878 the defendant laid two assessments on the policy, to wit: on $2000, the amount of the insurance on the dwelling. These assessments were paid by the plaintiff. At the time they were levied and paid, the defendant had knowledge of the Smith encumbrance, and also of the Porter purchase.

"Mr. Ward, in his application, agreed that his answers to the interrogatories were given as a warranty on his part as to the description of the property to be insured. He stated he was the sole and undisputed owner of the property, and that it was unencumbered; that the building was 100 feet on Main Street by 55 feet deep, and four stories high. He made no reservation or mention of the part owned by Porter, but covenanted and engaged in his application that 'the representation given in the application for the insurance is a warranty on the part of the assured, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property insured.'

"The jury found for the plaintiff in the sum of $2614, including $4.25, injury to the dwelling-house, and specially as follows:—

"1. That defendant corporation levied assessments numbered thirteen and fourteen at the dates stated, viz., years 1877 and 1878, and received pay thereon from Ward on the following dates, viz., 1877 and 1878. That at the time of such levy and assessments, the defendant had knowledge that the Smith encumbrance existed when the application was made; also of the conveyance to Clark B. Porter. That the defendant

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had knowledge that $10,000 additional insurance had been taken by Ward on the Ward House, and also $2000 additional on his dwelling-house.

"All the facts stated, including the special finding of the jury, are undisputed; at least, the facts in the special verdict are to be taken as true, and those contained in our statement are undisputed.

"The points reserved are:

"1st. Was the contract entire.

"2d. If so, were the rights of the parties—as they existed immediately upon the occurrence of the fire (Sept. 8, 1876)—altered, changed, or affected by the facts found in the special verdict? and—

"3d. Can the plaintiff recover under the undisputed evidence of the case?

"A decision of the last point involves the whole, so they need not be discussed separately.

"The claim on the part of the plaintiff is that even if the policy was void, it was made valid by the assessments numbered thirteen and fourteen, when the defendant had knowledge of the Smith encumbrance and Porter purchase, that the contract was simple and entire, ratified and made effectual by this act of the defendant.

"The application and policy constituted but one contract. They are to be taken and construed together. The representations made in the application were untrue, both as to the encumbrance on and ownership of the hotel property. The plaintiff stipulated that his representations were true, and should be a warranty on his part. They were untrue in fact, and the policy was void. (Cooper *v.* Farmers' Ins. Co., 14 Wright, 299.) Therefore whether the contract was entire or not, the plaintiff brought suit, and based his claim upon a contract which was void, and how could it be made valid by the acts of the defendant, which treated that portion of it relating to the dwelling-house as in force. The rights of the parties, so far as they relate to this suit, were fixed upon the occurrence of the fire. Suit was brought in a few weeks thereafter. No assessment was made until 1877. Admitting that the contract was entire (Fire Association *v.* Williamson, 2 Casey, 196, and Gottsman *v.* Penna. Ins. Co., 6 Smith, 210), it was at an end by the destruction of one building and a partial destruction of the other; that is to say, the plaintiff no longer held a policy of insurance against loss by fire, but he had a chose in action or right of action against the insurer and company. That right was based upon the policy. To hold that the defendant in treating the policy in force as to Ward's dwelling-house, incurred a new liability in the suit that was then pending would be to hold what was not intended or thought of by the parties, and against reason. It cannot be said that this is a refusal on the part of the Court to give these acts of the defendant an effect; for it is probable that they were equivalent to a severance of the contract, and had Ward's house been destroyed while the policy was treated as in force, he could have recovered. Indeed, I think that was the effect of levying and collecting these assessments after the 'Ward House' was burned. Whether it was or not, I am of the opinion that the defendant incurred no new or additional liability in this suit, and that taking all the undisputed evidence into consideration in connection with the special findings of the jury, the plaintiff cannot recover.

"And now, to wit, October 11, 1879, it is ordered that judgment be entered for the defendant upon the reserved points, *non obstante veredicto*."

The plaintiff took this writ, assigning for error the entry of the judgment, *non obstante veredicto*.

John F. Sanderson (with whom were *Edward Overton, Jr.*, and *N. C. Elsbree*), for the plaintiff in error.

The contract was entire. That two properties were insured is immaterial.

Fire Association *v.* Williamson, 2 C. 196.
Gottsman *v.* Pa. Ins. Co., 6 Sm. 210.

The breaches of warranty rendered the policy voidable, not void.

Pearsoll *v.* Chapin, 8 Wr. 9.
Negley *v.* Lindsay, 17 Sm. 217
Hummel's Appeal, 28 Id. 320.
Cumberland Valley Ins. Co. *v.* Mitchell, 12 Wr. 374.

The breach of warranty was waived by the assessment.

Pearsoll *v.* Chapin, *ante*.
Negley *v.* Lindsay, *ante*.
State Ins. Co. *v.* Todd, 2 N. 272.
Buckley *v.* Garrett, 11 Wr. 204.
Ins. Co. *v.* Slockbower, 2 C. 199.
Elliott *v.* Lycoming Ins. Co., 16 Sm. 22.

The question of severance of the contract should have been left to the jury.

Coursin *v.* Pa. Ins. Co., 10 Wr. 323.
Dumpor's Case, 1 Smith's L. C. 111.

Carnochan (*Davis* with him), for the defendant in error.

The truth of the warranty was a condition precedent to recovery.

State Mutual Ins. Co. *v.* Arthur, 6 C. 332.
Smith *v.* Ins. Co., 12 H. 320.
Cooper *v.* Farmer's Ins. Co., 14 Wr. 299.

The assessments having been made long after the cause was at issue, could not affect the rights involved in it. The insured was not misled by the assessments therefore no estoppel could operate.

The contract was severable.

Wood on Insurance, 298.
Clark *v.* N. E. Mut. Fire Ins. Co., 6 Cushing, 342.

March 21, 1881. THE COURT. We affirm this judgment upon the opinion of the learned President of the Court below.

Judgment affirmed.

PER CURIAM.

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Oct. & Nov. '81, 220. Oct. 7, 1881.

Commonwealth ex rel. Mark v. McCallin, Treasurer of Allegheny County.

Licenses to sell liquors in Allegheny County—Local Act of April 3, 1872, not repealed by general Act of April 12, 1875.

The local Act of April 3, 1872 (P. L. 843), entitled "An Act to regulate the sale of intoxicating liquors in the County of Allegheny" is not repealed by the general Act of April 12, 1875 (P. L. 40), regulating the sale of intoxicating liquors throughout the Commonwealth.

Error to the Common Pleas No. 1, of Allegheny County.

This was a petition filed by Gustav Mark, setting forth that he had complied with the requirements of the Act of Assembly of April 12, 1875 (P. L. 40), and had tendered to the defendant the sum of $50, and a bond, as provided for in said Act, and had requested the defendant to issue to him a tavern license, which he had refused to do. The petitioner prayed for a mandamus, requiring the defendant to issue such license. The Court granted a rule to show cause why an alternative mandamus should not issue.

The answer of the defendant admitted the facts averred, but denied that the petitioner was entitled to a license under said Act, and averred that the petitioner was within the provisions of the Act of April 3, 1872 (P. L. 843), which he had not complied with, and which required that in such cases as the petitioner's the applicant for license shall pay the sum of $300 therefor.

Demurrer to answer.

The special Act of April 3, 1872, relating to Allegheny County, provides, *inter alia*, as follows:—

SECTION 2. The treasurer of said county shall, annually, upon payment to him of the license fees, and the receiving of the bond hereinafter mentioned, grant the license hereinafter specified to citizens of the United States, of temperate habits and good moral character, for the term of one year, to be computed from either the first days of May, August, November, or February following the date of the granting thereof.

SECTION 5. That every vender of vinous, malt, or distilled liquors . . . shall be classed and required to give the bond, and pay annually, for and before obtaining their respective licenses as follows: Those who are esteemed and taken to make and effect annual sales . . . to the amount of $50,000, and less than $75,000, the eighth class, and pay $300.

SECTION 8 prescribes the form and amount of bond, and SECTION 19 provides a penalty for violation of the Act.

The general Act of April 12, 1875, provides, *inter alia*:—

SECTION 2. That licenses for sales of liquors, when not otherwise provided for by special law, may be granted by the Court of Quarter Sessions of the proper county, at the first or second session in each year, and shall be for one year. The said Court shall fix, by rule or standing order, a time at which application for said licenses shall be heard, at which time all persons applying, or making objections to applications for licenses, may be heard by evidence, petition, remonstrance, or counsel.

SECTION 3. All hotels, inns, and taverns shall be classified and rated . . . All cases where the estimated yearly sales shall be less than $4000, the fifth class and shall pay $50.

After argument the Court (STOWE, P. J.), on the authority of Kilgore *v.* Commonwealth (10 Pitts. L. Jour. N. S., 230), overruled the demurrer, and entered judgment for the defendant. The petitioner took this writ, assigning for error this action of the Court.

A. M. Brown (with him *R. M. Gibson* and *Josiah Cohen*), for the plaintiff in error.

The question in this case is not that raised in Commonwealth *v.* Kilgore, relied on by the Court below. That was a contest between the county and the State, the former claiming, under the Act of 1875, three-fourths of the tax which had been actually assessed and collected under the Act of 1875, and was in the hands of Kilgore as county treasurer. This Court, in deciding that question, expressed *incidentally* the opinion that the Act of 1875 does not repeal the Act of 1872, but it was not essential to the decision. The case at bar is one between the county treasurer and a tavern-keeper, who tendered the sum of $50 (due by applicants of his class), and was refused a license. We contend that, under the Act of 1875, it was a mere ministerial duty of the treasurer to accept the $50, and give his receipt, which is the license, to the applicant, leaving the question of where the money should go to be settled afterwards. The Act of 1875, being upon the same subject as the Act of 1872, modifies and repeals all inconsistent or repugnant provisions of the Act of 1872. Especially are the two Acts inconsistent in the matter of classification and license fees. The general Act of 1875 was passed to carry out the "uniform taxation" provided for in the Constitution of 1874. The Attorney-General decided that this Act related to Allegheny County, and it has been acted upon for six years by the courts and the people. If the inconsistent local laws in the several counties remain in force, what use is the general statute, passed "to *restrain* and regulate the sale of intoxicating liquors in the Commonwealth." A general law repeals a local or special law on the same subject so far as the latter is inconsistent with its provisions.

Keller *v.* Com'th, 21 Sm. 413.
Nusser *v.* Com'th, 1 Cas. 126.
Gwinner *v.* Lehigh Co., 5 Sm. 126.
Southwark Bank *v.* Com'th, 2 Cas. 446.
Norris *v.* Crocker, 13 Howard, 429.
Iron City Bank *v.* Pitsburgh, 1 Wr. 340.
Com'th *v.* Fayette Co. R. R. Co., 5 Sm. 452.
Potter's Dwarris on Statutes, 154-5.

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Bruce (*Negley* with him), for the defendant in error.

This case is ruled by Kilgore *v.* Com'th (10 Pitts. L. Jour. N. S., 230).

October 17, 1881. THE COURT. After hearing the able argument of the learned counsel for the plaintiff we see no reason to change the opinion expressed by this Court in Kilgore *v.* The Com'th (10 Pittsburgh Legal Journal, N. S., page 230), "that neither directly nor by implication does the Act of 1875 repeal that of 1872." The Act of 1872 was unquestionably constitutional when it was passed, and it must continue to be the law until repealed.

Judgment affirmed.

PER CURIAM.

Jan. '80, 21. March 4, 1881.

Miller v. Schlegel.

Mortgage— Will— Testamentary power to mortgage— Construction of.

A. devised to B. a piece of land in trust for C., for life, subject to the payment of a sum of money to A.'s executors. B. was authorized to mortgage the land to repay said sum, and after C.'s death to sell the same, in order from the proceeds to pay the said sum. B. executed a mortgage upon the land in C.'s lifetime, payable in one year from date. Suit being brought thereon prior to C.'s death:

Held, that the power did not oblige B. to execute a mortgage payable after C.'s death, but that he had full authority to execute a mortgage payable when he pleased, and that therefore the mortgagee was entitled to judgment.

Error to the Common Pleas of Berks County.

Scire facias sur mortgage by M. and E. Schlegel, executors of S. Schlegel, deceased, to use, etc., against Henry H. Miller, trustee under the will of Henry Miller, deceased.

Henry Miller by his will devised a piece of real estate to his son, Henry H. Miller, defendant, subject to the payment of $3400 to testator's executors; the said property to be held in trust for one Abraham Miller for life. The will further provided, *inter alia*, as follows:—

"And I do hereby authorize and empower the said Henry H. Miller, his heirs, executors, or successors, to mortgage the whole or any part of said lands for the security and repayment of said sum of three thousand four hundred dollars, and I do authorize and empower the said Henry H. Miller to sell said lands as soon after the death of the said Abraham Miller as he conveniently can, either at public or private sale, for the best price that can be obtained for the same, and out of the proceeds of said sale to pay and discharge the said sum of three thousand four hundred dollars, and any unpaid interest thereon, and out of the balance of the said proceeds to pay unto each of the children of the said Abraham Miller, then living, the sum of one hundred dollars."

On April 18, 1873, Henry H. Miller executed a mortgage of the above premises to S. Schlegel, to secure the sum of $3400. Said mortgage recited at length the above clauses of the will of Henry Miller, and was made payable in one year from the date thereof. Default being made in the payment of the interest thereon, this suit was brought in 1878 by the executors of the mortgagee.

Affidavits of defence were filed by the defendant, Henry H. Miller, trustee, and by Abraham Miller, the *cestui que trust*, suggesting that the trustee had no power under the will to execute a mortgage payable in one year, or at any time during the life of the *cestui que trust*, and that, as the mortgage recited the power at length, the mortgagee had full notice. Plaintiff thereupon obtained a rule for judgment for want of a sufficient affidavit of defence. After argument, the Court (SASSAMAN, J.) entered judgment for the plaintiffs, delivering the following opinion:—

"Both the trustee and the *cestui que trust* file suggestions of defence on matters arising under the recitation of the power of the trustee incorporated in the mortgage and derived from the will of Henry Miller, deceased, creating the trust estate, with power to encumber by mortgage, to a limited extent for a specified purpose. The power to mortgage certainly includes the power to promise to pay interest and principal of the loan at a certain time, and whatever time so agreed upon was fixed in the mortgage is the period of maturity of the obligation to pay. There is no question made that such time has not elapsed. We are referred to Maurer's Appeal (5 Norris, 380), which, it is claimed, decided a point that would be a legal barrier to a recovery here. That case only considered what would be the limit of the power to mortgage, and what the effect would be if that power were exceeded. Such a point does not arise here. The point here is whether, if there is power in a trustee to mortgage, and he does mortgage, such mortgage can be collected before the termination of the trust. A mortgage for the security of a loan is a matter of contract, and like all other contracts must be construed by its terms, as between borrower and lender. If the lender could not, at maturity, recover his loan from the borrower, such a power to borrow, vested in a trustee, could hardly be executed at all. It would produce too much uncertainty, and, from the necessity of the case, the power would become a powerless gift. We conceive the law would not allow such a result to occur. The point that the defendants contend for, if upheld, would likely prove disastrous to them as borrowers. The only safe way to construe such matters, we think, is to regard such powers as efficient, and to uphold contracts made under

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them the same as other contracts are upheld and enforced.

"The rule for judgment is made absolute, and judgment for plaintiff for debt and interest."

The defendant took this writ, assigning for error the entry of judgment for plaintiffs for want of a sufficient affidavit of defence.

R. L. Jones, for plaintiff in error.

This is a question of power, and not of contract. The power directs that the mortgage shall be payable out of the proceeds of the sale of the property, to be made after the death of *cestui que trust*. The conclusion of the Court below entirely defeats the intention of the testator, as that was clearly to secure to the *cestui que trust* the means of living. Under the judgment below, all the property must be swept away by the sale.

Maurer's Appeal, 5 Norris, 380.

G. F. Baer, for defendants in error.

The power to mortgage is not connected with the power given later in the will to sell the land after the death of *cestui que trust*. Their contention would make us wait supinely until the death of the *cestui que trust*, during which time defendant need pay nothing, and our security would soon become useless. Their contention would have rendered the power to mortgage utterly useless, if it had been made at the time the mortgage was created, for nobody would have loaned the money upon such terms.

If the sale takes place, it is not true that the trust will be destroyed; the proceeds, after payment of the amount of the mortgage, will be subject to the same trusts.

March 14, 1881. THE COURT. We affirm this judgment upon the opinion of the learned Judge in the Court below.

Judgment affirmed.

PER CURIAM.

Common Pleas—Equity.

C. P. No. 2. Sept. 1881.

Clark v. Gibson et al.

Mortgage— Mortgage without consideration— Duty of one purchasing a mortgage—Decree declaring mortgages void and ordering the same to be cancelled—Equity practice.

Hearing on bill, answer and proofs.

Bill in Equity, between John S. Clark, complainant, and John S. Gibson, Charles D. Knight, and Bergner & Engel, defendants.

The bill averred that the defendant, Gibson, being the owner of a lot of ground in the First Ward of the city of Philadelphia, divided the same into fifteen lots, and on April 28, 1877, executed and delivered to Chas. D. Knight fifteen mortgages of $400.00 each, one upon each lot. These mortgages were second liens. The mortgages were duly acknowledged and recorded, but no consideration was given for them. On March 16, 1878, the lots, upon which there were then three houses in the course of erection, were sold by the sheriff under an execution issued upon a judgment obtained subsequent to the mortgages.

At the time of the sale the complainant was a mechanics' lien creditor, and purchased the premises at the sheriff's sale to protect his interest.

No money was ever paid on the mortgages until after the sheriff's sale. On August 10, 1878, Knight, at the request of Gibson, executed an assignment of four of said mortgages to Bergner & Engel, which said assignment was duly recorded.

The said assignment was negotiated entirely by Gibson, the mortgagor, who received the consideration; and Bergner & Engel took the same with full knowledge of the facts attending the existence of the said mortgages, and knowing that they were owned by Gibson, and not by Knight, and were made without consideration, and for the mere purpose of raising money by their sale; and further, with full knowledge of the fact that Gibson's ownership of the properties covered by them had ceased, and that the title to the same was vested in complainant.

The bill further averred that the existence of the mortgages unsatisfied was a cloud upon complainant's title, that the injury thus done him was irreparable, that there was no remedy at law, and that defendant Gibson was entirely insolvent, and that, with the exception of the four mortgages assigned to Bergner & Engel, the whole of them were in the hands of Gibson, but that there was danger of their being assigned to *bona fide* purchasers. The prayers were:—

"I. That the Court will quiet complainant's title in and to the said premises, in such manner as to the Court shall seem proper; whether by a decree for the cancellation and delivery up of the said mortgages so held or pretended to be held by the said several defendants, and by declaring the same void and of no effect, or by ordering an assignment by the said defendants thereof to him, or the entry of satisfaction thereon respectively.

* * * * *

"III. And that the said defendants be severally enjoined by injunction, preliminary until the final decree in this cause, and perpetual thereafter, from asserting or setting up their said

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title, whether as purchasers, assignees, mortgagees, or otherwise, in and to the said premises and the said mortgages, and from making any conveyances, transfers, or assignments thereof; from molesting or interfering with the possession of complainant; and from doing any acts in any wise interfering with or prejudicial to his interest in the premises."

Decrees were entered against Knight and Gibson, *pro confesso*. Bergner & Engel filed an answer, in which they averred that they knew nothing whatever about the said mortgages previous to taking an assignment, but supposed them to be all right, nor did they know that Gibson's ownership of the properties had ceased, but supposed him to be the owner, as he so represented himself. That the first knowledge they had of the mortgages being without consideration, or Gibson not being the owner, was derived from plaintiff's bill.

That through an agent, one Snyder, they had sold certain personal property and fixtures to Gibson, who was to give his note with satisfactory security in payment therefor, that said Gibson mentioned a row of houses on Hoffman Street which he owned, on which there were second mortgages of four hundred dollars each, and he then stated that there were four of those mortgages that he could get the holder of to transfer as security to Bergner & Engel. This security was favorably thought of by Snyder, and he then made inquiry as to the value of the houses. Gibson then invited Snyder to accompany him and look at the houses, which Snyder did, and Gibson showed Snyder the row of houses, and told him he was getting fifteen dollars a month rent from each of the houses. On these representations and observations Snyder deemed the security offered sufficient, accepted the terms offered by Gibson, and the terms were duly carried out by an assignment of the four mortgages, the giving of Gibson's note for fifteen hundred dollars, and thereupon the property, which was the subject-matter of the agreement, was duly delivered to said Gibson.

The answer also averred that the houses were advertised for sale by the sheriff as "subject to mortgages of $1400 each" (viz., a first mortgage of $1000 and the mortgages in dispute), and that the deeds from the sheriff to the complainant contained the same recitals.

The proofs developed the facts substantially as set forth by the bill and answer.

Francis S. Cantrell and *Geo. P. Rich*, for complainant.

The statement by Gibson that he was the owner of the houses, coupled with his offer to procure an assignment of the mortgages, was notice that no consideration had been paid, and that the mortgages were subject to all rights of subsequent lien-creditors and purchasers. It will be noticed that no inquiry was made of any one but Gibson.

John Dolman, for defendants.

The duty of one purchasing a mortgage is to inquire of the owner of the land whether there is any defense. This was done in the present case.

Oct. 8, 1881. THE COURT. It is ordered, adjudged, etc., that the said mortgages be and the same are hereby declared null and void, and of no effect, and ought to be delivered up to be cancelled; and it is further ordered, adjudged, and decreed that the said Bergner & Engel and the said Charles D. Knight deliver up the said mortgages to the said John S. Clark, the complainant. And further that the Recorder of Deeds be, and he is hereby directed to enter satisfaction of each of said mortgages upon the record . . . and that the said defendants be perpetually enjoined from setting up title to said mortgages, whether as owners, holders, purchasers, assignees, mortgagees, or otherwise, and from molesting or interfering with the complainant's possession of the said . . . premises.

Common Pleas—Law.

C. P. No. 3. Sept. 20, 1881.

Reeves v. Pritchard et al.

Married woman—Rights and powers—Power to contract with respect to separate real estate—Sale upon condition with reservation of ground rent—Replevin—Set-off and defalcation—Statute of Limitations—Cannot be set up on a demurrer—Must be pleaded.

Replevin, brought April 12, 1881, by Paul S. Reeves against Mary V. Pritchard (formerly Boker) *et al.*, for certain goods taken and distrained on plaintiff's property. The narr. was in the usual form. The defendant on June 14 avowed and acknowledged the taking, setting forth that the plaintiff, on April 20, 1874, and thence afterward, was tenant to the said Mary V. Pritchard under a certain ground-rent deed made by Charles Boker and Mary V. his wife at that date to the plaintiff, reserving a rent of $575 annually, and that the said Mary V. Boker was divorced *a vinculo* from her husband March 13, 1880, and that the taking was for the sum of $287.50, arrears of the said rent.

To this plaintiff on June 18 pleaded as follows:—

" . . . the said premises, prior to the said conveyance thereof by the said Charles Boker and Mary his wife

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to the said Paul S. Reeves, were owned by the said Mary Boker the said avowant, and the said premises were conveyed by the said Charles Boker and Mary his wife to the said Paul S. Reeves, and the said ground-rent was reserved by virtue of a certain agreement theretofore made, to wit, on the twentieth day of April, A. D. 1874, between the said Mary Boker and the said Paul S. Reeves, and it was one of the terms of the said agreement, and part of the consideration for the reservation of the said ground-rent, that the said Mary Boker should pay to the said Paul S. Reeves the expenses of curbing and paving the said premises whenever thereafter the same should be curbed and paved, and she should be thereunto requested, whereupon thereafter before any part of the rent mentioned in the avowry became due, to wit, on the 12th day of August, 1874, the said premises were curbed and paved, and the expenses incurred and paid thereon amounted to" the sum of $317.38." The plea then set forth a refusal on the part of avowant to pay this sum.

Defendants demurred to the plea upon the ground:—

1. That the avowant was a *feme covert* at the time of the alleged contract.

2. That the Statute of Limitations barred the claim.

3. That the set-off set up did not arise within the term for which the rent is claimed.

Gimber, for the demurrer.

A married woman has no power to make such a contract, and, at all events, it is barred. There is no set-off in replevin.

Pennypacker, contra.

If the vendee cannot make defence to the rent he is without remedy.

There is nothing in the character of the action to prevent his defalking losses occasioned by the landlord's breach of agreement.

Peterson *v.* Haight, 3 Wh. 153.
Fairman *v.* Fluck, 5 Watts, 516,
Gray *v.* Wilson, 4 Watts, 39.
Beyer *v.* Feusterwacher, 2 Wh. 95.

A married woman may contract for repairs.

Lippincott *v.* Leeds, 27 Sm. 422.

If so, why may she not include such a contract in her sale?

She may give a judgment-bond for purchase-money.

Patterson *v.* Robinson, 1 Casey, 82.
Ramborger *v.* Ingraham, 2 Wr. 146.
Sawtelle's Appeal, 34 Leg. Int. 349.

She can buy subject to a condition.

Bortz *v.* Bortz, 12 Wr. 382.
Vance *v.* Nogle, 20 Sm. 176.
Walker *v.* Cooper, 15 Sm. 432.

In the present instance the *feme covert* is endeavoring to enforce the contract after the termination of the coverture and trying to evade her part of it.

The Statute of Limitations must be pleaded.

Angell on Limitations, sec. 285.
Hollis *v.* Palmer, 3 Scott, 265.

C. A. V.

Sept. 24, 1881. THE COURT. Demurrer overruled, with leave, etc.

C. P. No. 3. September 19, 1881.

Biddle et al. v. H. W. Black & Co., def'ts, and the Pennsylvania Woolen Bag Co., Limited, Geo. Campbell, and James M. Preston, Garnishees.

Practice—Attachment under the Act of March 17, 1869 (P. L. 8)—Dissolution of attachment—What is fraud and fraudulent representation.

Sur rule to quash attachment under the Act of March 17, 1869, and dissolve writ, proceedings to stay.

The affidavit on which the attachment issued was as follows:—

"The defendants in the above entitled case are indebted to my firm in the sum of $156.94. The defendants bought goods from the plaintiffs on the dates and of the amounts stated in the annexed account; and they returned certain goods, which being credited against the said account due by them reduced it to the amount above stated. The defendants fraudulently contracted the debt and incurred the obligation for which this claim is made."

The annexed account was as follows:—

To Mdse.		$29 53
"		27 19
etc.	etc.	etc.
		$576 54
By goods returned		419 60
		$156 94

Plaintiffs took the depositions of defendants and others, which showed that on July 1, 1881, the sheriff took possession of the dye works of the firm defendant under an execution issued on a judgment note for $2000, executed by the firm defendant in favor of the American Life Insurance Company, on April 21, 1881, and payable one day after date with interest, that in June of the same year defendants purchased goods from plaintiffs to the amount of $156.94, that about July 5th, several days after the sheriff had taken possession of their works, the defendants again purchased goods from the plaintiffs to the amount of $419.60, which goods, however, they subsequently returned.

The defendants denied that at the time of purchasing the goods they had made any false or fraudulent representations, and the only evidence of such representation was that on the 1st of July one of the defendants in ordering goods said "he was doing a fair business."

W. H. Peace, for the rule, cited—

McGlensey *v.* Landis, 3 WEEKLY NOTES, 240.
Rodman *v.* Thalheimer, 25 Smith, 232.

C. S. Patterson, contra.

C. A. V.

Sept. 22, 1881. THE COURT. Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, NOV. 17, 1881.* [No. 31.

Supreme Court.

Oct. & Nov. '81, 187. Oct. 14, 1881.

Phelps' Appeal.

Equity—Execution—Contribution among joint defendants—Equities springing out of successive conveyances of lots bound by a common encumbrance—Act of April 22, 1856, now solely applicable—Constitutional law—Applicability of said Act of 1856 to cases where equities have arisen out of transactions prior to its passage.

The Act of April 22, 1856, § 9 (P. L. 534), providing a mode to compel contribution where the real estate of several persons is subject to a common encumbrance entirely supersedes any course of proceeding in equity to effect that end which had been pursued before its passage, and as by its provisions an option is given to the holder of the encumbrance either to accept his debt and make an assignment or to have his executions controlled so as to subserve the rights and equities of the parties whose real estate is encumbered, the making of an order controlling said executions in the manner aforesaid without giving to the encumbrancer the option of accepting his debt and making an assignment constitutes error calling for reversal.

Arna's Appeal, 15 Smith, 72, followed. MERCUR J., dissents.

Where a petition is presented praying for an order in accordance with the provisions of the said Act, it must distinctly admit that the encumbrance in question constitutes a lien on petitioner's real estate, otherwise it is fatally defective.

Where the encumbrance in question was created and the successive conveyances out of which the equities of the various real estate owners have arisen were made prior to the said Act, it is nevertheless solely applicable in proceedings instituted after its passage to compel contribution. Being merely a modification of an existing remedy, its constitutionality when so applied cannot be doubted.

Appeal of Thomas H. Phelps, from an order of the Common Pleas No. 1, of Allegheny County.

The material facts of the case were as follows:—

Abraham Horbach, Jr., on December 23, 1850, conveyed a certain tract of land in Peebles and Wilkins townships to Henry Reis, who on March 13, 1851, executed and delivered to him a mortgage, to secure the payment of the purchase-money for the same in instalments, recorded April 16, 1851. This mortgage was on February 25, 1859, assigned to Maria B. Horbach, who subsequently assigned it to Thomas H. Phelps.

The said Henry Reis divided this land into seven lots, which he sold and conveyed to different purchasers, in the following order, to wit:—

Lot E. on April 1, 1851.
" F. on " "
" A. on " 11, "
" B. on " 12, "
" G. on " 30, "
" D. on May 12, "
" C. on August 10, 1854.

The parties in possession of the property having refused to pay the instalments on the above mortgage; at the expiration of a year and a day after the maturity of the last instalment thereon, Phelps sued out a writ of scire facias, and prosecuted the same to judgment. He then issued a writ of levari facias by virtue of which the property was advertised for sale on Monday, June 6th, 1881. The sale, however, was adjourned until June 10th, and on June 8th, Henry B. Stotler *et al.*, owner of parts of lots A, B, D, E, and G applied to the Court, by petition, for an order on the plaintiff and the sheriff to sell the land covered by the mortgage in separate lots, and to offer and sell said lots in the inverse order in which they were sold and conveyed by Reis. The petitioners did not admit that the mortgage was a lien on their property; nor did they offer to pay it and take an assignment thereof under the provisions of the Act of April 22, 1856, § 9 (P. L. 534).

On the same day the Court made the order prayed for as follows:—

"And now, this 8th day of June, 1881, the petition of Henry B. Stotler *et al.* being presented in open court, the said Court, in compliance with the prayer therein contained, hereby order and direct the said plaintiff and Thomas H. Hunter, Sheriff, to offer and sell the said land in separate lots or divisions, according to the Reis plan thereof, in the following order:—

1st. Lot C of said plan.
2d. Lot D " "
3d. Lot G " "
4th. Lot B " "
5th. Lot A " "
6th. Lots E and F of said plan.

And not to offer or sell any succeeding lot in said list or any part thereof until the proceeds of the lot or lots directed to be sold earlier prove insufficient to satisfy the claim under said Reis mortgage. Provided, that this order shall not affect the right of plaintiff to sell any property included within his levy not owned by petitioners here represented in such order as he may deem proper."

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Thereupon Phelps took this appeal, assigning for error the above order of the Court.

Geo. W. Guthrie (with whom was *F. M. Magee*), for appellant.

Prior to the Act of April 22, 1856 (Purd. Dig. 827, pl. 40), our Courts had exercised the power of regulating the order in which property belonging to different persons, but subject to a common encumbrance, should be sold. Now the Act regulates the manner in which the power must be exercised.

Act of March 21, 1806, § 13, Purd. Dig. 58, pl. 5.
Arna's Appeal, 15 Smith, 72.
Roddy's Appeal, 22 Ibid. 98.

The Act of 1856 was not followed in this case. The plaintiff was not given the option of accepting his money and assigning his claim. Plaintiff's lien is denied, and if he is compelled to enforce his claim by adverse proceedings at his own risk and expense, it is right and fair that he should be allowed to proceed first against the property on which he considers his claim best.

The power of the Court being equitable should not be exercised in such a manner as to work injustice.

J. F. Slagle and *Wm. P. Elliot* (with whom were *Hampton & Dalzell*), for appellee.

The judgment is against the interest of Henry Reis. The terre-tenants not having been made parties by notice or otherwise, can avail themselves of any defence that they might have set up at the trial of the scire facias, had they been served.

Mevey's Appeal, 4 Barr, 80.

They are therefore not compelled to admit the validity of the lien of the mortgage before asking the relief sought. In Roddy's Appeal, *supra*, where, without tendering the amount of the claim, a rule to show cause why such order of sale should not be granted had been discharged in the Court below, this Court reversed the order discharging the rule.

In Arna's Appeal, *supra*, and Roddy's Appeal, *supra*, the rights accrued after the Act of April 22, 1856, was in force. That Act does not apply to the case at bar. "A statute shall always be interpreted so as to operate prospectively and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the Legislature."

Taylor *v* Mitchell, 7 Smith, 211.
Neff's Appeal, 9 Harris, 247.
Becker's Appeal, 3 Casey, 55.
Seamans *v.* Carter, 15 Wis. 548.
Mevey's Appeal, 4 Barr, 80.
Cowden's Appeal, 1 Ibid. 277; overruling Presbyterian Church *v.* Wallace, 3 Rawle, 165.
Nailer *v.* Stanley, 10 S. & R. 456.
Carpenter *v.* Koons, 8 Harris, 226.
Clowes *v.* Dickenson, 5 John Ch. 235.

It would be equally within the reason of the prohibition of an *ex post facto* law.

Dash *v.* Van Kleeck, 7 John. 505.
Sedgwick on the Construction of Statutes and Constitutional Law, 161.
Dwarris on Statutes, 162.

By sustaining the decree of the Court below, the plaintiff would not be delayed, and justice would be done.

Roddy's Appeal, *supra*.
Martin's Appeal, 9 WEEKLY NOTES, 484.

October 24, 1881. THE COURT. In Arna's Appeal (15 P. F. Smith, 72) the question was on a motion to quash the appeal which was not by the plaintiff in the execution but by the terre-tenant, whose land the Court below had ordered to be first sold. The plaintiff below was permitted to intervene and make the motion to quash, offering to accept his debt and assign his judgment to either of the terre-tenants. The point here made was directly raised, and this Court held that the ninth section of the Act of April 23, 1856 (Pamph. L. 534), entirely superseded any course of proceeding in equity which had been pursued before. It is not easy to see how the decision could have been otherwise. Not only would it be in the teeth of the Act of March 21, 1806, sect. 13 (4 Smith's Laws, 332) which provides that where a remedy is given or anything directed to be done by an Act of Assembly, the directions of the Act shall be strictly followed: but it is abundantly evident that to sustain the old proceeding, without regard to the limitation or qualification contained in the Act of 1856, would be practically to repeal the Act *in toto*. The Legislature has seen fit to enact in order to secure the rights of the judgment-creditor and to prevent any delay or embarrassment to him, that he shall have the option offered to him of accepting his debt and assigning his judgment before he can be controlled in the order in which the different tracts of land, subject to his lien, shall be sold under his execution. It is not for us to question the mandate of the Legislature, even if we thought it unjust or oppressive to the terre-tenant. The authority of Arna's Appeal is not in the least shaken by Roddy's Appeal (22 P. F. Smith, 98). The order in that case simply discharged the rule. It seems the attention of the Court below had not been called to the Act of 1856, and it was said in the opinion of this Court, "As the Court below declined to exercise their power at all, or to make any order in the case, their order discharging the rule must be reversed." The case was therefore remanded to be reheard and decided according to the Act of 1856.

It is proper to remark that the petitions upon which the order was made in this case are all fatally defective in not distinctly averring that the plaintiff's judgment, or the mortgage upon which it is founded, is a lien on their lands. Indeed some of the petitioners expressly reserve

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the right to contest that point. But the words of the Act confine the remedy to the real estate of persons which is subject to a common lien. Without such lien, the petitioners had no equity to interpose and arrest the proceeding of the plaintiff to recover his debt. In that case no harm can be done to them. Their title will not be disturbed or affected by the sale, and it is open to them in an ejectment by the sheriff's vendee to contest his title.

We see no ground to question the constitutionality of the Act of 1856 in its application to all proceedings after its passage. It is a modification of an existing remedy, and in no way infringes any clause in the Federal or State Constitution. Order reversed and record remitted.

Opinion by SHARSWOOD, C. J. MERCUR, J., dissents from the construction given to the Act of 1856, but concurs in the judgment on the other ground. GREEN, J., absent.

May, '81, 191. June 15, 1881.

Wilson v. Douglass, defendant, and Irvin et al., garnishees.

Growing timber—When severance of, not immediately contemplated, growing timber remains on sale thereof realty—Vendor and vendee.

In a sale of growing timber, where no immediate severance is contemplated, the timber is to be deemed to continue real estate.

A. agreed to sell to B. certain growing timber, B. to remove the timber within nine years, but not before satisfactory security should be given to A. for the payment of the purchase-money in instalments. Afterwards A.'s interest in the timber was sold out as *real estate* by the sheriff:

Held, that all A.'s interest passed to the vendee, together with the claim for the purchase-money, and that therefore the instalments due from B. were not liable to an attachment execution subsequently issued under a judgment obtained against A.

Error to the Common Pleas of Clearfield County.

Attachment execution on a judgment held by E. H. Wilson against B. F. Douglass *et al.* The garnishees, E. A. and W. D. Irvin, pleaded "*nulla bona*," but admitted that they held a sum of money sufficient to satisfy the judgment if it were legally applicable to this attachment.

On the trial, before ORVIS, A. L. J., the following facts appeared: On January 6, 1873, B. F. Douglass, by articles of agreement, contracted to sell to E. A. and W. D. Irvin all the white pine and oak timber growing and standing on two tracts of land, containing sixty acres each, and one undivided half of all the white pine and oak timber standing on two other tracts of land, containing respectively three hundred and sixty and one hundred and twenty acres, for a certain sum, payable in instalments. E. A. and D. W. Irvin agreed "to remove the timber from the said lots within nine years from the date of this agreement, . . . and further agreed that no timber was to be cut upon the said lots until security, satisfactory to the party of the first part, was given by the parties of the second part for the amount of timber they proposed to cut." By the same agreement Douglass agreed to sell to E. A. and W. D. Irvin two tracts of land, for which a deed was to be executed when the first three payments had been made. The testimony showed that under favorable circumstances it would have been practicable to cut all the timber included in the agreement within three years.

On October 3, 1873, B. F. Douglass assigned to W. M. Stewart all his interest under the above-mentioned articles of agreement, in trust to secure the payment of three notes, for $10,000 each, made by Douglass and held by the Indiana County Deposit Bank; and he authorized the said trustee, on non-payment of said notes, to proceed to collect the balance of the purchase-money unpaid on said articles of agreement, and apply the same to the payment of the notes.

Under certain judgments entered against Douglass, other than that of E. H. Wilson, the said tracts of land and growing timber were levied on as the real estate of Douglass, and sold under a *vend. exp.*, October 5, 1877, to the Indiana County Deposit Bank, and a sheriff's deed was duly acknowledged therefor.

The plaintiff presented the following points, all of which were refused:—

(1) The sale of the timber, upon which the indebtedness of the garnishees arose to B. F. Douglass, was, in law, a severance of the timber from the land, which had the effect of converting it into personal property. (2) After said sale, the interest of Douglass, the vendor of said E. A. & W. D. Irvin, was personal property. (3) Such interest was not bound by judgments entered up against Douglass and others, the vendors of said E. A. & W. D. Irvin, and levy and sale of it as real estate conveyed no title to the purchaser at the sheriff's sale. (4) Such indebtedness stands on the same footing as any other debt, and is subject to attachment. (5) Under the evidence, it being admitted that there is sufficient in the hands of the garnishees, the plaintiff is entitled to recover.

The Court instructed the jury, *inter alia*, as follows:—

"[We, being of the opinion that the interest in the four tracts of land in Indiana County, sold by B. F. Douglass to E. A. & W. D. Irvin by article of agreement of January 6, 1873, was *real estate*, the legal title to which remained in

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the vendor, the same was bound by the judgments against him in Indiana County.] The interest of Douglass in these lands having been assigned to the Indiana Deposit Bank as collateral security for notes held by said bank, and subsequently having been sold at sheriff's sale, and purchased by said bank, no right to recover the purchase-money remained in B. F. Douglass [and we therefore direct you to find a verdict against the plaintiff, and in favor of the garnishees."]

Verdict accordingly for the garnishees, and judgment thereon. The plaintiff took this writ, assigning for error the refusal of his points and the portions of the charge included within brackets.

McEnally & McCurdy, for plaintiffs in error.

It has been held that a sale of timber to be immediately severed is by force of the contract converted into personalty. No case decides that where the object of the sale is the severance of the timber, but not at the *earliest* practicable period, it continues realty. "Immediately" means a reasonable time, according to the circumstances of the case. The object of this sale was the severance of the timber, and the purchaser bound himself to cut it all "*within* nine years." He had the option of cutting it sooner, if he gave the required security. On so large a purchase, the greater portion of which was an undivided interest, requiring an arrangement to be made with the other owners, a maximum limit of nine years was not an unreasonable time. The precise point has never been decided, but has been approached in the following authorities:—

1 Greenleaf on Evidence, § 271.
Toller on Executors, 194, 195.
Huff *v.* McCauley, 3 Sm. 206.
Pattison's Appeal, 11 Ibid. 297.
McClintock's Appeal, 21 Ibid. 365.

If, as we contend, Douglass's interest under the contract was personalty, it did not pass as real estate under the sheriff's sale, and remains bound by an attachment.

Murray (*Gordon* with him), for the defendant in error. Before the contract the growing timber was realty, and the rule is that "that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character."

Rogers *v.* Gilinger, 6 Cas. 188.
Sheppard's Touchstone, 90.

The parties to the contract treated it as realty; it was included in the same agreement by which lands were sold; the greater part of it was an undivided interest, requiring consent of the other owners, which was never obtained; it was not to be cut until additional security was given, proportioned to the amount proposed to be cut; and three times the time necessary to cut it was allowed. A sale of standing timber, not made with a view to "immediate severance," is a sale of an interest in land.

Huff *v.* McCauley, 3 Sm. 206.
McClintock's Appeal, 21 Ibid. 366.
Yeakle *v.* Jacob, 9 Cas. 376.
Caldwell *v.* Fulton, 7 Ibid. 475.
Smith on Contracts, 122, and cases cited in note.

The reasonable rule to be extracted from the decisions is, that where, by the terms of the contract, any discretion is left in the grantee as to the time of removal, it is a contract for the sale of an interest in land.

June 22, 1881. THE COURT. The only question in this case upon which the seven assignments of error all depend is, whether the agreement between Douglass and the Irvins for the sale of the standing timber converted it into personal property. By this agreement the Irvins were to remove the timber within nine years from the date of the agreement, and as to certain parts of the land, no timber was to be cut until satisfactory security was given by the vendees for the amount of timber they proposed to cut. As no immediate severance was in contemplation, it is clear, according to McClintock's Appeal (21 P. F. Smith, 365), that it remained real estate, subject to the lien of judgments against the vendor. His title passed to the sheriff's vendee, and with it his claim to the purchase-money. It was not then subject to the attachment, and the charge of the learned Court below was entirely right.

Judgment affirmed.

PER CURIAM.

Jan. '81. March 3, 1881.

Huffort's Appeal.

Exemption—Mortgagor not entitled to—When judgment prior to mortgage, exemption cannot be claimed from proceeds of real estate.

Where real estate is sold under a judgment prior to a mortgage, the defendant is not entitled to claim his exemption out of the proceeds thereof.

Appeal from a decree of the Common Pleas of Lehigh County, dismissing the exceptions to, and confirming the report of a commissioner appointed to distribute the proceeds of the real estate of Stephen Huffort.

The facts of the case were as follows: Stephen Huffort was seised of a certain piece of real estate against which the following encumbrances were entered of record:—

1. Municipal claims of the city of Allentown of various dates, aggregating, with interest, $79.90.
2. A judgment against Huffort, in favor of Thomas B.

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Wilson, entered March 28, 1876, for $364.05, including interest.

3. A mortgage dated Jan. 25, 1878, given by Huffort to Nathan Hunsicker for $800. Recorded the same day.

Wilson in 1878 issued a fi. fa. on his judgment by virtue of which all Huffort's personalty was levied upon. He claimed his exemption therefrom, however, and the whole, being appraised at $49.50, was delivered to him.

The real estate was then levied on, and Huffort claimed the residue of his exemption from the proceeds thereof, the same being found incapable of division.

At the sheriff's sale, the premises were sold for $1100, which sum was paid into Court, and a commissioner appointed to distribute the same. Before the commissioner, Huffort claimed the sum of $250.50, being the balance of his exemption from the fund. The commissioner refused to entertain the claim, and distributed the fund as follows:—

Costs of audit,	$ 87 85
City claims,	79 90
Wilson's judgment,	364 05
Hunsicker's mortgage on account,	568 20

Huffort filed exceptions to this report on the ground that the commissioner erred in not awarding to him the balance of his exemption. The Court, ALBRIGHT, P. J., dismissed the exceptions, and confirmed the report, delivering the following opinion, after stating the facts:—

"Gangwere's Appeal (12 Cas. 466) decided that a debtor cannot claim the benefit of the Exemption Act of 1849, against a mortgage: that a mortgage is a contract waiver of the right of exemption. In the recent case of Nerpel's Appeal (7 WEEKLY NOTES, 549), it was said that the mortgage is something more than a lien; that for all purposes of security to the mortgagee it is a conveyance of the land, and it was held that the exemption could not be claimed by the widow of the mortgagor under the Act of April 12, 1851. In Hill *v.* Johnston (5 Cas. 362), the real estate of the debtor was sold under a levari facias, upon a purchase-money mortgage. The debtor, having given notice of his claim, was allowed the surplus remaining after payment of said first mortgage lien, to the exclusion of judgment creditors, in whose favor there was no waiver, although no appraisement had or could have been made. McAuley's Appeal (11 Cas. 209) decided that the debtor could not be allowed exemption against his mortgage, although the sale was under a vend. ex., issued upon the judgment on the bond secured by the mortgage, and an appraisement had in fact been made. The principles of Hill *v.* Johnston and McAuley's Appeal were recognized and applied in Quinn's Appeal (6 WEEKLY NOTES, 118).

"It is clear that the defendant cannot receive the exemption to the prejudice of Hunsicker, the mortgagee. Can he obtain it at the expense of the city and Wilson, the judgment creditors, whose liens precede the mortgage of Hunsicker?

"In Shelly's Appeal (12 Cas. 373) it was held that the judgment liens must be paid in the order in which they stand on the record where the fund is insufficient to pay all, although the last judgment contained a waiver of the exemption laws, and those preceding it did not. It was said that a debtor cannot, by giving the later judgment creditor a waiver, defeat the statutes which recognize priority of liens.

"Bower's Appeal (18 P. F. Sm. 130) is cited by exceptant's counsel as authority for the allowance of defendant's claim. It is insisted that that case squarely decided the law to be as exceptant's counsel contend for in this controversy. There the liens divested by the sale were: a judgment in favor of Richards for $40, and one in favor of Elizabeth Bower for $246.17, both entered on the same day, and next a mortgage to Riffert for $75. Under a levari facias upon the latter the land was sold for $450; the debtor had claimed the benefit of the exemption laws. It was decided that the fund should go first to the Riffert mortgage, second to the debtor in satisfaction of his exemption claim, and the balance to said judgment lien creditors. It was decided in that case that the creation of a mortgage subsequent to judgment liens is not to be taken like a waiver of the exemption in a later judgment, as a waiver by the debtor of his rights to claim exemption against the earlier judgments.

"In Bower's Appeal, the mortgage creditor was paid in full, and if no mortgage had been given by the debtor there would not have been a sufficient sum to pay the exemption claim and the judgments in full. If we were to do here what was done in the case of Bower, we should direct that the mortgage of Hunsicker be paid in full in the first place. (What amount of interest is due thereon does not appear.) In that event there would not be enough left to pay the defendant the whole of his claim, and Wilson and the city of Allentown would receive nothing upon their judgments. Shall Bower's Appeal be literally followed in making this distribution? If that is done, the result will be that a judgment creditor, who had secured a lien on real estate, which was more than sufficient to pay the debtor's exemption claim and the judgment debt, will have had his security taken from him by no act of his, but simply because the debtor afterwards created a mortgage. The debtor will have accomplished that which it was said in Shelly's Appeal he shall not be permitted to do; he will have defeated the statutes which recognize priority of liens.

"I think that all doubts can be resolved by applying what was intimated by Justice WOODWARD, in Shelly's Appeal, to be the proper rule

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applicable in such cases, to wit: to treat the sum claimed by the debtor, as one fund, and the residue as a second fund. Hunsicker, having a claim on both, and the judgment creditors upon but one, equity will compel him to exhaust the first fund before resorting to the second. The result will be, the distribution reported by the auditor.

"What was decided in Giering's Estate (Wieand's Appeal) has some bearing upon this question. There the proceeds of the real estate sold by the assignee, under the Act of 1876, were before the Court for distribution. The assignor had reserved the benefit of the exemption law, and he claimed out of the fund a balance of $275. The first lien was a judgment of $366.25: then followed mechanics' liens amounting to more than the fund after payment of the judgment, even if the exemption claim had been disallowed. This Court rejected said exemption claim and gave the fund, after paying the judgment, to the mechanics' lien creditors on the ground that if the exemption claim were allowed it would, in effect, be taken from the mechanics' lien creditors. The Supreme Court affirmed this decree. (Wieand's Appeal, 37 Leg. Int. 407.)

"As has been remarked already, if defendant's claim were to be given to him, it would have to be at the expense of the mortgagee, Hunsicker. It seems that it would be illegal and unjust to refuse payment to the city and to Wilson's judgment, when the fund is sufficient to pay those liens (they being prior to the mortgage), and leave exceeding $500 over."

Huffort thereupon took this appeal, assigning for error the refusal of the Court to allow him the residue of his exemption.

James L. Schaadt and *Geo. H. Rupp*, for the appellant.

The exemption law, being passed for the benefit of the debtor and his family, should be construed favorably.

Hill *v.* Johnston et al., 5 Casey, 362.

The proper order of distribution would have been: (1) the municipal claims; (2) the Hunsicker mortgage; (3) the residue of appellant's exemption; (4) the Wilson judgment.

Bower's Appeal, 18 Smith, 126.

R. E. Wright & Son for the appellees.

No exemption can be claimed as against a mortgage.

McAuley's Appeal, 11 Casey, 209.
Gangwere's Appeal, 12 Casey, 466.
Nerpel's Appeal, 7 WEEKLY NOTES, 549.
Hill *v.* Johnston, 5 Casey, 362.
Quinn's Appeal, 6 WEEKLY NOTES, 118.

Therefore appellant cannot claim exemption in priority to it, nor can he, as he argues, postpone the judgment to the mortgage by reason of his claim for exemption.

Wieand's Appeal, 37 Leg. Int. 407.

Bower's Appeal, 18 Smith, 126, is clearly distinguishable on the grounds set forth in the opinion of the Court below.

March 14, 1881. THE COURT. We affirm this decree upon the opinion of the learned President of the Court below.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

May, '81, 181 June 16, 1881.

Baltimore and Cumberland Valley Railroad Extension Company's Appeal.

Railroads—Crossings at grade—Overhead crossings—Act of April 10, 1871.

The courts of equity of this Commonwealth are by the Act of April 19, 1871, § 2 (P. L. 1361), imperatively required to restrain by injunction the crossing of one line of railroad by another at grade, if, in the judgment of the Court, it is reasonably practicable to avoid such grade crossing.

The findings of fact of the Court sitting as a Master on the question of the reasonable practicability of an overhead crossing, will not be set aside on appeal except on the ground of palpable error.

What evidence is sufficient to demonstrate the reasonable practicability of avoiding a grade crossing.

Appeal from, and certiorari to the Common Pleas of Franklin County.

Bill in Equity, filed by the Cumberland Valley Railroad Co., complainant, against the Baltimore and Cumberland Valley Railroad Extension Co., defendant, alleging that the defendant had in process of construction a line of railway, which, when completed, would cross the railroad of the complainant at grade, and would thus encroach for a considerable distance upon the complainant's right of way. The bill prayed an injunction to restrain the construction of such grade crossing.

To this bill the defendant filed an answer.

A preliminary injunction was granted and an examiner was appointed to take testimony, and on the filing of his report respondent moved to dissolve the preliminary injunction. To avoid delay, the parties waived reference to a Master and submitted the case to the Court on bill, answer and testimony, the right of appeal being reserved. The Court found that, from the evidence taken before the examiner, the following facts appeared. The two roads, if constructed to cross at grade, would intersect at an angle of about fifty-five degrees. Such an intersection would usually be comparatively safe, but owing to the conformation of the country no such result would follow in this case, as, in consequence of

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curves in the track, approaching trains would not be aware of their respective positions until close to each other.

The Western Maryland R. R. Co., whereby the road of the company defendant was leased and operated, had already at another point a crossing at grade over complainant's road. The cost of an overhead crossing with a gradient of seventy-nine feet to the mile would be about $12,000; with a gradient of fifty-two feet to the mile it would be about $20,000. This expense was, in the opinion of the Court, not such as to render impracticable the construction of the overhead crossing, nor would such construction, in the opinion of the Court, seriously impair the value of the defendant company's road.

The following was the opinion of the Court delivered by HALL, P. J.

"By the Act of 1871, the rights of the defendant at the point of crossing are secondary to the rights of the plaintiff. Under that Act, as is said by the Justice who delivered the opinion of the Court in Pittsburgh and Connellsville R. R. Co. *v.* South West Pennsylvania R. R. Co. (27 Sm. 173), the company crossing shall perpetrate no unnecessary injury on the road sought to be crossed, and a crossing at grade shall be prevented when it can reasonably be avoided. As held in that case, the *prima facie* presumption of law is that a crossing at grade can be reasonably avoided, and the burden of proving that it cannot in any particular case, is on the company seeking to cross. This is held on the ground that it is the policy of the law to discourage crossings at grade, because they are always attended with more or less danger to the travelling public, and that in no case should such crossing be allowed where it is possible to be avoided unless the requiring of an overgrade crossing would seriously impair the usefulness of the new road, or, by reason of expense, render its construction reasonably impracticable, or bring to the public some countervailing danger equal to the danger of a crossing at grade.

It is very manifest that there are degrees of danger in crossings at grade. Where the roads cross each other in an open plain, and at right angles, and on a level, with both roads in full view of each other for some distance on each side of the crossing, and the number of trains daily on each road is not great, the danger of collisions would be very much less than where these conditions are wanting. To require under such conditions the expenditure of a large sum of money, to raise the proposed road on a high and long embankment so as to cross the old road with a viaduct or bridge might very seriously interfere with the construction of new roads. If, under such conditions, a new road is required to erect an expensive embankment it would be equivalent to an enactment that no new road shall cross an old road at grade. Manifestly, that is not the legislative intent in the enactment of 1871. The Act of 1868 allowed the crossing at grade in every instance. This Act was found to be too sweeping in its grant of privileges. To restrict this latitude the Act of 1871 was passed establishing the basis of *reasonable practicability*. The inherent danger of a crossing at grade is to be avoided, unless the overgrade crossing is *reasonably impracticable*. This phrase has no fixed or definite meaning. What is reasonably practicable depends on the circumstances of each case, and it is largely a matter of opinion about which men of experience would be very likely to differ. Now there is a very wide and positive difference of opinion exhibited by experienced engineers in this case.

The improvement and development of the country is largely dependent on the construction of new lines of railroad. No unnecessary obstacle in the shape of expense should be thrown in the way of such enterprises. Where the public safety can be reasonably secured at a grade crossing by appliances of signals and watchmen and stoppage of trains, and the expense of an overgrade crossing would be so considerable as to seriously interfere with the profitable construction of the new line, it is not, as we view it, reasonably practicable to avoid the grade crossing. If every possible known precaution against danger is in every case to be required regardless of cost, it may not pay to construct the road at all.

But in this case the proposed crossing at grade is one of more than ordinary danger by reason of a cut and curve in the new road on the west side of the Cumberland Valley Road, and the expense of an overgrade crossing, with a clearance of sixteen feet, would not be so great as to make the avoidance of a grade crossing reasonably impracticable.

I am, therefore, of opinion that under the law, as it is ruled in The P. & C. R. R. Co. *v.* The S. W. P. R. R. Co. (27 Sm. *supra*), the motion to dissolve the preliminary injunction must be overruled, and the defendants be permanently restrained from effecting the proposed crossing at grade."

The defendant took this appeal and certiorari, assigning for error the overruling of the motion for the dissolution of the preliminary injunction.

David Wills and *F. M. Kimmell* (with them *Stenger* and *McKnight*), for plaintiff in error.

By the New Constitution, Art. 17, Sect. 1., it is provided that "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination."

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The power of the appellant company to locate their road is absolute and beyond judicial control, unless exercised in disregard of the rights others.

New York and Erie R. R. Co. *v.* Young, 9 Casey, 182.

Cleveland and Pittsburgh R. R. Co. *v.* Speer, 6 Sm. 333.

The fact that a large portion of the stock of the appellant is owned by a foreign corporation, viz., the Western Maryland R. R. Co., and that the road, when built, will be operated by that foreign corporation, does not deprive the appellant of any of its legal rights as a Pennsylvania corporation.

New York and Erie R. R. Co. *v.* Young, 9 Casey, 180.

Where one railroad crosses another there must necessarily be *some* injury to the road crossed; but unless the injury is such as to deprive the company of the free use of its corporate franchises, or to seriously impair or interfere with its operations, there is no reason why a railroad company should claim immunity from such injury any more than other corporation or individuals.

The facts in the case of Pittsburgh and Connellsville R. R. Co. *v.* Southwest Penna. R. R. Co. (27 Sm. 173) were entirely different from those in the case at bar.

If an overhead crossing with a gradient of seventy-nine feet to the mile be constructed, the appellant's trains would have to run through the streets of Chambersburg (the nearest town to the point of crossing) at a much greater rate of speed than the borough ordinances permit. On the other hand, if a gradient of fifty-two feet be adopted, the embankment would extend for several hundred feet within the borough limits, in direct violation of the agreement between the appellant and the authorities of Chambersburg, whereby the former have bound themselves to conform to the grades of the streets through which the railroad passes.

The system of signals, which the appellant agrees to maintain, will render the grade crossing as safe as, if not safer, than an overhead crossing.

Kennedy and *Stewart* (with them *J. McD. Sharpe*), for appellee.

The finding of the Court below, as Master, will not be disturbed or reversed in this Court, unless there be plain error affirmatively shown.

Kisor's Appeal, 12 Sm. 428.
Phillips's Appeal, 18 Sm. 131.
Sproull's Appeal, 21 Sm. 137.
Crowell *v.* James, 2 WEEKLY NOTES, 176.
Trexler *v.* Mennig, 2 Ibid. 680.
Miller's 6 Casey, 478.

The appellant's allegation that the grade introduced at the overhead crossing would be so great as to destroy the appellant's road is unsupported by the testimony.

The Act of April 19, 1871, looks with disfavor upon grade crossings.

Pittsburgh and Connellsville R. R. Co. *v.* Southwest Penna. R. R. Co., 27 Sm. 173.

The rights of the first occupant of the ground in pursuance of law, are recognized as superior to those of the new claimant.

June 22, 1881. THE COURT. The findings of fact of the learned Judge stand upon the same footing as the findings of a Master, or the verdict of a jury. We can set them aside only on the ground of palpable error. We see none in this case. Upon the facts, as found, the decree was unquestionably right. It is the imperative mandate of the Legislature by the Act of April 10, 1871, that if, in the judgment of the Court, it is reasonably practicable to avoid a grade-crossing, they shall, by their process, prevent a crossing at grade. The learned Judge, in the Court below, to whom the case was submitted as a Master, found as a fact, we think upon sufficient evidence, that it was reasonably practicable for the appellant to avoid crossing the railroad of the appellee at grade, and he was bound by the law to prevent such crossing.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

Jan. '81, 216. March 28, 1881

First National Bank of Carbondale v. Cowperthwaite et al.

Trusts and trustees—Trustee ex maleficio, what does not constitute—Parol agreement to purchase land from another—Breach of contract—Right of dower not vested in possession, insufficient to support a resulting trust.

No resulting trust will arise as against a purchaser of realty at sheriff's sale by reason of a failure on his part to comply with the terms of a parol contract to buy in such realty in the interest of another, and convey the same to him, unless the promisee has furnished the purchase-money in whole or in part, or has at the time of the contract an actual estate or interest in the land or a *bona fide* claim thereto.

A wife has no such interest in the real estate of her husband sold during his life, as to warrant the raising of a resulting trust in her favor, under the circumstances above described.

In the summary proceedings by a purchaser at sheriff's sale to obtain possession of realty authorized by the Act of June 16, 1836 (P. L. 780), an affidavit not strictly complying with the terms of the Act is invalid.

Error to the Common Pleas of Lackawanna County.

Ejectment, by the First National Bank of

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Carbondale against Nancy C. Cowperthwaite and James Cowperthwaite, her husband, for a farm in Greenfield Township.

The proceeding was originally instituted before a justice of the peace, under the Act of June 16, 1836 (P. L. 780), and supplementary Act of May 24, 1878 (P. L. 134). The following affidavit was filed by James Cowperthwaite.

"I, James Cowperthwaite, do swear that I firmly believe that I am legally entitled to the premises in dispute against the First National Bank of Carbondale, the petitioners; that I do not claim the same by, from, or under the defendant (myself) as whose property the same were sold, by any title in me before the sale, but by, from, and under a different title, namely, by, from, and under Nancy C. Cowperthwaite, and further saith not.

His
JAMES X COWPERTHWAITE."
mark.

The cause was thereupon certified to the Common Pleas. Plaintiff filed a declaration in ejectment. Defendants pleaded not guilty.

On the trial before HANDLEY, P. J., plaintiff proved that the bank holding a judgment against Cowperthwaite had issued execution against the farm in question, that the same had been bought in at sheriff's sale by the bank, and that a deed had been duly executed to the bank by the sheriff therefor, that possession had been duly demanded of defendants but that the same had been refused, whereupon the above proceedings were instituted.

The defendants then, under objection, proved that prior to the sale the officers of the bank had at the request of Mrs. Cowperthwaite and with the consent of James Cowperthwaite, agreed verbally to buy in the property at the sale for Mrs. Cowperthwaite and to allow her to have it on payment therefor by her to the bank of a sum certain in instalments, and also that at the time of the sale several persons were prevented from bidding the property up higher by reason of their knowledge that such an arrangement had been concluded. The admission of this testimony constituted the first, second, third, and fifth assignments of error.

Plaintiff submitted, *inter alia*, the following points:—

"If the bank agreed verbally with Mrs. Cowperthwaite to purchase the farm at sheriff's sale for her, and to convey to her upon any terms; and she had no interest in the title, the agreement is not a defence to this action."

Answer. "This point involves facts. If you find from the evidence that the sheriff's sale was not made against the will of the owner, James Cowperthwaite, and the bank simply agreed verbally with Mrs. Cowperthwaite to reconvey this property to her, then we affirm this point." *Exception.* (6th assignment of error.)

The defendants submitted the following points, *inter alia*:—

"That when a party at sheriff's sale obtains property by means of representations and promises that he would obtain the same as cheaply as he could for the benefit of another, and a confidence is reposed in him by another, and he buys it in at a price greatly below its value, he cannot use that confidence and hold the property for his own benefit, but he will be converted into a trustee *ex maleficio*." *Affirmed. Exception.* (7th assignment of error.)

"That under the uncontradicted testimony in this case, there was a trust created and there has been no such default on the part of Mrs. Cowperthwaite as will entitle the plaintiff to recover possession of the property, and the verdict must be for the defendants."

Answer. "A trust is created where one having an interest in land is induced to confide in the verbal promise of another, that he will purchase his real property at sheriff's sale for the benefit of such owner, and in consequence the purchaser is enabled to obtain the legal title. His denial is such a fraud as will make him such a trustee. If, therefore, you find the facts to be as stated in this point, and that they are uncontradicted, then we affirm it." *Exception.* (8th assignment of error.)

The Court in the general charge to the jury said, *inter alia*:—

"The deed was acknowledged and thereupon delivered to the First National Bank, who immediately commenced proceedings, as the evidence discloses, before an alderman to obtain possession. Now this is the great and important question in this case. If you should ascertain from all the evidence in the case that the agreement was that the First National Bank should purchase this property and re-convey it to Cowperthwaite's wife, she to pay all the liens then of record against the property, there is nothing in this case to prevent you, unless you find some other facts that will be recalled to your attention hereafter, from deciding in favor of the plaintiff for the land described in the writ. If, on the other hand, after you have examined all of the testimony carefully in this case, you should say the agreement was to re-convey this property to her at the amount of the bid, then your further deliberation is very short. You have simply to say, we find in favor of the defendants. Now this is about all there is in this case."

Verdict for the defendants and judgment thereon.

The plaintiff took this writ, assigning for error the admission of the evidence for the defendants excepted to, the answers of the Court to the points cited, and the charge of the Court.

S. B. Price, for plaintiff in error.

There was no evidence to show that Mrs. Cowperthwaite had any interest in the title, or

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that she furnished the whole or any part of the purchase-money. The case is therefore within the ruling in—

Wolford *v.* Herrington, 5 Nor. 39.

To make out a defence based on the right to purchase, tender of the money due according to contract must be proved.

McKennan *v.* Pry, 6 Watts, 137.

An agreement to stop bidding is void on the ground of public policy.

Slingluff *v.* Eckel, 12 Harris, 472.

This is not a case of a trustee *ex maleficio*, for the promisee has no interest in the land.

Wolford *v.* Herrington, 5 Norris, 39.

If the defendant is in possession at the time of sale, the plaintiff is entitled to that possession, no matter from whom defendant claims.

Drake *v.* Brown, 18 Sm. 223.

Chas. Pike and *E. Robinson*, for defendant in error.

Where artifice or trick is used to procure property at a sheriff's sale at an undervaluation, the purchaser takes as trustee for the person misled.

Faust *v.* Haas, 23 Sm. 295.

Beegle *v.* Wentz, 5 Id. 369.

It was for the jury to decide from all the evidence in this case whether the circumstances did or did not create a trusteeship *ex maleficio*. The jury decided that question. The plaintiff cannot dispossess the defendants because no one can take advantage of his own wrong.

Wilson *v.* Eggleston, 27 Mich. 257.

Laing *v.* McKee, 13 Id. 124.

Mrs. Cowperthwaite had an inchoate right of dower in the land. Though not a vested interest it could not be barred except by her own voluntary act. Her right was of such value as to constitute a good consideration for a contract.

Dower is a highly favored right, and was not barred here.

Eberle *v.* Fisher, 1 Harris, 528.

Lazear *v.* Porter, 6 Norris, 517.

May 2, 1881. THE COURT. We are clearly of opinion that this case is ruled by Wolford *v.* Herrington (5 Norris, 39). Mrs. Cowperthwaite neither alleged nor offered to prove any other title than such as she claimed to arise by force of an agreement with Bronson and Mott, that they would purchase the property for her at the sheriff's sale. That alleged agreement was in parol, and she paid no part of the purchase-money, and was a stranger to the title. This brings her directly within the rule as established in the cases of Barnet *v.* Dougherty (8 Casey, 371); Kellum *v.* Smith (9 Casey, 158). In the cases of Beegle *v.* Wentz (5 P. F. S. 369) and Boynton *v.* Housler (23 Id. 453) the decision was put upon the express ground that the party setting up the trust *ex maleficio* had an actual vested estate in the land at the time of the agreement to purchase. When Wolford *v.* Herrington was here the second time, the present Chief Justice very carefully presented the antecedent claim of title in the wife under a deed to her upon a money consideration actually paid by her with money not derived from her husband, as the basis of the distinction between the case when it was first presented and when it was last heard. He expressly said, "Had Mrs. Wolford been an entire stranger to the title or the defendant in the execution, as whose property the land was about to be sold at sheriff's sale, then the determination in Jackman *v.* Ringland (4 W. & S. 149), and Barnet *v.* Dougherty (8 Casey, 371); Kellum *v.* Smith (9 Id. 158), Robertson *v.* Robertson (9 Watts, 32) ruled the case." The suggestion that the wife, Mrs. Cowperthwaite, had a possible right of dower in the land and was therefore vested with a sufficient interest to give her the benefit of the rule as held in Beegle *v.* Wentz, and Boynton *v.* Housler is not tenable. The estate or interest in the land must be an actual subsisting one at the time of the agreement to purchase. This was the ground upon which Beegle *v.* Wentz was distinctly ruled. AGNEW, J., on p. 373, says, "The distinguishing feature of the case is, that the agreement of Wentz was not to acquire a new interest in the land by parol; but he was the owner of the land, had a title both legal and equitable, and a right to retain so much of the land as would be of the value of $300. It was this subsisting title which Beegle procured Wentz to forego by his promise to leave him his house and fifteen acres and make over to him the sheriff's deed for that part. This part he was not to take, but to hold in trust." In Boynton *v.* Housler the defendant was the widow of the former owner and had a vested right of dower in the land and also a preceding contract right of purchase from Housler, who held a deed for it. This Court, MERCUR, J., said, on p. 459: "The distinction in this case is, that the defendant had an interest in the land in reference to which the contract was made, and she was to retain a portion of that land. This is a distinction clearly taken and recognized in Beegle *v.* Wentz and Seichrist's Appeal, *supra*." In the present case, Mrs. Cowperthwaite and her husband were both living at the time of the alleged parol agreement. Her estate in dower could not become a vested interest in possession except in the event of her survival, which might never happen. The case is therefore the ordinary one of a parol agreement by one to purchase land for another at a sheriff's sale followed by a breach of the contract to convey on the part of the purchaser, in which event it has been uniformly held that no resulting trust arises, unless the promisee had furnished the purchase-money in whole or in part, or had

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at the time of the contract an actual estate or interest in the land or a *bona fide* claim thereto. The action was in its origin a proceeding before an alderman by the plaintiff as purchaser at sheriff's sale to recover possession of the land of the defendant in the execution sold as his and of which he was in possession at the time of and after the sale. In such cases under the Act of June 16, 1836 (Purdon, 662), the right of the plaintiff to recover can only be denied upon affidavit and proof, 1st, that the person in possession has not come into possession and does not claim to hold the same under the defendant in the execution but in his own right; or 2d, that he has come into possession under the title derived to him from the said defendant before the judgment under which the execution and sale took place; or 3d, that he holds under a third person who claims in his own right and not under the defendant or claims under the defendant by title derived before the judgment. None of these defences were established on the part of James Cowperthwaite, and the defence set up by Mrs. Cowperthwaite was invalid for the reasons heretofore stated.

The considerations above indicated affect all the assignments of error except the fourth, and with that exception they are all sustained.

Judgment reversed, and a venire facias de novo awarded.

Opinion by GREEN, J.

Jan. '81, 114. February 22, 1881.

Strickler's Appeal.

Assignment for the benefit of creditors—Partnership—Preferred creditors—Wages of laborers—Individual and firm creditors—Marshalling of assets—Adverse claimant—When not to be admitted to share in fund for distribution.

In the distribution of a fund arising from the sale of property owned by and used and treated as belonging to a partnership, but the title to which is in the name of one of the firm, the wages of laborers and others employed by the firm are entitled to a preference over claims of creditors of the individual partner who have loaned their money upon the faith of his representations that the property belonged to him.

Where a firm makes an assignment for the benefit of creditors, and the assignees sell a portion of the property assigned to them:

Held, in the distribution of the fund produced by said sale, that no one but a creditor of the firm was entitled to share therein.

Appeal from the Common Pleas No. 3, of Philadelphia County.

Appeal of J. S. Strickler from the decree dismissing his exceptions to the report of the auditor on the first account of the assignees of Caleb H. Malin *et al.*, trading as Malin Brothers.

The material facts, as they appeared before the auditor, Charles F. Corson, Esq., and his opinion thereon were as follows:—

"But one question of importance has arisen in the distribution of the fund, and that is in reference to the claim of Strickler, a judgment and individual creditor of George Malin, one of the assignors, who claims that, as the property at the Dauphin Furnace was in George Malin's individual name, it should be treated as his separate property, and applied, first, to the payment of his individual debts.

"Strickler adduced testimony to show that at the time the debt was contracted he was informed by George Malin that he (George) was the owner of the Dauphin Furnace, and that this was confirmed by the record of the deed, which stood in George's name alone, and that at the time of the purchase of the real estate a bill of sale was made of the personal property also to George Malin alone.

"It was argued by Mr. Bispham that, the debt having been contracted upon the faith of this representation, made by George Malin, that the property was his individual property, and the confirmation of it by having the deed in his name alone, it should be so treated, and that the assignors and the partnership creditors are estopped from now setting up that the property, although in the name of one of the partners, was in fact partnership property.

"Considerable testimony was adduced by the assignees to show, and I find, that the Dauphin property, although standing in the name of George Malin alone, was in fact purchased with the partnership money and belonged to the firm, but at the time the purchase was made the title was to be in George Malin's name for convenience only, he being a widower, and because in the event of a sale it could the more readily be transferred. I find that it was always treated as partnership property of the firm, and that fact seemed to be well known by nearly all the persons dealing with the firm, all notes given to the furnace being drawn by George Malin to the order of the firm and indorsed by them.

"Having found that this property was really partnership property, the auditor is of the opinion that in the distribution of this fund it must be so treated, and that the question of estoppel, which would no doubt apply in a contest between the claimant and the assignee, can not apply here, where the creditors of the insolvent firm are claiming the proceeds in the hands of the assignees. Besides this, there is no sufficient evidence to show that the representations made by George Malin were made with the knowledge or were acquiesced in by Caleb Malin and Wil-

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liam R. Gunnis, the remaining members of the firm.

"The auditor therefore decides that the claim of J. S. Strickler, as an individual creditor of George Malin, should be disallowed; but as the notes held by him are indorsed by the firm of Malin Brothers, the assignors, he should be entitled to a *pro rata* dividend upon the fund for distribution, and it will be so awarded to him."

Upon the hearing of exceptions filed by Strickler, the report was recommitted to the auditor for the purpose of taking testimony in reference to the amount due for wages and other preferred claims, if any.

The auditor found:—

That there was realized from the sale of the personal property of Dauphin Furnace the sum of $2464.80.

That there should be paid for wages and other preferential labor claims properly chargeable to said fund the sum of $3319.24, thus making the sum paid out for wages and other preferential claims exceed the sum realized from the sale of the personalty at the Dauphin Furnace by the sum of $854.44.

Strickler excepted to this report, because the auditor had not reported that his claim should be paid in full, or as far as the balance for distribution, after deducting the expenses of the audit, would go, on the ground that the partnership creditors were estopped from denying that the property was the individual property of George Malin, and that the labor claims were partnership debts.

The Court, after hearing, dismissed the exceptions, and confirmed the report, whereupon Strickler took this appeal, assigning for error the action of the Court in dismissing the exceptions.

G. T. Bispham, for the appellant.

In a controversy between the firm and the appellant, the estoppel would operate; the rights of the assignee cannot rise higher than those of his assignor. The estoppel is not prevented by the existence of the preferred claims, because the contest is between creditors of different debtors. The wages were partnership debts, but, *quoad* the appellant's claim, the fund for distribution was individual property.

Callender *v.* Robinson, 38 Leg. Int. 24.
Waters' Appeal, 11 C. 527.

J. Howard Gendell, for the appellees.

The appellant was neither purchaser nor lien creditor. The auditor found that the property was the firm's, and was right in applying the proceeds of it to their creditors.

Erwin's Appeal, 3 Wr. 535.
Mining Association *v.* Reed, 30 Sm. 38.

The preferred claims were all for work done on the furnace, and they were, therefore, entitled to priority out of the fund produced by it.

March 7, 1881. THE COURT. We think it very clear that whether the Dauphin Furnace property was to be regarded as belonging to the firm of Malin Brothers or to George Malin individually, it was liable to the wages of laborers and others, and to the expenses and other matters, which the auditor allowed as preferred claims, and which exhausted the entire fund. Besides, the fund in Court was in the hands of the accountants as assignees of Malin Brothers, and how could any adverse claimant be admitted to share in its distribution?

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM.

GREEN and MERCUR, JJ., absent.

Common Pleas—Law.

C. P. No. 1. May 7, 1881.

Drechman v. Lauer.

Affidavit of defence—Appeal from magistrate—Recognizance of bail—An affidavit setting forth that defendant entered into recognizance without reading it on the representation that it was only security for costs, is insufficient.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur recognizance of bail on appeal from the judgment of a magistrate.

The plaintiff obtained judgment against one Gotsh, whereupon the latter appealed, the defendant entering into the following recognizance:—

"I am held in the sum of $200 as bail absolute, conditioned for the payment of the debt, and all costs that may be legally recovered against appellant."

Appellant failing to pay on the judgment being affirmed, a sci. fa. issued on the recognizance, whereupon the defendant and Gotsh filed affidavits setting forth that they called at the magistrate's office for the purpose of entering security for costs, and were informed that the security was only for costs and not for the debt, and that relying on such representations Lauer signed the recognizance without reading it, or having it read to him.

Wireman, for the rule.

In a suit on a recognizance its validity cannot be questioned, either by proof that it was illegally taken by the magistrate, or that it was fraudu-

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lently obtained. The only remedy is an application to the magistrate to reform it or set it aside.

Clark *v.* McComman, 7 W. & S. 469.

Signing a paper without reading it is no defence.

Volkmar *v.* Ervin, 3 WEEKLY NOTES, 291.
Penna. Co. *v.* Shay, Ibid. 45.
Firth's Est., 38 Leg. Int. 166.
Arundel, contra.

May 14, 1881. THE COURT. The recognizor and the original defendant both allege that the magistrate misled them by representing that the recognizance was for costs only, whereas it was for the debt and costs. That these facts do not constitute a sufficient defence is clearly shown by the authorities cited on argument. Lauer should have asked the magistrate to read the recognizance or should have read it himself.

Rule absolute.

Oral opinion by ALLISON, P. J.

C. P. No. 2. Sept. 24, 1881.

Commonwealth to use of Martin v. Leonard.

Pleading and practice—Declaration in debt due to one other than plaintiff.

Appeal from the judgment of a Magistrate.

Debt, by the Commonwealth of Pennsylvania to the use of Jos. J. Martin, City Treasurer, setting forth that the defendant was indebted "to the said Joseph J. Martin, as City Treasurer, in the sum of forty-three dollars" for the annual license of a billiard (pool) table and costs, etc.

The defendant demurred, because, *inter alia*, "the said declaration alleges an indebtedness by the defendant to one Joseph J. Martin, City Treasurer, who is not a party to the suit."

Joseph T. Ford, for demurrer.
J. S. Williams, contra.

THE COURT. Demurrer sustained, with leave to amend.

C. P. No. 4. Oct. 8, 1881.

Larkins v. Coffee.

Practice—Taxation of costs—Attorney's fees, when not allowed.

Sur exceptions to Prothonotary's taxation of costs.

Judgment was obtained by plaintiff against defendant in a magistrate's court. Two rules were taken by defendant for an appeal to the Common Pleas *nunc pro tunc*, both of which were discharged. Plaintiff having issued a fi. fa., which was returned "*nulla bona*," then filed a transcript in the Common Pleas and also a bill of costs including $3.00 for an attorney's fee on each rule taken by defendant for appeal *nunc pro tunc*.

The bill was taxed and allowed by the commissioner. Defendant excepted to the allowance of the attorney's fees, and of the magistrate's costs, which amounted to $5.40.

J. Jos. Murphy, for the exceptions.
E. Fox, contra.

October 20, 1881. THE COURT (after stating the facts). This bill was allowed by the commissioner. We, however, fail to find any law to warrant it, and no Act of Assembly has been shown us justifying the allowance of an attorney's fee upon a judgment obtained in a magistrate's court; indeed, the Act of Assembly pertinent to the case seems to intimate that no attorney is required in such cases. It provides (Bright. Purd. 863, pl. 100): "The prothonotaries of the respective counties shall enter on their dockets transcripts of judgments obtained before justices of the peace of their proper counties, without the agency of an attorney." It follows from this that the first and second exceptions must be sustained to the extent of deducting from the bill the sum of six dollars allowance for the attorney's fees. The record does not show that the costs of the magistrate were before the commissioner for taxation, and hence the third exception is dismissed.

And now Oct. 20, 1881, it is ordered that the commissioner's taxation of plaintiff's bill be reversed. It is further ordered that the said bill is now taxed at $2.25.

Opinion by BRIGGS, J.

U. S. District Court—Admiralty.

Sept. 30, 1881.

Chambers v. British Steamship "Clymene."

Constitutional law—Pilotage—Waters of Delaware River and Bay—Concurrent jurisdiction of the States of Delaware and Pennsylvania over—Construction of Acts of Congress of Aug. 7, 1789, and March 2, 1837—Right of

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a pilot licensed by Act of April 5, 1881, of the State of Delaware to recover compensation for piloting a vessel from the sea to Philadelphia —Invalidity of Pennsylvania Act of February 4, 1846, imposing a penalty for acting as a pilot without a Pennsylvania license—Jurisdiction of Pennsylvania over pilotage of vessels bound to Philadelphia not exclusive.

The right of a State bordering on public navigable waters to legislate on the subject of pilotage with respect to vessels bound to her ports is not exclusive but is shared by the other States bordering on such waters.

A law of any such State prohibiting any one from acting as a pilot on such waters without its license is invalid so far as it interferes with the performance of pilotage service by persons licensed by the other States bordering thereon.

The libellant, a pilot duly licensed by Act of April 5, 1881, of the State of Delaware, but having no license from the State of Pennsylvania, offered his services as pilot to the respondent, while off the Five Fathom Bank Lightship, at the entrance of Delaware Bay. The respondent accepted his services, which were performed by the libellant, who took the vessel from the sea to Philadelphia, for which he claimed the compensation prescribed in the Delaware Act of April 5, 1881, which was refused on the ground that he had no authority to perform the services, that he was liable to indictment for so doing under the statute of Pennsylvania of Feb. 4, 1846 (P. L. 30), and that his services were accepted in ignorance of such want of authority:

Held that the libellant was a duly licensed pilot authorized to pilot a vessel over the waters of the Delaware Bay and River to Philadelphia, notwithstanding any law of Pennsylvania to the contrary, and that he was therefore entitled to recover.

Semble that the provisions of the Delaware statute of April 5, 1881, in so far as they contemplate an exclusive jurisdiction over the subject of pilotage on the waters of Delaware Bay and River, are inoperative and void.

Sur libel and answer.

Libel for pilotage, filed July 7, 1881, by Robt. C. Chambers against the British steamship "Clymene."

The libel set forth that some time in June, 1881, the libellant boarded the steamship "Clymene" while off the Five Fathom Bank Lightship in Delaware Bay and offered his services as a pilot to conduct her to Philadelphia, her port of destination; that his services were accepted and performed; that he held a license as pilot by Act of April 5, 1881 (P. L. 494, etc.), of the State of Delaware, and claimed the compensation prescribed in that Act for her pilotage from the sea to the Port of Philadelphia.

The answer admitted the tender of his services, and their acceptance upon the supposition that libellant was a pilot licensed under the laws of the State of Pennsylvania, which make the taking of a pilot compulsory. But while admitting the performance of the services, the answer denied libellant's authority to perform them, and averred that he was liable to indictment for the discharge of such services by the Act of February 4, 1846, of the State of Pennsylvania (P. L. 30, Purd. Dig. 1313, pl. 7).

Henry Flanders and *Thomas F. Bayard* (of Delaware), for libellant.

The jurisdiction of the Court in this case is based upon the Constitutional grant of admiralty and maritime jurisdiction.

Hobart *v.* Drogan, 10 Peters, 108.
Cooley *v.* The Port Wardens, 12 How. 299.

The States have concurrent power of legislation upon the subject of pilots and pilotage.

Act of Congress, Aug. 7, 1789 (2 Bioren & Duane's Laws U. S. 34).

Navigation is a paramount right, and the navigable waters of the United States are part of the *jus publicum* irrespective of the proprietary claims of riparian States. Therefore the waters upon which a pilot may exercise his calling are not limited to waters within the jurisdiction of the State from which he holds his license, but extend to all navigable waters connected therewith, and within the terms of his license, which by custom and usage have become pilotage ground.

Wilson *v.* McNamee, 12 Otto, 572.
Hobart *v.* Drogan, 10 Peters, 108.
Cisco *v.* Roberts, 36 N. Y. 292.

That the State of Delaware has the power to pass laws regulating pilotage on the Delaware River and Bay is clear from—

Act of Congress of March 2, 1837 (5 U. S. Stat. at L. 153).

The position assumed by the State of Pennsylvania is identical with the pretension set up by the State of New York to exclusive legislation over waters within her territorial limits, which was held to be untenable in—

Gibbons *v.* Ogden, 9 Wheaton, 207.

A pilot licensed by either of the States bounded by common waters may pilot a vessel into or out of any port situated upon such waters.

Flanigen *v.* Washington Ins. Co. 7 Barr, 306.

Pilotage laws are compulsory and cannot be evaded on the plea of ignorance. Compensation for pilotage beyond the boundaries of the State is the subject of legislation by such State.

The China, 7 Wallace, 53.
The Nevada, 7 Ben. 386.
Cisco *v.* Roberts, 36 N. Y. 292.

H. G. Ward, Morton P. Henry, and *R. C. McMurtrie*, for respondents.

Pilotage is a subject for local regulation by the State within which lies the port whose commerce is to be protected. The State of Delaware cannot repeal or affect the legislation of the State of Pennsylvania upon the subject, for no State can give extra-territorial force to her laws.

The Annapolis, Lush. 295.
Cisco *v.* Roberts, 36 N. Y. 292.
The Bark Nevada, 7 Ben. 386.

Admitting that Delaware River and Bay are navigable waters of the United States and com-

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mon to all the citizens thereof, without reference to the territorial limits of States, the supplying by the State of Delaware of pilots to vessels bound to and from the ports of another State cannot be said to be an exercise of her right to the free navigation of those waters. It has nothing to do with her right to free navigation, except to obstruct a similar right of the State of Pennsylvania to free navigation.

The Daniel Ball, 10 Wall. 563.
The Montello, 11 Id. 411.
Gibbons *v.* Ogden, 9 Wheaton, 1.

Pennsylvania, as a province, had an easement in these waters derived from the Charter of 1681 from King Charles II. to Penn, wherein it is provided as follows:—

"We doe also give and grant unto the said William Penn, his heires and assignes, the free and undisturbed use and continuance in and passage into and out of all and singular ports, harbors, bayes, waters, rivers, isles, and inletts, belonging to or leading from the country or islands aforesaid."

The title to the three counties of Newcastle, Kent, and Sussex, now comprising the State of Delaware, granted to Penn by the Duke of York, was subject to the public right of navigation.

Pea Patch Case, 1 Wall. Jr. cxxiii.

After the Declaration of Independence the colonies succeeded respectively to the rights of the Crown, and the navigable waters were held for their common use.

Martin *v.* Waddell, 16 Peters, 367.

Laws regulating commerce not bound to or from the State enacting such laws, are unreasonable, because impeding the commerce of other States. The result of the principle contended for by libellant would be to oblige vessels bound to the Port of Philadelphia to take pilots from all three States bordering on the river Delaware, and this would almost amount to laying an embargo on that port.

The contention in favor of the Delaware Act is not, however, based on the right of that State to regulate pilotage on navigable waters within her limits, but on the Act of Congress of March 2, 1837. A reasonable construction of that Act does not support the claim. It was merely intended to give to States lying on either side of a port an equal right to supply pilots to vessels bound for that port.

Cribb *v.* The State, 9 Fla. 409.
The Glenearn, 7 Fed. Rep. 604.

The State of Delaware is not so situated with reference to the State of Pennsylvania as to entitle her to take advantage of the provisions of this Act.

There can be no recovery on a *quantum meruit*, for, by the Act of Feb. 4, 1846, of the State of Pennsylvania, the performance of pilotage service by libellant was illegal.

Johnson *v.* Kolb, 3 WEEKLY NOTES, 273.
Bank *v.* Coal Co., 7 W. & S. 233.
Seidenbender *v.* Charles, 4 S. & R. 151.
Mitchell *v.* Smith, 1 Binn. 110.

Oct. 12, 1881. THE COURT. The claim is for services rendered in piloting the respondent up the Delaware Bay and River to Philadelphia. The tender and acceptance of the service, as well as its performance, is admitted by the answer. The refusal to pay is rested on an allegation that the libellant had no authority to perform the service, that he was liable to indictment, under the laws of Pennsylvania, for performing it, and that the service was accepted in ignorance of such want of authority.

The libellant was duly licensed under a statute of the State of Delaware, approved April 5th, 1881. Does this license authorize him to do what he undertook? This is the only question presented.

Jurisdiction over the subject of pilotage is conferred upon the Federal Government by the third clause of Article eighth of the Constitution, which provides for the regulation of commerce. (Cooley *v.* The Port Wardens, 12 How. 299.) Whether the States might exercise jurisdiction until such time as Congress should interfere is a vexed question, about which the Judges disagreed in the case cited. To sustain such jurisdiction it must be held that the constitutional grant of authority to the Federal Government did not, of itself, oust the authority of the States. While such a view might seem to be illogical, it is not inconsistent with what has frequently been asserted by the Supreme Court in similar cases. As is said in Henderson *v.* The Mayor (2 Otto, 272), "It is stated in the decisions of this Court that there is a kind of neutral ground, especially in that covered by the regulations of commerce, which may be occupied by the States, and their legislation be valid, so long as it interferes with no Act of Congress or treaty of the United States. Such a proposition is supported by the opinions of several of the Judges in The Passenger Cases (7 How. 283); Cooley *v.* The Port Wardens (Ibid.); and by the cases of Crandall *v.* Nevada (6 Wall. 35), and Gilman *v.* Philadelphia (3 Wall. 713). But the doctrine has always been controverted in the Court, and has seldom, if ever, been stated without dissent."

As, however, Congress did interfere, by the statutes of 1789 and 1837, the jurisdiction of the States is now confined within the limits thus prescribed. The first of these statutes adopted the existing laws of the States regulating and governing the subject of pilotage, and provided for the adoption of such others as they might thereafter make, thus conferring upon the Acts of the

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State Legislatures the effect of Federal statutes. Its language is as follows: "All pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." It might readily have been foreseen that the States thus left to separate, independent action would soon come into conflict. Two or more, bounding on the same water, each intent upon its individual interests, would be impelled to conflicting, hostile legislation. Such a result did follow, and, to provide for it, Congress, in March, 1837, enacted, "That it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly authorized or licensed by the laws of either of the States bounded by said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding."

The first of these statutes conferred on the State of Delaware (if she had it not before) authority over the subject of pilotage, on the navigable waters within her limits. Such at least was its effect. I do not mean to say that the authority thus conferred (or recognized) was *exclusive*, and might lawfully be exercised in hostility to her neighbors,—even before the enactment of the subsequent statute. I believe, indeed, that it was not exclusive; and that it could only be exercised in such manner as was consistent with the relations which the several States bear to each other as members of the Federal Government. (Gibbons *v.* Ogden, 9 Wheat. 1; The Daniel Ball, 10 Wall. 563; The Montello, 11 Wall. 411.) The subsequent statute did not interfere with the proper exercise of this authority, but was intended to put the question just suggested at rest, by providing against such abusive, hostile exercise. She may license pilots, and provide regulations for their government and employment, but she may not exclude others, duly licensed elsewhere, from employment on the public waters of the nation, because these waters happen to be within her territorial limits. Those from Pennsylvania as well as her own may lawfully exercise their calling there, and vessels requiring such service may elect whom they will employ. That this statute was intended to apply to circumstances such as exist in this case I cannot doubt. They are clearly within its spirit; and with a just interpretation of its language, as clearly within its terms. It was so understood and applied by the Supreme Court of Pennsylvania in Flanigen *v.* The Insurance Company (7 Barr, 306), and so construed by Congress in the subsequent statute of February, 1847, relating to the same subject.

In this view of the case the respondent's contention that "pilotage is the subject of local regulation of the State in which the port lies," and therefore that Pennsylvania, in the absence of statutory prohibition, has exclusive jurisdiction of pilotage respecting the Port of Philadelphia and its commerce is unimportant. It is not improper, however, to say (as before intimated) that I could not adopt this position, even in the absence of the statute last referred to. The relations of the States as members of the general government—the fact that they are not separate independencies, and that the navigable waters within their respective limits are subject to common use—must be constantly kept in view. The commerce on the Delaware Bay and River, no matter where from or where bound, does not belong to Pennsylvania. That she and her citizens derive a larger share of benefit from it than her neighbors is her good fortune, but it confers no right on her to say who shall enter a port within her limits, or what pilot shall be employed. The port itself, constituted of the public waters of the nation, is not hers; and it is but by the grace of the general government that she is allowed any independent voice respecting it. In the absence of the statute of 1837, that of 1789, construed in the light of these facts, must have been held to confer on Pennsylvania, I believe, such authority only as is here conceded to her. Before the adoption of the Federal Constitution she had no jurisdiction whatever beyond her territorial limits. Since that event she has none (even within) except such as Congress has conceded to her. She must be content, therefore, with a voice on the subject in common with her neighbors, who with her border on the waters that constitute her and their outlet to the sea.

It follows from what has been said that the libellant was a duly licensed pilot, authorized to do what he undertook; and that any law of Pennsylvania designed to interfere with him in this respect, is inoperative and void. It also follows that the provision of the Delaware statute which contemplates an *exclusive* jurisdiction over the subject on waters within her limits—by requiring "that any person exercising the profession of a pilot in the bay and river Delaware shall . . . apply in person to the Board of Pilot Commissioners (of the State of Delaware) for a license to entitle him to follow that occupation"—is equally inoperative and void.

A decree must be entered in favor of the libellant for the amount claimed.

Opinion by BUTLER, J.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, NOV. 24, 1881.* [No. 32.

Supreme Court.

May, '81, 144. May 3, 1881.

Stone and Wall v. McMullen.

Wills—Words "die without legitimate issue"—When construed to contemplate an indefinite failure of issue.

A devise to testator's two sons, A. and B., "to be equally divided between them, to them their heirs and assigns forever," and a direction "if either of testator's two sons should die without legitimate issue, that the survivor should inherit the whole of the deceased's part of the land," will be held to contemplate an indefinite failure of issue, and will, therefore, by implication, vest an estate tail in the devisees.

Such a construction will give way only when the will contains other expressions, showing an unequivocal intent on the part of the testator that his words shall not be construed in their technical sense.

An illiterate testator devised a farm to A. and B., his two sons, "to be equally divided between them, to them their heirs and assigns forever." He then provided as follows: "It is my will that if either of my two sons . . . should die without legitimate issue that the survivor shall inherit the whole of the deceased's part of the land."

At the time of testator's death, in 1793, neither A. nor B. was of age; on coming of age they divided the land in severalty. A. died leaving issue, then B. died leaving issue. Afterwards B.'s issue became extinct, whereupon one of A.'s issue brought ejectment against the vendees of the last survivor of B.'s issue for his undivided share of B.'s portion of the land:

Held, that the terms of the will must be construed to contemplate an indefinite failure of issue, that therefore a fee tail was vested in the devisees with cross remainders over, and that the plaintiff was accordingly entitled to recover.

Error to the Common Pleas of York County.

Ejectment, by George McMullen against Thomas H. Stone and Jacob Wall, for an undivided interest in a tract of land in York County. The material facts, as contained in a case stated in the nature of a special verdict, were these:—

Hugh McMullen died in February, 1793, seised of the premises in question, having by his will, dated November 29, 1792, provided as follows:—

"Item. I Give and devise to my Two Sons Hugh McMullen & George McMullen the plantation that I now live on to be Equally divided between them, to them their Heirs & Assigns forever, Subject to the payment of thirty Shillings Yearly to My daughter Elizabeth during her natural Life & One third of the Clear Rent yearly to Mye dearly beloved Wife during her Natural Life. It is also my Will that if Either of my two Sons Hugh or George *should die without Legitimate Issue that the Survivor Shall Inherit the Whole of the deceased's part of the land afs'd.* I also Give and bequeath to my said two Sons Hugh and George all my Horses & Mares and all the farming utentials that Shall be in my possession at the time of my decease Together with two thirds of all the Residue of my personal Estate at the appraisment after their Mother my beloved Wife maketh her Choice of the first third part thereof Further it is my Will that my said two Sons Shall neither rent Bargin nor Sell the land afs'd nor Enter into Agreement indentures or bargins of Importance before they Arive to the Age of twenty One Years but by the Aprobation and Consent of my Executors."

At the date of the will and of the testator's death his sons, Hugh and George, were minors, aged about twelve and sixteen, respectively. Soon after they arrived of age they divided the land, each taking a parcel in severalty. Hugh, the son, died in 1864, leaving two daughters, to whom he devised his parcel. One of the latter having died intestate and without issue, her interest vested in the other, Elizabeth, who, in 1879, sold and conveyed part of said land to Stone and Wall, the defendants. Elizabeth died October 29, 1879, without issue.

George McMullen, the testator's son, died in 1850, leaving several children, all of whom have since died, leaving children to survive them, of whom plaintiff is one. Said George McMullen had, during his lifetime in 1819, aliened part of the real estate, and the plaintiff sought to recover in this action not only that portion of the land devised to Hugh, but also that which George sold during his lifetime, and which, by divers mesne conveyances, had passed to defendants. As to the latter portion of his claim, it was, however, conceded by the plaintiff on the trial that he was barred by the Statute of Limitations, his right of action having accrued in 1850, and this suit having been brought in 1880. He, therefore, confined his claim to his share of the portion of the land claimed by Hugh and sold by Hugh's daughter Elizabeth.

The Court held that the limitation in the testator's will imported an *indefinite* failure of issue, that therefore the sons, Hugh and George, took an estate tail, which was conclusive of the plaintiff's right, on the failure of issue of Hugh, to recover his proportionate undivided part of the land in the defendant's possession, which Hugh McMullen took under his father's will, and of which he died seised. WICKES, A. L. J., filed an opinion, in which, after reviewing the arguments and authorities, he said: "We have considered the will from the standpoint of its own phraseology, and not in the light of subsequent events. Not only do we think the technical words of the will are to be taken in their technical sense, but we know of no other sense in which they could so well execute what we con-

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ceive to have been the intention of the testator. If the testator had been asked, 'Suppose your son Hugh should die leaving issue, and that issue should die in one month afterwards, how, in that case, do you intend his part of your estate shall go under your will?' Would not the probable answer have been: 'Why to my surviving son surely.' And suppose the further question addressed to him: 'But if your son George should have departed this life before the failure of Hugh's issue, leaving, however, children or grandchildren to survive him?' Can it be doubted, that he would have declared: 'Then to such posterity.' And yet that intention would be entirely defeated by the construction contended for, and George never could have taken at all, even had Hugh's issue survived him but a single hour.

"If we are correct in our interpretation of the meaning of this will it can make no difference that Hugh McMullen died leaving issue to survive him, which issue subsequently became extinct, for an indefinite failure of issue would embrace that event.

"Nor can it affect the limitation over, which would be good as a remainder, although void as an executory devise. Nor can the death of George McMullen during the lifetime of the issue of Hugh, affect the result. For if the limitation over operates as a vested remainder in fee, it would on the failure of Hugh's issue, pass to George, if living, not as a life estate or in tail, but in fee simple, and if dead, would descend to his heirs. (Lapsley *v.* Lapsley, 9 Barr, 130; Braden *v.* Cannon, 1 Grant, 65; Heffner *v.* Knepper, 6 Watts, 18.)"

The Court entered judgment for the plaintiff for the one undivided tenth part of said land. The defendants took this writ, assigning for error the said judgment.

R. L. Muench and *V. R. Keesey*, for the plaintiffs in error.

The testator first devises the land to his two sons, naming them, their *heirs and assigns*. By failure of issue, in the next sentence, he meant a definite failure either in the testator's lifetime, or at the death of the first taker. "If *either* of my two sons Hugh or George should die without legitimate issue, the *survivor* shall inherit (from testator) the whole," etc., may fairly be read: "If my son Hugh shall die without children then George shall take, and if George die without children then Hugh shall take the whole of the *deceased's* part." He says "survivor" of "either of his two sons Hugh or George," not "the survivor, his heirs," etc. The testator's belief that he had given his sons a fee simple is indicated by the restriction at the end of the devising clause that they shall not *sell* (in fee) during their minority *except* with the approval of his executors. The testator was aged and unlearned, but he has expressed the fact that he did not intend an indefinite failure of issue, with sufficient clearness to exclude a rule of construction only applicable where the will contains technical words without more. The will is to be read as you would read a letter of the testator.

2 Jar. on Wills, 268, 372.
Hill *v.* Hill, 24 Sm. 173.
Taylor *v.* Taylor, 13 Sm. 481.
Ingersoll's App., 5 Nor. 240.
Reck's App., 28 Sm. 432.
Wright's App., 8 Nor. 67.
Diehl *v.* King, 6 S. & R. 32.
Eichelberger *v.* Barnetz, 17 S. & R. 295.
Anderson *v.* Jackson, 16 Johns. 382.

W. C. Chapman, for defendant in error.

The settled construction to be given to the words, "die without legitimate issue," is not overcome by the use of the word "survivor."

Clark *v* Baker, 3 S. & R. 470.
Haines *v.* Witmer, 2 Yeates, 400.

"Survivor" means "the one who *personally or in his issue* is the survivor."

Clark *v.* Baker, *supra*.
Roe *v.* Scott, 1 Fearne on Rem. 47, note.

Nor does the subsequent restrictive clause affect this construction in any way, except by different punctuation. In the will it is not punctuated at all.

October 3, 1881. THE COURT. The will of Hugh McMullen, the elder, admitted to probate in March, 1793, contains the following provisions, upon the construction of which the present contention hinges, viz.: "I give and devise to my two sons, Hugh and George McMullen, the plantation that I now live on, to be equally divided between them, to them their heirs and assigns forever. Subject to the payment of thirty shillings yearly to my daughter Elizabeth during her natural life, and one-third of the clear yearly rent to my beloved wife during her natural life. It is also my will that if either of my two sons, Hugh or George, should die without legitimate issue, that the survivor shall inherit the whole of the deceased's part of the land aforesaid. . . . Further, it is my will that my said two sons shall neither rent, bargain, nor sell the land aforesaid, nor enter into agreements, indentures, or bargains of importance before they arrive at the age of twenty-one years, but by the approbation and consent of my executors." These are the only clauses in the will that can have any bearing on the question presented for our consideration. The testator left six children, of whom Hugh and George, then respectively sixteen and twelve years of age, were the youngest. They took possession of the farm devised to them by their father, and shortly afterwards divided the same between them. Hugh died testate in 1856, leaving two daughters, Elizabeth and Mary Ann, to

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whom he devised his portion of the land. In February, 1879, Mary Ann died intestate and without issue. A few days thereafter, Elizabeth, who had survived her husband, conveyed part of the land to Stone, one of the defendants below, and another part to Wall, the other defendant; and, in October of the same year, she died without issue. The issue of Hugh thus became extinct. George, the other devisee, died in Dec. 1850, leaving five children, all of whom have died since, leaving children, of whom the plaintiff below is one. During his lifetime, in 1819, George sold his part of the real estate; and the plaintiff sought to recover in this action not only that portion of the land devised to Hugh, but also that which George sold during his lifetime, and which by sundry conveyances had, in the mean time, passed to the defendants below. Inasmuch, however, as the purchasers from George, and those claiming under them, have been in continuous adverse possession since 1819, and as the right of action accrued in 1850, it was properly conceded that there could be no recovery as to that part of the land. But, the Statute of Limitations has no application to Hugh's portion, and the only question that arises in regard to it is: What estate did he take under his father's will—an estate in fee simple or fee tail? This depends solely on whether the devise over was upon a definite or an indefinite failure of issue. If it was the latter, the devisee clearly took only an estate tail, as the Court held, and in that event the judgment is right. In the first clause, above quoted from the will, the testator devised his plantation to his two sons, "their heirs and assigns forever." Standing alone, the language thus employed would undoubtedly give them a fee simple; but it is well settled that a testator may restrain the generality of a devise by subsequent expressions, and convert that which otherwise would have been a fee simple into an inferior interest; and in this mode more frequently than in any other is a particular estate given. (Middleswarth's Admr. *v.* Blackmore, 24 P. F. Smith, 414.) The generality of the devise was so restricted in this case. In its legal signification the word "issue" very nearly resembles the technical phrase "heirs of the body," and it is well settled that when real estate is devised, by one or more limitations in the same will, to a person and his issue, the word "issue" will be construed as a word of limitation, so as to give the ancestor an estate tail, unless there are expressions in the will unequivocally indicative of a contrary intent. Such expressions as "if he die without issue," "on failure of issue," "for want of issue," "without leaving issue," and the like, have frequently been considered; and, when standing alone in a will, the law defines them and gives them a precise and certain signification. They import an indefinite failure of issue, and thus create an estate tail in the first taker. The technical meaning given to such phrases has long since become a settled rule of property from which it would be unsafe to depart, except in cases that come clearly within a recognized exception to the rule. The following are a few of the many cases in which the subject has been considered: Clark *v.* Baker (3 S. & R. 470); Eichelberger *v.* Barnetz (9 Watts, 447); Langley *v.* Heald (7 W. & S. 96); Eby *v.* Eby (5 Barr, 463); Angle *v.* Brosius (7 Wright, 187); Kleppner *v.* Laverty (20 P. F. Smith, 70). According to these and other authorities that might be cited, the language employed by the testator "if either of my two sons, Hugh or George, should die without legitimate issue" must be taken to mean an indefinite failure of issue; from which it follows that the devisees took an estate tail.

But, while the rule of law which thus fixes the meaning of certain forms of expressions is, in a certain sense, an unbending one, it is not without some exceptions. It is conceded, as already intimated, that the construction referred to will give way when the will contains other expressions which clearly indicate that the technical words were intended to have a different meaning. The cases, however, show that the intent not to use the words in their legal sense must be unequivocal, and so plain that no one can misunderstand it. (Angle *v.* Brosius, *supra;* Guthrie's Appeal, 1 Wright, 9; Physic's Appeal, 14 Wright, 128.) In an early English case we have an instance in which the legal sense was controlled by plain and unequivocal words. The testator died leaving issue three sons, William, Thomas, and Richard. He devised land to Thomas subject to the payment of twenty pounds to Richard at the age of twenty-one years, and then provided that if Thomas died "without issue, living William, his brother," the latter should have the lands in fee. The question was, whether Thomas took an estate in fee or fee tail, and it was held that the clause, "without issue, living William," did not mean an indefinite failure of issue, but a dying in the lifetime of William without issue.

It is claimed by the plaintiffs in error that the death of whichever of the two sons might happen to die first, was the period fixed by the testator when the failure of issue was to occur, and that this definite failure of issue is indicated by the concluding words of the devising clause, "the survivor shall inherit," etc. In support of this view, Anderson *v.* Jackson (16 Johns. 382) is cited. In that case there was a devise in fee to two sons, with a subsequent direction that "if either of the said sons should depart this life without lawful issue, his share or part should go to the survivor;" and it was held that the words

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of the devise created a defeasible fee in the first taker with a limitation over by way of executory devise. But that case is contrary to the general current of authority, both in England and here; and the same may be said of Johnson *v.* Currin (10 Barr, 498), and other cases that are supposed to recognize the same doctrine. All the cases in which the question has been considered, with very few exceptions, are opposed to giving any such effect to the word "survivor" as is claimed for it by the plaintiff in error. (Wilson *v.* Dyson, Raym. 426; Chadock *v.* Cowley, Cro. Jac. 495; Roe *v.* Scott *et al.*, 1 Fearne on Rem. 47, note; Haines *v.* Witmer, 2 Yeates, 400; Clark *v.* Baker, 3 S. & R. 470; Heffner *v.* Knepper, 6 Watts, 18; Lapsley *v.* Lapsley, 9 Barr, 130; Smith's Appeal, 11 Harris, 9; Rancel *v.* Cresswell, 6 Casey, 158; Hope *v.* Rusha *et al.*, 7 Norris, 127.) In one of the English cases (Roe *v.* Scott *et al.*, *supra*), the words were "if either of my three sons shall depart this life without issue of his or their bodies, then the estate or estates of such sons shall go to the survivors or survivor," and the words were held to create an estate tail. The devise in Smith's Appeal was of real and personal property to the testator's children with a provision that in case of the death of any of them without issue, his or her share should be equally divided among the survivors, and, as to the land, it was held to pass an estate tail to the first taker.

The subsequent clause in regard to renting or selling the land can have no effect on the construction of the will, so far at least as the present question is concerned. All the questions arising in the case are so well discussed and the authorities so fully cited in the opinion of the learned Judge of the Common Pleas that it is unnecessary to add anything to what is there so well said.

Judgment affirmed.

Opinion by STERRETT, J.

July, '79, 94. March 7, 1881.

Cohen's Appeal.

Execution — Sheriff's sale — Purchase-money — Distribution pro rata — Lien creditors — Judgment for purchase-money — Priority — Where the lien is for purchase-money not necessary to be so stated on the face of the judgment or mortgage — Assignee without notice, who is not — What amounts to sufficient notice.

In order that a judgment or mortgage may have the effect of a purchase-money incumbrance, it is not necessary that the fact that it is so should be stated on its face.

Where a mortgage is given to secure a loan made by the mortgagee to the cestuis que trustent of the mortgagor, and subsequently the mortgagor conveys his interest in the real estate mortgaged to his cestuis que trustent by a deed reciting the mortgage and conveying the title expressly subject to the payment thereof, and on the same day the cestuis que trustent confess a judgment to the mortgagee expressed to be for the amount of the mortgage, whereupon the mortgagee satisfies the mortgage:

Held, that such judgment, given to the mortgagee, is to be deemed a purchase-money incumbrance, and is therefore entitled to share *pro rata* in a distribution of the proceeds of the real estate produced by a sheriff's sale under a prior judgment, with a judgment for purchase-money or his share in the land given by the cestuis que trustent to the mortgagor, and entered up the same day as the judgment of the mortgagee.

An assignee of said last-named judgment, with no express notice of the prior transactions, is in no better position than his assignor.

Appeal of Henry Cohen from a decree of the Common Pleas of Luzerne County, dismissing the exceptions to and confirming the report of the Auditor appointed to distribute the proceeds of a sheriff's sale of the real estate of Solomon Sturmer.

From the evidence adduced before the Auditor the following facts appeared:—

On Feb. 15, 1876, E. G. Butler conveyed the real estate in question to Sturmer by deed duly recorded. Sturmer held the title in trust for a partnership, consisting of himself, Bechtold, Elterich, Luschinger, and Mampel, trading as Sturmer & Co. His individual interest therein was limited to certain mechanics' liens held by him against it. On March 11, 1876, Sturmer confessed seven separate judgments, aggregating $10,480, which were entered up and took effect as liens against the property.

On Oct. 21, 1876, certain of the members of the firm of Sturmer & Co. and others gave to Sturmer a promissory note for $10,000. This note he indorsed over to the First National Bank of Pittston, who advanced the amount thereof to the firm. On the same day Sturmer, in order to secure this note, gave to the bank a mortgage for $10,000 on the said real estate, which was on the same day duly recorded.

Being desirous of relinquishing business, Sturmer, by deed dated Feb. 3, 1877, conveyed the real estate in question to his four partners. This deed recited all the judgments confessed by the grantor which had been entered as liens against the property, and also the mortgage to the bank, conveying the title expressly subject to these liens. On the same day that this deed was executed and delivered a judgment for $10,000 was entered up in favor of the bank against Elterich, Bechtold, Luschinger, and Mampel, upon the following judgment-note:—

$10,000. Pittston, Pa., February 1, 1877.

For value received, we promise to pay to The First National Bank of Pittston ten thousand dollars, with interest, two years from this date, and we do hereby confess judgment unto the said First National Bank of Pittston,

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for the above sum, debt, interest, and full costs of suit, with a release of all errors, and with waiver of inquisition on real estate, and with waiver of all exemption laws.

This instrument is given, and this judgment confessed to secure the payment to the said First National Bank of Pittston, of a loan of ten thousand dollars, made on Oct. 21, 1876, on a promissory note, drawn by S. Sturmer, Ph. Mampel, Wm. Bechtold, Richard Brenton, James R. Wear, and L. Elterich, to the order of Solomon Sturmer, and by said Solomon Sturmer indorsed to the said First National Bank of Pittston, which note is now unpaid. The said note to be taken up by a new note bearing even date herewith drawn by Ph. Mampel, Wm. Bechtold, L. Elterich, Henry J. Luschinger, to the order of Wm. Bechtold, and due ninety days after date, at the said First National Bank of Pittston, and this obligation to be and remain as collateral security for the loan represented by said note, and any and every renewal thereof, either wholly or in part, whether executed by all the parties thereto, or by any part of said parties, or by any other parties, until the loan represented by said first mentioned note, which this obligation is intended to secure, shall have been fully paid and discharged, it being understood that said note shall be renewed from time to time, as it becomes due and the discount paid.

(Signed), L. ELTERICH,
WM. BECHTOLD,
H. J. LUSCHINGER,
PH. MAMPEL.

On the same day the bank entered satisfaction on their mortgage against the said realty, though there was no agreement for such entry, and Sturmer was ignorant of it.

On the same day Elterich, Bechtold, Luschinger, and Mampel gave to Sturmer a judgment-note for $1255.79, being the purchase-money of his interest in the firm's real estate that day conveyed to them. This judgment was the same day entered up, but at a later hour than the entry of the bank's judgment. This judgment was, on August 8, 1878, assigned to Henry Cohen, who had no actual knowledge of the foregoing transactions.

The real estate was sold at sheriff's sale on Sept. 7, 1878, for $11,005, under one of the judgments confessed by Sturmer on March 11, 1876.

It was conceded that all of said last-named judgments confessed on March 11, 1876, were entitled to priority in the distribution of the fund. As to the residue thereof it was claimed both by the bank and by Cohen. The Auditor awarded to Cohen therefrom the full amount of his claim, less the sum of $425.49, already realized by him from the sheriff's sale of certain personalty belonging to Elterich *et al.* The residue of the fund he awarded to the bank.

To this report exceptions were filed by the bank, and sustained by the Court in an opinion by HAND, J. The said balance was by the final decree awarded to Cohen and the bank *pro rata*, the amount of Cohen's judgment being reduced as aforesaid in the ascertainment of his *pro rata* share. Cohen thereupon took this appeal, assigning for error the action of the Court in refusing to award him the full amount remaining due on his judgment in priority to the judgment of the bank.

J. Vaughan Darling, for the appellant.

A judgment for purchase-money entered on the day of the delivery of the deed has priority over all other judgments entered the same day against the grantees in the deed.

Brown *v.* McCormick, 6 W. 64.
Lyon *v.* McGuffey, 4 Barr, 129.

When the bank, without the knowledge of Sturmer, satisfied their mortgage against him, and took a general judgment against the four grantees of Sturmer, they lost their priority of lien, and could not assert it again even against Sturmer had he continued to own the judgment. It is submitted that Cohen was an assignee without notice, for the records, on August 6, 1878, showed that the bank mortgage was satisfied, and he cannot be bound by any agreement not spread upon the record.

Hendrickson's Appeal, 12 Harris, 363.
Parke *v.* Neely, 9 WEEKLY NOTES, 193.

Steuben Jenkins, for the appellees.

The claim of the bank is recited in the deed, and the deed was made expressly subject to its payment. As notice of its judgment having been given for purchase-money appears upon the face of the title, the lien is preserved. The bank is protected by the recital in the deed.

Irvine *v.* Campbell, 6 Binney, 119.
Bear *v.* Whisler, 7 W. 144.

Unpaid purchase-money may be constituted a lien by apt words in a conveyance.

Heist *v.* Baker, 13 Wr. 9.
Neas's Appeal, 7 C. 293.

No man can call a judgment-creditor a purchaser, nor has such creditor any right to the land. He has neither *jus in re* nor *ad rem*. All that he has by the judgment is a lien on the land.

Cover *v.* Black, 1 Barr, 494.

The law abhors secret liens.

Kauffel *v.* Bower, 7 S. & R. 73.

The doctrine of equitable liens has never been adopted in Pennsylvania.

Hepburn *v.* Snyder, 3 Barr, 72.

When real estate has been purchased for partnership purposes, a judgment for a partnership debt is payable out of the proceeds of a sheriff's sale in preference to judgments in favor of or against the separate partners. All the debts of the firm must be paid before any of the partners are entitled to any part of the fund arising from the sale of its property.

Kelly's Appeal, 4 Harris, 59.

The defendant had ample time and opportunity to be informed of the state of the record.

Whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, where

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the inquiry, if pursued, would lead to a knowledge of the requisite facts.

People's Bank *v.* Spering, 7 WEEKLY NOTES, 435.
West's Appeal, 7 Id. 427.
Mulliken *v.* Graham, 22 Sm. 484.

May 2, 1881. THE COURT. In this case we have reached the conclusion, with some hesitancy, that the decision of the Court below was right. The Auditor gave priority in the distribution, to the judgment held by Cohen over the judgment of the bank. Both judgments were entered the same day, that of the bank being entered first in point of time. In ordinary circumstances neither would have had priority, and the proceeds would have been divided between them *pro rata*. But priority was claimed for the appellant's judgment on the ground that it was for purchase-money, and therefore entitled to priority as against any other judgments entered on the same day. As a general rule, this proposition is also true. But it is claimed for the bank that its judgment was also given for purchase-money, and was entitled to priority, because, on its face, it was given to secure a debt anterior to the conveyance, and for which a mortgage for the same amount was expressly stipulated to be paid by the deed conveying the title to the land sold to the defendants in the judgments. The Court below did not award priority to the judgment of the bank, but made division of the fund *pro rata* between it and the appellant's judgment. Was this correct? We think it was, in view of all the circumstances of the case. We think that, as between Sturmer and his grantees, the defendants in both judgments, on the one hand, and the bank, on the other, the judgment of the latter must be regarded as having been given for purchase-money. Sturmer, in trust for himself and others, held the legal title, and on Oct. 21, 1876, executed a mortgage to The First National Bank of Pittston for $10,000 on the brewery property in question, to secure the payment of a loan to that amount. For this debt the bank held the promissory note of Sturmer, indorsed by Luschinger, Bechtold, Elterich, and Mampel. The Auditor found, as a fact, that the individual interest of Sturmer, in the property of which he held the legal title, was limited to the value of some mechanics' liens he held against it. The other parties, above named, were interested with him in the ownership of the property, which was a brewery, and in the business there conducted. On February 3, 1877, in pursuance of an arrangement for closing out Sturmer's interest in the matter, a deed was delivered by him, conveying the property to the other parties named. Prior to the date of the mortgage to the bank Sturmer had confessed a number of judgments to various persons, and when the deed was made it recited these judgments, and also the mortgage of the bank, and conveyed the title expressly subject to the payment of these liens, including the mortgage. As the payment of the debts, secured by the judgments and mortgage mentioned, constituted to that extent the consideration of the conveyance, the amount of money which they represent must be considered as purchase-money as between the parties to the deed. On the same day that the deed was delivered, a judgment was entered of record in favor of the bank, and against the grantees in the deed, for the sum of $10,000. The instrument, containing the confession of this judgment, recited that it was given to secure the payment of the loan of $10,000, made on Oct. 21, 1876, by the bank, "on a promissory note, drawn by S. Sturmer, Ph. Mampel, Wm. Bechtold, Richard Brenton, James R. Wear, and L. Elterich, to the order of Solomon Sturmer, and by said Solomon Sturmer indorsed to The First National Bank of Pittston, which note is now unpaid." The instrument further recited that the above note was to be taken up by a new note to be drawn by Mampel, Bechtold, Elterich, and Luschinger, to the order of Bechtold, and that the judgment was to be held as collateral security for the payment of the loan. On the same day, but at a later hour, that the above judgment taken by the bank was entered, another judgment, in favor of Solomon Sturmer, against the said grantees in the deed, for $1255.79, was entered, and the instrument of confession recited that the obligation was for "a balance of purchase-money on lands this day conveyed by plaintiff," and that the judgment was restricted to the premises conveyed.

It is contended by the appellee that this was not a purchase-money judgment, but as the parties themselves declared it to be such, we think it must be so considered, as it appears to have been given for a part of the consideration of the conveyance.

In regard to the judgment held by the bank, it must be further stated that, simultaneously with its entry, the bank entered satisfaction of the mortgage held against Sturmer, though it is found that there was no agreement for such entry of satisfaction, and Sturmer was ignorant of it. It is contended by the appellant that the judgment of the bank is not a purchase-money judgment, and that, even if there had been a written agreement between the bank and Sturmer that the new judgment should have priority of lien over Sturmer's judgment, such agreement being collateral, and not spread upon record, would not bind one claiming by assignment from Sturmer of his judgment. This latter proposition is undoubtedly correct under the decisions (Parsons *v.* Wilhelm, 4 Norris, 218, and cases there cited). But we think that the judgment of the

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bank must be considered as a purchase-money judgment in view of all the circumstances. It is true it is not so stated on its face, but we do not understand that to be necessary in any given case, where, in point of fact, the lien, whether it be judgment or mortgage, is given for purchase-money. It is also true that the bank was not the vendor of the property conveyed. But it was a lien-creditor of the vendor by a mortgage antedating the conveyance, and the payment of the lien was a part of the consideration of the conveyance, and so recited therein. If this judgment had been given by the grantees to Sturmer, and by him assigned to the bank, it would undoubtedly have been a purchase-money judgment. Why, then, should the fact that it is given directly to the bank prevent its being so regarded, when, in point of fact, the money which it secures does constitute a part of the purchase-money of the property? By consent of the vendor, the vendees contract directly with the bank to pay it this part of the consideration of the sale. In reality the bank thus holds, by good title, that portion of the purchase-money represented by the amount of the judgment. The only question that remains is, Did Cohen, the assignee of Sturmer's judgment, have notice of this quality of the bank's judgment? He did not take his assignment until August 8, 1878, about eighteen months after the date of his judgment. He had ample opportunity to examine the records, and, of course, was bound by every thing that appeared in the title of the defendants, or which, as a matter of record, affected that title. When he looked at the record of the judgment he was taking, he saw it was for a *balance* of purchase-money for property conveyed by the deed recorded February 3, 1877, by Sturmer to the defendants. When he looked at the record of that deed, he found that it contained an express stipulation that the mortgage to the bank for $10,000 was to be paid by the grantees, and hence it constituted a part of the consideration of the conveyance. When he examined the record of judgments against the defendants, he found that on the same day that the judgment he was buying was entered, and prior in place on the docket was entered a judgment in favor of the bank, against the same defendants, for $10,000, which recited upon its face that it was given to secure the payment of a loan of $10,000, made on October 21, 1876, on a note, upon which the vendor and vendees were jointly liable. In looking at the record of the mortgage, which was recited in the deed to the defendants in his judgment, he would have discovered that it was given on the same day, October 21, 1876, that the note for the same amount was made, to secure which the judgment was given. The record of the mortgage further showed that it was satisfied on the same day that the judgment was taken and entered. We think that, in these circumstances, Cohen cannot be regarded as an assignee without notice, and that as between him and the bank the equities are at least equal. It is a familiar rule that whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, when the inquiry, if pursued, would lead to knowledge of the requisite facts. (Parke *v.* Neeley, 9 Norris, p. 59; Mulliken *v.* Graham, 22 P. F. S. 490.) We agree with the learned Judge of the Court below, that in view of these facts Cohen could ask for no preference; that Sturmer, upon manifest considerations, has no claim to preference as against the bank. This view of the case makes it unnecessary to consider the various assignments of error in detail. The facts upon which we determine it are not controverted.

Decree affirmed at the costs of the appellant.

Opinion by GREEN, J.

Jan. '81, 168. June 3, 1881.

Kern v. Powell.

Assignments for benefit of creditors—Preference—Act of March 24, 1818 (7 Sm. L. 132)—Act of April 17, 1843, (P. L. 273)—Recording of assignment.

An unrecorded assignment of property, in trust for the benefit of a single creditor, is invalid as against a subsequent general recorded assignment for the benefit of all the assignor's creditors. If, therefore, the assignees under the last named assignment take and sell the property named in the first assignment, the assignee under said first named assignment can recover neither the proceeds nor avails of the said property.

Error to the Common Pleas of Lehigh County.

Assumpsit, by A. M. Kern, in trust for Mary Ann Kern, against W. B. Powell, assignee for the benefit of creditors of William Kern.

On the trial before ALBRIGHT, P. J., the following facts appeared.

On March 28, 1877, William Kern being honestly indebted to his wife, Mary Ann Kern, in the sum of $7280, executed an assignment to his son, Albert M. Kern, in trust for the sole use of Mary Ann Kern, of certain cattle, farm stock, and other personal property on a farm belonging to the assignor in the possession of said Albert M. Kern, with power to sell the same for the use of Mary Ann Kern. This paper was not recorded. On April 7, 1877, William Kern made a general assignment for the benefit of his creditors to W. B. Powell, duly recorded within thirty days. Powell, acting as such assignee, appraised and subsequently sold the property

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assigned by the deed of trust to Albert M. Kern, with full knowledge of the fact that it had been so assigned. There was some conflicting evidence that this sale was made by the consent of Albert M. Kern, trustee, on the understanding that the question of his title to the proceeds should be settled before the auditor to whom Powell's account and the fund should be referred by the Court of Common Pleas. Soon after the sale William Kern was adjudicated a bankrupt, and under an order of the United States Court Powell filed his account in that Court, in which he charged himself with the proceeds, stated the claim of Albert M. Kern, trustee, and asked that the sum of $10,000 be set aside to await its determination. At the time this suit was brought Powell's account was pending before a register in bankruptcy, to whom it was referred to adjust and report distribution of the funds "the same as if they were in the hands of an assignee in bankruptcy."

The plaintiff requested the Court to charge, *inter alia*, in substance, that Powell having admitted that he sold with full knowledge of the trust in favor of Mary Ann Kern, was personally liable to her for the proceeds, whether or not the sale was made by consent and upon an agreement of her trustee to claim the proceeds before an auditor, and that the fact that Powell was assignee for benefit of creditors was no defence. The Court declined so to charge, and in the general charge submitted to the jury as a question of fact whether the sale by Powell was made with the consent of Albert M. Kern, trustee, on the understanding that he would claim the proceeds before an auditor, and instructed them that if it was with his consent the plaintiff could not recover, otherwise the verdict should be for the plaintiff.

Verdict for the defendant, and judgment thereon. The plaintiff took this writ, assigning for error, *inter alia*, the refusal of the Court to charge as requested, and the charge of the Court.

Edward Harvey (with whom was *O. E. Holman*), for plaintiff in error.

The defendant, as assignee of William Kern for the benefit of creditors, was a volunteer, and standing in the shoes of his assignor could not acquire any rights in derogation of the prior assignment in trust for Mary Ann Kern.

Ritter *v.* Brendlinger, 8 Sm. 68.
Spackman *v.* Ott, 15 Ibid. 131.
In re Fulton's Estate, 1 Ibid. 211.

Whatever trusts affect the assignor affect both the assignee and the general creditors claiming under the assignment.

Garrison's Appeal, 2 Grant, 216.
Vandyke *v.* Christ, 7 W. & S. 373.

Powell having assumed to sell the trust property, the proceeds in his hands are clothed with the same trust as the property was, or if he has parted with the proceeds he is individually liable. A volunteer is bound by the trust although he had no notice of it (Sadler's Appeal, 6 Nor. 154), but here Powell had actual knowledge and notice. No breach of trust by the trustee could relieve Powell from liability to the cestui que trust who was no party to the assignment.

Pratt *v.* Lewis, 4 Wh. 22.
Perry on Trusts, § 438, § 245.
Hatz's Appeal, 4 Wr. 209.
Guillou *v.* Peterson, 7 WEEKLY NOTES, 268.

The Court therefore erred in submitting to the jury as a test of the plaintiff's right to recover the question whether he made the alleged agreement that Powell should sell the trust property.

Jas. S. Biery and *R. E. Wright & Son*, for defendant in error.

The jury found that the plaintiff consented to the sale by Powell, and agreed to follow the fund before an auditor. He is therefore bound by the agreement, even though because of the bankruptcy proceedings no auditor could be appointed, and he is estopped from seeking to hold Powell personally liable by reason of the sale made by his own consent.

October 3, 1881. THE COURT. The view we take of this case makes it unnecessary to consider the assignments of error in detail.

Both parties claim by assignment from William Kern, in trust; the legal plaintiff in trust for the equitable plaintiff by assignment dated the 28th March, 1877, and the defendant as general assignee for the benefit of all creditors by assignment dated 7th April thereafter.

Section one of the Act of 17th April, 1843, (Purd. Dig. 91), declares all assignments of property in trust thereafter made by debtors to trustees to prefer one or more creditors, except wages of laborers not severally exceeding fifty dollars, shall be held and construed to enure to the benefit of all the creditors in proportion to their respective demands, and that all such assignments shall be subject in all respects to the laws now in force relating to voluntary assignments. The fifth section of the Act of 24th March, 1818 (Purd. Dig. 92), requires all such assignments to be recorded within thirty days after their execution, in the office for recording of deeds in the county in which the assignor resides, and on failure to so record, the assignment shall be considered null and void as against any of the creditors of the assignor. The first section of the Act of 14 June, 1836, makes it the duty of the assignee within like time, to file in the office of the prothonotary an inventory of the property assigned.

The assignment to the plaintiff was in trust, to pay a debt due to the wife of the assignor, which

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was not for the payment of wages for labor, and none of the requirements of the statutes relating to voluntary assignments were complied with by this assignee. This assignment, in express terms, gave a preference to one of the creditors of the assignor. Such attempted preference is made inoperative by the Act of 1843. (Worman *v.* Wolfersberger's Executors, 7 Harris, 59; Watson *v.* Bagaley, 2 Jones, 164; Fallon's Appeal, 6 Wright, 235; Miner's Nat. Bank's Appeal, 7 P. F. Smith, 193; Wallace *v.* Wainwright, 6 Norris, 263.)

The assignment to his son, both in express terms and by legal intendment, created a trust. It declares the transfer, to be "in trust and for the sole use of my wife, Mary Ann Kern." It proceeds, "and I authorize my said son to sell any portion of said property, and convert the same into money, and to otherwise use said property, to the use of my said wife." It is not the case of a transfer of property directly to the creditor. That would not be an assignment in trust under the statute. (Chaffees *v.* Risk, 12 Harris, 432.) This assignee is not a creditor. The object and intended effect of this assignment were to vest the legal interest in him and the equitable interest in another. That is clearly a trust. (Chaffees *v.* Risk, *supra;* Wallace *v.* Wainwright, *supra.*)

All preference of the plaintiff under the assignment, was annulled by the Act of 1843. Non-compliance with the Act of 1818 made the assignment void against all creditors, of whom the defendant is the representative. The property enured to their benefit. It all passed to the defendant as general assignee, who did comply with the requirements of the statute.

He having taken and sold the property in execution of his trust, the plaintiffs cannot in this action recover from him the proceeds or avails thereof. (Heckert's Appeal, 12 Harris, 482; Vanarsdale *v.* Richards, 1 Whar. 408.)

It is true, a voluntary assignee is not a *bona fide* purchaser for value, as is shown in Wright and Slingluff *v.* Wigton (3 Norris, 166) and the cases there cited. That rule of law, however, does not prevent full effect being given to the Act of 1843 when applied to an assignment in conflict therewith.

As under any view of the case presented, the plaintiffs cannot recover, the learned Judge committed no error to their prejudice.

Judgment affirmed.

Opinion by MERCUR, J.

July, '80, 41. May 11, 1881.

Packer v. Schrader Mining and Manufacturing Co.

Survey—Presumption of regularity—When absolute—Chamber survey—What does not constitute.

A surveyor in executing a warrant may adopt the lines of older or contemporaneous surveys as boundaries without marking them afresh upon the ground. A survey so executed will not be deemed a chamber survey.

Paschall *v.* Jones, 5 Smith, 153, followed.

Where a survey has been returned and accepted without caveat, the presumption, after twenty-one years, is *juris et de jure* that it was made on the ground.

Ormsby *v.* Ihmsen, 10 Casey, 462, followed.

When the regularity of a survey is legally fixed and absolute, it remains for a jury to determine whether upon the ground such lines, adjoiners, or other marks can be found, as will, to a reasonable certainty, determine the location of the tract claimed under that survey.

Where two warrants of different date are located by the same surveyor, the former being returned as surveyed before, but not being returned until after the survey of the latter, the adoption of the junior warrant as an adjoinder of the senior survey ought to have no other effect than to aid in the location of the older warrant.

Error to the Common Pleas of Bradford Co.

Trespass *quare clausum fregit*, by E. A. Packer against the Schrader Mining and Manufacturing Company, for cutting timber on land of the plaintiff, and converting the same.

Pleas, "not guilty," and "*liberum tenementum.*"

The suit was originally brought by E. A. Packer and several others, but the record was afterwards amended by striking off all the other names, so that Packer remained sole plaintiff.

The plaintiff claimed title to the land on which the alleged cutting was done, and traced back his title to a warrant for a tract of unseated land to one George Moore, dated April 27, 1792, "for 400 acres adjoining or near lands this day granted to Samuel Temple;" indorsed as "surveyed November 21, 1792;" and returned into the land office on January 8, 1795. Plaintiff showed that he and those under whom he claimed had paid the taxes on this tract down to the time of the alleged trespasses, which were committed in 1867, '68, '69. The plaintiff further showed by several practical surveyors that they had recently made an examination and survey of the land in the vicinity of the place where the cutting was done; that they located the Moore survey by original marks found on the ground. That the return called for a hemlock at the northeast corner; that they found and blocked it, and that it was plainly marked on four sides for a corner of the George Moore: that commencing at the

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southwest corner of the Moore and running north, they found the west line plainly marked for nearly one hundred rods; this brought them to the southeast corner of the Robert Erwin, a tract of land surveyed the next day after the Moore, and calling for it as a boundary. The Erwin called for a hemlock sapling as its southeast corner. This corner was found, plainly marked 1792. From this point no north line could be traced. Plaintiff further showed that the defendants cut and took all the valuable timber from about 250 acres of the Moore tract. He also gave evidence of the value of the timber, etc., and rested.

The defendants did not dispute the fact of cutting, but claimed title to the land on which it was done, under a warrant, survey, and patent for a tract of 409 acres of unseated land, to Andrew Tybout, on which they and their predecessors in title had regularly paid taxes. The warrant was dated 15 February, 1794; survey thereon was made March 24, 1794. There was an interference of about 250 acres between the Moore and Tybout tracts. The Tybout covered about 250 acres of the northern portion of the Moore. The return of the Moore called for a tract surveyed to Henry and Joseph Betz on the east. It was shown that this east line was marked 1792, and that the Betz tracts on the east were warranted 25 February, 1793, and surveyed July 4, 1793, by the same surveyor who had surveyed the Moore. The defendants claimed that the Moore was a chamber survey.

The Court charged the jury, *inter alia*, as follows:—

"If there was a survey under the Moore warrant, before the 24th March, 1794, the time the Tybout was surveyed, the title under the Moore patent dates back to the date of the warrant, but if it was not surveyed until after the Tybout was surveyed then the title to the land was in the defendants. I mean by survey, actual survey on the ground. It was the duty of the deputy-surveyor to go upon the ground, run and mark the lines, and establish the corners. In many instances he neglected his duty and omitted to do this, and made a draft in his office of a pretended survey, and returned it into the land office. These surveys, so returned, but never actually made on the ground, are commonly called 'chamber surveys.' It is claimed on the part of the defendants that the survey of the Moore warrant was a chamber survey. This allegation presents the principal question as to title; for I think the undisputed evidence shows that the Tybout was located by actual survey in the year 1794. Had the Moore been surveyed before that time? To determine this question you must consider all the evidence bearing upon it. I think there is no dispute but that the line for a long distance, both north and south of the hemlock corner, was run upon the ground in the year 1792. It is not enough that he was there to survey other warrants that adjoin it. Was he there, and did he survey the Moore warrant?"

The jury found for defendants, on which verdict judgment was entered. The plaintiff thereupon took this writ, assigning for error, *inter alia*, the portion of the charge of the Court above given.

H. C. De Witt, for plaintiff in error.

Prior to 1800, the surveyor-general indorsed no acceptance upon returns. The indorsement on this return "Ret'd, etc., 8 Jan'y, 1795," showed that there had been a return prior to this date. Where a survey is found in the office, without any marks or other evidence to show when it was returned, it becomes a matter of fact for the jury to determine when it was returned; and it is error in the Court to give a legal direction on the subject.

Snyder *v.* Bowman, 4 Watts, 132.

The instructions of the Court that the title of defendants dated back to the date of the survey was erroneous. Unless it is certain that the error did the plaintiff no harm, the judgment must be reversed, and the cause sent back for another trial.

Riddlesburg Coal Co. *v.* Rogers, 15 Smith, 418.

There is no evidence in this case that in many cases the deputy surveyor "neglected and omitted to do his duty." The presumption is that he performed his duty.

Fugate *v.* Coxe, 4 Serg. & Raw. 293.
Meade *v.* Haymaker, 3 Yeates, 71.
Wilson *v.* Horner, 9 Smith, 155.

A chamber survey is not *ipso facto* a void act.

Glass *v.* Gilbert, 8 Smith, 291.

One line, or part of a line of an old survey, found on the ground makes the whole good.

Norris *v.* Hamilton, 7 Watts, 97.
Lambourn *v.* Hartwick, 10 S. & R. 113.

It is not essential to the validity of a survey in all cases, that the deputy-surveyor should have gone on the ground to execute the warrant. If the land be bounded, etc., it is sufficient. If it be by the adoption of old lines, of older surveys, made under authority of law, to the same extent that is necessary to make a good survey on the ground, it is as valid as though done by running and marking the line afresh.

Caul *v.* Spring, 2 Watts, 390.
Glass *v.* Gilbert, 8 Smith, 291.

Davies and *Sanderson*, for defendants in error.

May 2, 1881. THE COURT. The question involved in this case is a very simple one; one of location only. The Moore survey was older than the Tybout. It was regularly returned and accepted, and was also patented. If, therefore,

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there were any marks found on the ground, or any adjoinders called for by the survey, as returned to the land office, by which the position of the tract could be ascertained, this controversy ought to have been determined by the jury, in favor of the owners of this survey.

We repeat, the question was one simply of the location of the Moore warrant. Was there a corner or line found on the ground which was a corner or line of this tract? If so, the question was resolved; for, from either, the location of the warrant could be readily and certainly determined by simply following the courses and distances called for by the survey. So, if there were known adjoinders, the location could, in like manner, easily be established.

But the Court below, departing from this simple proposition, erred in two principal points: (1) in submitting to the jury the question whether or not the Moore survey was a chamber survey; (2) in saying to the jury, that it was not enough that the surveyor was on the ground to survey adjoining warrants, if he was not there to survey the Moore warrant. This, of course, meant that he could not adopt the lines of older or contemporaneous surveys as the lines of the Moore tract. But in Parshall *v.* Jones (5 P. F. S. 153), it was said, following McRhea *v.* Plummer (1 Binn. 227), and Caul *v.* Spring (2 Watts, 390), that the lines of older surveys may be adopted for a later warrant, without re-running or re-marking them, and that such a survey is not a chamber survey. To us, indeed, it seems strange that a proposition so obvious and reasonable should ever have been doubted; for as it is admittedly improper to re-mark old lines when adopted for a new survey, why should they be re-run? Certainly, for the purposes of location, this would be an unnecessary labor, and to us no reason occurs for the enforcement of such a work, except to compel the deputy-surveyor to earn his fees.

A chamber survey is one that has never been made upon the ground, but where a survey has been returned and accepted without a caveat, the presumption after twenty-one years, as was held in Ormsby *v.* Ihmsen (10 Casey, 462), is *juris et de jure* that it was made on the ground. In other words, this presumption is one that no fact, however obvious, can rebut. In the case just cited, the Court below, whilst holding that, after the period mentioned, the survey, returned by the proper officer, was by law presumed to have been run upon the ground, nevertheless instructed the jury that this presumption might be rebutted by positive proof. This was held to be error; that such was not the nature of the presumption attending a survey returned without objection, for more than twenty-one years; that the presumption was absolute in its character, a legal conclusion. A like result was arrived at in the cases of Lambourn *v.* Hartswick and Mock *v.* Astley (13 S. & R. 113, 382). Justice DUNCAN, who delivered the opinions in both these cases, in substance said, that, *prima facie*, a survey was made as returned, and that it was the business of the adverse party to disprove it. But that where time, analogous to the Statute of Limitations, had run; where the owner had continued to pay the public taxes, and where there had been no caveat, a presumption of law ought to arise in favor of the regularity of the survey.

Following these cases, HUSTON, J., in Norris *v.* Hamilton (7 Watts, 91), held "that after a survey had been returned more than twenty-one years, the presumption that it had been legally made became a violent presumption, or as is said in the last case, not to be contradicted." The same idea is repeated in Bellas *v.* Cleaver (4 Wr. 267), per THOMPSON, J.

How then, in view of these authorities, does the case in hand stand? The Moore warrant purported to have been surveyed on the 21st of November, 1792, and was duly returned, accepted and patented, this final act of the land office occurring on the 24th of February, 1795. Then for twenty-one years after the date of this survey, the *prima facie* presumption was in favor of its correctness, nevertheless, within that time, this presumption was *prima facie* only, and might have been rebutted by those interested in the interfering Tybout survey by a caveat or in an action of ejectment; neglecting this, allowing the survey to remain unquestioned for the period above mentioned, the presumption became absolute and was no longer open to attack.

The regularity of the survey being thus legally fixed and absolute, it but remains for a jury to determine whether upon the ground such lines, adjoinders, or other marks, can be found as will, to a reasonable certainty, determine the location of the plaintiff's claim.

Finally as the Moore and Betz warrants were located by the same surveyor, and as the former was not returned until after the survey of the latter, the adoption of the junior warrants as adjoinders of the senior survey, ought to have no other effect than to help in the location of the older warrant.

The judgment of the Court below is reversed, and a new venire is ordered.

Opinion by GORDON, J.

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Common Pleas—Equity.

C. P. No. 1. March 16, 1881.

Cox et al. v. The Philadelphia, Wilmington, and Baltimore Railroad Company.

Equity—Special injunction—Laches—A court of equity will not grant a special injunction to restrain the obstruction of a public street at the suit of a private citizen, unless particular damage is alleged to be suffered by such citizen—Laches will be inferred where the citizen has acquiesced for thirty years in the obstruction—Public and private nuisance.

Sur demurrer to bill for injunction.

The bill was filed to compel the removal of certain fences and other obstructions maintained by the defendants across Fifteenth Street, on the premises occupied by the company. It set forth that the complainant became seised of a certain lot on the east side of said street, above Carpenter Street, in 1846, and that the same was conveyed in 1878 to his wife, he having first erected certain buildings thereon. That in pursuance of the Act of Assembly of 1808 Fifteenth Street was duly laid out on the plans of the then township of Moyamensing over and across the lot of land now occupied by defendants. That a petition was presented to the Court of Quarter Sessions of the city in 1847, praying for a jury of view, which jury reported in favor of opening said street, and that the report was confirmed in 1848. That thereupon the said street became a lawful public highway from South to Federal Street, which included defendants' premises, and was used as such until 1852. That the defendants had acquired title to a lot between said streets in 1850 and 1851, and had built fences across said Fifteenth Street at both sides where the street crossed their lot, thus entirely closing it, without lawful authority, solely for the use and benefit of defendants. That the citizens in the neighborhood had made various efforts to have the said obstructions removed both by Councils and the Legislature, but without effect. That said obstructions were a public nuisance, and had greatly decreased the value of real estate in the neighborhood, and that the buildings of the complainants erected on their lot had been depreciated in value to the extent of one-third by such obstructions.

The bill then prayed that the defendant corporation be enjoined from maintaining any obstruction across the line of said Fifteenth Street.

The defendants demurred—

1st. Because complainants had no such interest as entitled them to the relief sought.

2d. Because it was not alleged that the damages caused by opening said street were paid within one year.

3d. Because the allegations of efforts to reopen the street after it was closed by defendants rendered the bill uncertain, contradictory, and multifarious, and tend to show an abandonment of the previous opening.

4th. Because the bill did not sufficiently set forth the proceedings of 1848, and failed to aver that any order was issued to the supervisor to open the said street.

McCaffrey, *Pettit*, and *Sellers*, for complainants.

Any citizen sustaining special injury may support an action against one maintaining a public nuisance.

Hughes *v.* Heiser, 1 Binn. 463.
Alexander *v.* Kerr, 2 Rawle, 83.
Mayor *v.* Scott, 1 Barr, 309.
Faust *v.* Railroad, 3 Phila. 164.

The proper remedy to prevent the continuance of such nuisance is by injunction.

Story's Eq. Jur., § 924.
Hill on Injunctions, 572, § 2.
Angell on Highways, §§ 283–4.
Phila's Appeal, 28 Smith, 33.

The special injury is admitted by the demurrer.

The defendants acquired title after the proceedings under which Fifteenth Street was opened, and the right to damages belonged to the then owners, and did not pass to the purchasers.

Tenbrooke *v.* Jahke, 27 Sm. 392.
McFadden *v.* Johnson, 22 Ibid. 335.

No lapse of time and no acquiescence will bar an action by a citizen for a public nuisance, or legalize a purpresture.

Act of April 15, 1782, § 11, 2 Sm. L. 51.
City *v.* Crump, 6 Philada. 275.
Times Pub. Co. *v.* Ladomus, 5 WEEKLY NOTES, 33.
Saul *v.* Turnpike Co., 3 Ibid. 270.
Northern R.R. *v.* Com., 9 Ibid. 129.

As the street was actually opened it is unnecessary to aver that an order was issued to carry into effect the decree of Court that it should be opened; such an order will be presumed.

Springbrook Road, 14 Sm. 451.
Shaw *v.* Boyd, 2 Jones, 215.
McCoy *v.* Michew, 7 W. & S. 386.
Cromelien *v.* Brink, 5 Casey, 522.

Hart and *Gowen*, for demurrer.

The complainants cannot maintain this bill for the reason that the obstruction, if illegal, is a public nuisance. The special injury alleged is not of the character entitling private citizens to sue, because the special damage must be different in kind and not merely in degree.

Black *v.* Reading R.R., 8 Sm. 249.
Coal Co. *v.* Navigation Co., 14 Wright, 91.

This is not a case for the interposition of equity.

Att'y-Gen. *v.* Brown, 9 C. E. Green, 89.

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In regard to this identical street, it has been decided that the proceedings to open were void, inasmuch as there was no payment of the damages within one year.

Philada. & Wil. R.R. *v.* City, 9 Phila. 563.
City *v.* Dyer, 5 Wright, 469.

Under a similar Act to that of March 26, 1808, it was held that an order to open must precede the assessment of damages. There can be no presumption that an order to open issued.

Mifflin *v.* Commissioners, 5 S. & R. 69.
Improvement Co. *v.* Munson, 14 Wall. 442.
1 Green's Evidence, § 20.
Seechrist *v.* Baskin, 7 W. & S. 403.
Baskin *v.* Seechrist, 6 Barr, 154.

April 16, 1881. THE COURT (after stating the material facts.) The obstructions to the highway mentioned in the bill filed in this cause have been in existence since the year 1852, without objection on the part of the complainants, and during all of this time they have had full knowledge of them. We are now asked to grant the relief prayed for, upon the ground that the property of complainants has greatly depreciated in value by reason of the obstruction of Fifteenth Street, which has been set up and maintained by the defendants.

But it does not appear that the injury which the complainants say they have sustained differs in kind from that which the public have suffered. If the injury is a common and public nuisance, suffered by the portion of the community residing on or near to the section of Fifteenth Street, obstructed by the defendants, relief should be obtained through the interposition of the Attorney-General, but he is not a party to the proceeding, nor has he asked to be allowed to intervene, in his official capacity, to protect the rights of the public, if such rights have been invaded.

It is apparent that the foundation of the complainants' equity, as they believe it to exist, is the injury which they allege they have sustained by an invasion of a public right. If the injury was special to the complainants, and not resulting from an infraction of a common, public right, the remedy is at law, and not in equity, and to that remedy they must be remitted, upon the case as it stands upon their own showing.

For almost thirty years the complainants have been content with the condition of Fifteenth Street, of which they now complain. This is sufficient, of itself, to bar them out of equity. No one can sleep over an alleged injury of which he is fully advised for a long period of time, and yet retain a standing in equity. When laches so manifest appears, the doors of equity are closed against the suitor who asks for relief. To fail in a prompt assertion of one's rights is to forfeit the privilege of enforcing them in this forum. In this case laches has been so long continued that, upon this ground if there were no other, we would be required to hold that the complainants have no standing in equity. The demurrers are sustained, and the bill is dismissed.

Oral opinion by ALLISON, P. J.

Common Pleas—Law.

C. P. No. 1. Oct. 15, 1881.

Ingersoll v. Campbell.

Practice—Capias ad respondendum—Motion to quash on a plea of freehold—Court will quash within a reasonable time, though after the quarto die post.

Rule to quash *capias ad respondendum.*

A writ of *capias ad respondendum* was served upon the defendant on September 20, 1881, returnable October 3, 1881. The defendant entered his plea of freehold on October 8, 1881, and thereupon obtained the present rule.

R. P. Dechert, for the rule.

The defendant is a freeholder. He has made his affidavit in proper form, and now presents the deeds and other evidences of title. He should, therefore, be discharged under the authority of the Act of March 20, 1725, § 3.

(Bright. Purd. Dig. 49, pl. 48; 1 Sm. L. 164.)

Lex, contra.

The Act provides that if a defendant exempt from arrest is taken by any writ of arrest, "the Court where such writ is depending shall *forthwith*, on the defendant's motion, stay all further proceedings against him," etc. This clause has been interpreted to mean that the defendant shall make his application to the Court on or before the expiration of the *quarto die post.*

Blackiston *v.* Potts, 2 Miles, 388.

THE COURT. In the absence of any decision by the Supreme Court, we consider it to be a hardship to limit the defendant in entering his claim of freehold. The word "forthwith" in the Act of 1725 applies to the action of the Court.

Rule absolute.

Per BIDDLE, J.

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U. S. Circuit Court—Equity.

Oct. 13, 1881.

Taylor v. Phila. & Reading R. R. Co.

Receiver—Authority to create car trust—When refused.

Where the net earnings of a railroad company which is under a receivership are sufficient to purchase necessary rolling stock and equipments, they should be so applied, and the Receivers will not be authorized to create a loan secured by a car trust for their purchase, merely in order to allow the earnings of the road to be applied to the interest due the bondholders.

Whether it is within the scope of the Court's duty to grant to the Receivers authority to create such car trust, *dubitatur*.

Sur petition of Receivers for authority to create a car trust.

The petition set forth, *inter alia*, that the rolling stock of the Philadelphia and Reading R. R. Co., which passed to the Receivers at the time of their appointment, was not sufficient to transact the increased business of the road and its leased lines. That in order to keep the road in a proper condition of efficiency, the Receivers had found it necessary in addition to the renewing and repairing of the rolling stock, and keeping it up to its former carrying capacity, to construct additional cars at the cost of over $50,000, and engines costing over $125,000, and in addition to order to be built cars and engines to the value of over $975,000, amounting in all to upwards of one million of dollars.

That while such additional equipment was absolutely essential to the proper operation of the road, the Receivers considered it unfair and disadvantageous to the creditors of the company to pay for said equipments from the current earnings of the road, as it would deprive the bondholders and other creditors of the usual source of revenue for the payment of their income.

That the petitioners believe that the best interests of the creditors of the company demanded that the said additional equipment should be provided for by the creation of a car trust of a million of dollars, for which a loan should be created by certain trustees, in whom the title to the said rolling stock should be vested, and who should lease the same to the Receivers, and upon the termination of the receivership to the company, upon such terms and conditions that the annual rental should equal and be devoted to the payment of the interest upon the loan, and that $50,000 of the loan should be paid by the lessees every six months after the lease went into operation for ten years or until the whole should be paid off, when the property should be reconveyed to the company, and further that all expenses of the trust and any taxes imposed upon the loan or dividends thereon should be paid by the lessees.

The petition further averred that the petitioners were satisfied that such a loan could be negotiated at par, and perhaps at a premium, and would be advantageous as well to the company as to its creditors, and prayed for an order authorizing the Receivers to execute the proposed conveyance to the trustees, and the lease from them, and to carry into effect the scheme provided for.

The form of agreement vesting title to the rolling stock in the trustees selected to create the loan, and the lease of the same to the Receivers and company, containing at length the provisions which are in substance above stated, were annexed as exhibits to the petition.

The matter was referred to the Special Master, George M. Dallas, Esq. Testimony was offered before him in support of the petition, and he reported in favor of granting the prayer thereof, saying that the evidence satisfied him that the present supply of rolling stock was inadequate for the business of the company, and that the proposed increase of equipment was necessary to the proper operation of the road by the Receivers. That it would not be fair or advantageous to the creditors of the company to pay for the necessary additional equipment out of the current earnings of the company, and that the agreement and lease proposed by the Receivers provided a proper and wise means for carrying out the scheme suggested by them.

The Receivers thereupon moved for a decree in accordance with the prayer of the petition, and the report of the Master thereon.

Richard L. Ashhurst and *Samuel Dickson*, for the Receivers.

John C. Bullitt for McCalmont Brothers, stock and bondholders of the company, and for the company.

October 19, 1881. THE COURT. This is in effect an application on the part of the Receivers to borrow money upon rolling stock (cars and engines) manufactured at the company's shops and elsewhere, and in process of manufacture, for the Receivers. In terms, it is for the creation of a car trust, but in effect, it is for authority to make a loan, as stated.

Two questions arise in considering the appli-

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cation,—first, Is the matter contemplated within the scope of the Court's duty and authority, as custodian of the road and other property of the company? Second, If it is, would it be wise to grant the application? As respects the first question, it must be borne in mind that the custody of the Court is only temporary,—to preserve the property so long as may afford reasonable time to the plaintiffs in the foreclosure bill to prosecute their proceeding to a close, in case the company fails to make satisfactory arrangements to relieve itself from the proceeding. Whether the order asked for by the Receivers, or the allowance of it, falls within the proper scope of the Court's authority, under the circumstance, is certainly open to doubt. I will not, however, enlarge upon this subject, for if it was not so open to doubt I am satisfied that it would not be wise to make the order.

The petitioners admit, and the testimony proves, that the net earnings of the road are amply sufficient to make the purchase required; and if necessary, these earnings should be so applied. The ground on which the petitioners desire to borrow (instead of using such moneys) is that the moneys should be applied to payment of the bonded creditors of the company, in discharge of interest. We esteem it wiser, if necessary, to allow such interest to go unpaid, rather than to pay it by means of borrowing money—which may tend to mislead creditors and others respecting the actual condition of the road and its earnings. It must be borne in mind that the Court's custody of this property is not likely to continue very much longer. The foreclosure proceeding has been running for eighteen months, and it should close without unnecessary delay, and the Court expects it to do so. The interests of all parties involved require that the road and other property shall pass into the custody and management of its owners as speedily as possible.

The modern practice prevailing to some extent, elsewhere, of transferring corporate property to the custody of the Courts, to be thus held and managed for an indefinite period of years, to suit the convenience of parties, whereby general creditors and stockholders are kept at bay, I regard as a mischievous innovation. I have no doubt the petitioners are fully satisfied of the wisdom of the measure they suggest, and that they are actuated by a sincere desire to promote the best interests of the road. We do not, however, agree with them in this matter, and must be governed by our own judgment. The petition is therefore disallowed.

Oral opinion by BUTLER, J.

M'KENNAN, Circ. J., concurring, said:—I concur in what Judge BUTLER has said. The object of the proceeding whereby the property of the company was placed in charge of the Court, and the character of the Court's authority respecting it, we have heretofore had occasion to explain very fully. We hold the property of the railroad company to preserve it, to keep it in its present condition, while the proceedings under the bill of foreclosure are being prosecuted to their termination. I entertain considerable doubt of the authority of the Court to make the order asked for, and this of itself is sufficient for me; but I agree with Judge BUTLER in all he has said respecting the inexpediency of making the loan, even if we had authority so to do. The property should pass, with as little delay as is reasonably practicable, into the possession and control of owners, who will best be able to determine how it should be managed, and what measures relative to it are most likely to promote their interests. To the extent that the earnings of the road are required to keep it up in stock and equipments, and to preserve the property, the Receivers have authority so to apply it; but to borrow money to enable them to continue to pay interest to bondholders I consider unwise.

U. S. Circuit Court—Law.

April, 1881.

Fisher v. Dandistel, defendant, and John F. Hartranft, Collector of the Port of Philadelphia, garnishee.

Foreign attachment—Collectors of ports cannot be made garnishees as to goods held for duties—Harris v. Dennie, 3 Peters, 292, followed—Conard v. Pac. Ins. Co., 6 Peters, 262, distinguished—Removal of causes—Act of Congress, U. S. Rev. Stat., § 643—Interpretation of the word "suit" therein.

Sur rule by plaintiff to remand case to State Court.

Sur rule by garnishee to quash writ of attachment.

This case came before the Circuit Court on a certiorari from Court of Common Pleas No. 4, of Philadelphia County, under the following circumstances.

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A writ of foreign attachment having been issued at the suit of Frederick Fisher against Philip Dandistel, defendant, fourteen cases of wine consigned to the defendant were seized by the sheriff on their arrival at the Port of Philadelphia in the possession of the "Red Star Line," Peter Wright & Sons, Agents; and the "Red Star Line," the Pennsylvania Railroad Co., and John F. Hartranft, Collector of the Port of Philadelphia, were summoned as garnishees. The Collector of the Port having taken possession of the wine and stored it in a bonded warehouse, the plaintiff tendered him the amount of duties due upon the wine; but he refused to receive it or to allow the wine to be taken from his custody. A rule was then granted on petition of plaintiff requiring the Collector of the Port to show cause why he should not receive the duties and surrender the goods into the custody of the Court. Thereupon John F. Hartranft, the Collector, obtained a certiorari from the United States Circuit Court under the provisions of sect. 643, of the Revised Statutes of United States to remove the record to that Court.

Here the plaintiff moved to remand to the State Court, and the Collector moved to quash the writ of attachment as to him.

John K. Valentine, U. S. District Attorney, for the Collector of the Port.

Whenever a right is litigated between parties in a court of justice, the proceeding by which the decision is sought is a suit. Therefore a foreign attachment as to the garnishee is a suit within the meaning of the Act of Congress, U. S. Rev. Stat. § 643.

Purdon's Digest, 717 § 4.
Weston *et al. v.* City Councils of Charleston, 2 Peters, 464.
Taylor *v.* Carryl, 20 Howard, 597.

Goods in the hands of a collector of customs are not liable to attachment at the suit of a creditor of the owner and importer.

Harris *v.* Dennie, 3 Peters, 292.

This case is distinguished from Conard *v.* Pac. Ins. Co. (6 Peters, 262), wherein the plaintiff was the assignee of the importer, and therefore virtual owner not a creditor.

The revenue laws clearly intend that the United States shall hold the goods until the owner or consignee, his agent or factor, enters them at the custom-house and pays the duties or gives bond therefor; and it would be a violation of this provision to allow an attachment to issue to the Collector implying a right to seize and sell the goods.

Revenue Collection Act. ch. 2, §§ 27–58, §§ 36, 62, 49, 50, 56.

The goods therefore being in the custody of the United States, the State Court has no jurisdiction.

Taylor *v.* Carryl, 20 Howard, 594.
Payne *v.* Doewe, 4 East, 523.
Peck *v.* Jenness, 7 Howard, 625.
Oliver Jordan, 2 Curtis, 414, in Taylor *v.* Carryl, 20 Howard, 600.
Hagan *v.* Lucas, 10 Peters, 400, 403.

Lewin W. Barringer, for the plaintiff.

A part of a controversy only cannot be removed, but the case must be so removed that it can be wholly determined.

Hervey *et al. v.* Illinois Midland R. R. Co., 7 Bissell, 103.

The Collector, as appears by the petition and record, being a mere nominal party with no interest in the subject matter of the dispute, there is no ground under the Revised Stat. U. S., § 643, for removal to the U. S. Court, nor has the United States Court any jurisdiction in the premises.

City of Chicago *v.* Gage, 6 Bissel, 467.

The priority of the United States is only a priority of payment, not of possession: the actual possession by the Collector is not a legal possession adverse to the consignee, but is only to secure the lien of the duties.

Conard *v.* Pac. Ins. Co., 6 Peters, 271.
Conard *v.* Atl. Ins. Co., 1 Peters, 441.
U. S. *v.* Lyman, 1 Mason, 499.
Howland *v.* Harris, 4 Mason, 497, 499.
U. S. *v.* Case of Silk, 13 Int. Rev. Rec., 58.

If the Collector or other officer refuses the delivery of the goods after the duty or the proper security therefore is tendered it is a tortious conversion which renders him liable for damages.

Conard *v.* Pac. Ins. Co., 6 Peters, 271.
Tracy & Balestier *v.* Swartwout, 10 Peters, 98.

Revenue laws not being penal must be construed favorably.

Cliquot's Champagne, 3 Wallace, 114.

The Collector having no legal possession, the jurisdiction of the State Court is prior to that of the United States.

Buck *v.* Colbath, 3 Wallace, 341.
Taylor *v.* Carryl, 20 Howard, 583.
Hagan *v.* Lucas, 10 Peters, 400.

C. A. V.

April 15, 1881. THE COURT. The motion to remand is refused, and the service of the writ of attachment as to John F. Hartranft, the Collector, is set aside.

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WEEKLY NOTES OF CASES.

VOL. X.] *THURSDAY, DEC. 1, 1881.* [No. 33.

Supreme Court.

ORDER OF COURT,

Transferring certain counties from the Middle and Western Districts to the Eastern District of the Supreme Court; changing the terms in said districts, and establishing return-days.

And now, November 25, 1881, by virtue and in pursuance of an Act of the General Assembly of the Commonwealth of Pennsylvania, approved the fifth day of May, 1876, entitled "An Act authorizing the Supreme Court to change and transfer any of the counties of the Commonwealth from any of the districts of said Court" (P. L. 115), it is hereby ordered by the said Court, now sitting at Pittsburgh, in and for the Western District thereof, as follows, that is to say:—

The following counties shall be and are hereby transferred from the Middle District to the Eastern District of the said Court, viz:—

Bedford,	Lebanon,
Blair,	Mifflin,
Cumberland,	Montour,
Centre,	McKean,
Columbia,	Northumberland,
Clinton,	Perry,
Clearfield,	Potter,
Cameron,	Snyder,
Elk,	Sullivan,
Fulton,	Tioga,
Huntingdon,	Union,
Juniata,	Warren,
Lancaster,	York.
Lycoming,	

The following counties shall be and are hereby transferred from the Western District to the Eastern District of said Court, viz:—

Armstrong,	Fayette,
Butler,	Forest,
Cambria,	Indiana,
Clarion,	Lawrence,
Crawford,	Mercer,
Erie,	Somerset.

By reason of the said transfer, the Western, Middle, and Eastern Districts of the Supreme Court shall hereafter stand and be composed of the following named counties, viz:—

The Western District of:—

Allegheny,	Venango,
Beaver,	Westmoreland,
Greene,	Washington,
Jefferson,	

The Middle District of:—

Adams,	Franklin.
Dauphin,	

The Eastern District of:—

Armstrong,	Lebanon,
Bucks,	Luzerne,
Butler,	Lackawanna,
Bedford,	Lycoming,
Blair,	Lancaster,
Bradford,	Mercer,
Berks,	Monroe,
Cambria,	Montgomery,
Clarion,	Mifflin,
Crawford,	Montour,
Carbon,	McKean,
Chester,	Northampton,
Cumberland,	Northumberland,
Centre,	Philadelphia,
Columbia,	Perry,
Clinton,	Potter,
Clearfield,	Pike,
Cameron,	Schuylkill,
Delaware,	Somerset,
Erie,	Susquehanna,
Elk,	Snyder,
Fayette,	Sullivan,
Forest,	Tioga,
Fulton,	Union,
Huntingdon,	Wayne,
Indiana,	Wyoming,
Juniata,	Warren,
Lawrence,	York.
Lehigh,	

By virtue of the same Act of Assembly the terms in the respective districts are fixed as follows:—

The term in the Western District shall commence on the first Monday of October, and shall continue four weeks.

The term in the Middle District shall commence on the twenty-first Monday following the first Monday of January, and shall continue one week.

The term in the Eastern District shall commence on the third Monday of November and shall continue until the commencement of the term for the Middle District.

By virtue of the same Act of Assembly return-days are hereby established for all of the aforesaid counties, as follows:—

For the Western District: The return-day for the Counties of Allegheny, Beaver, Greene, Jefferson, Venango, Westmoreland, and Wash-

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ington, shall be the first Monday of October. The last three weeks of the term are hereby assigned to the hearing of all cases in and for the said county of Allegheny.

For the Middle District: The return-day for the counties of Adams, Dauphin, and Franklin shall be the twenty-first Monday following the first Monday of January.

For the Eastern District: The return days for the city and county of Philadelphia shall remain as heretofore.

For the other counties of the Eastern District, the return-days shall be as follows:—

For the first Monday of the term, the counties of Cambria, Clarion, Butler, and Fayette.

For the second Monday of the term, the counties of Crawford and Mercer.

For the third Monday of the term, the counties of Armstrong, Erie, Forest, Indiana, Lawrence, and Somerset.

For the fifth Monday following the first Monday of January, the counties of Chester and Delaware.

For the sixth Monday following the first Monday of January, the counties of Lycoming, Centre, and Elk.

For the seventh Monday following the first Monday of January, the counties of Lackawanna, Pike, and Wayne.

For the eighth Monday following the first Monday of January, the counties of Berks and Columbia.

For the ninth Monday following the first Monday of January, the counties of Carbon, Lehigh, Monroe, and Northampton.

For the tenth Monday following the first Monday of January, the counties of Bradford, Susquehanna, and Wyoming.

For the fourteenth Monday following the first Monday of January, the county of Luzerne.

For the fifteenth Monday following the first Monday of January, the counties of Schuylkill and Montgomery.

For the sixteenth Monday following the first Monday of January, the counties of Bucks, Clinton, Montour, and Northumberland.

For the seventeenth Monday following the first Monday of January, the counties of Clearfield, Lebanon, Snyder, and Union.

For the eighteenth Monday following the first Monday of January, the counties of Bedford, Cameron, Cumberland, Fulton, McKean, Perry, Potter, Sullivan, and Tioga.

For the nineteenth Monday following the first Monday of January, the counties of Lancaster and York.

For the twentieth Monday following the first Monday of January, the counties of Blair, Huntingdon, Juniata, Mifflin, and Warren.

The fourth week of the term in the Eastern District is assigned to *remanets* from the Western District, and such other cases from the said Western District, as the parties may desire to have heard in the Eastern District, preference being given to *remanets*.

Eight weeks of the term are hereby assigned for the hearing of all cases for the city and county of Philadelphia. The first period shall commence on the first Monday of January, and shall continue for five weeks; the second period shall commence on the eleventh Monday following the first Monday of January, and shall continue for three weeks.

To which return-days all writs of error, process, and proceedings in and for the said several counties in the respective districts, shall be accordingly and respectively returnable; and the causes from the said several counties shall be heard in the same week to which their writs of error and other process are respectively returnable, excepting as is herein otherwise provided for the counties of Allegheny and Philadelphia.

It shall be the duty of the Prothonotary of the Western and Middle Districts respectively, to certify to the Prothonotary of the Eastern District, the record in all cases now pending and undetermined upon writ of error, certiorari, or appeal, originating in each of the counties hereby transferred from the Western and Middle to the Eastern District.

This order shall be certified by the Prothonotary of the Western District to the respective Prothonotaries of the Middle and Eastern Districts. And the said order shall be published for four weeks in the *Pittsburgh Legal Journal*, at the expense of the county of Allegheny; once a week for four weeks in the *Harrisburg Telegraph* and *Harrisburg Patriot*, at the expense of the county of Dauphin, and four times in the *Legal Intelligencer* and WEEKLY NOTES OF CASES, at the expense of the city and county of Philadelphia.

PER CURIAM.

(Signed) GEORGE SHARSWOOD, Chief Justice.

July, '81, 33 & 32. November 12, 1881.

Baldwin v. City of Philadelphia.
Dixey v. City of Philadelphia.

Constitutional law—Constitution of Pennsylvania, Article III., Sec. 13—Construction of—Salaries of public officers—Ordinance of municipality not a "law" within meaning of section aforesaid.

Art. III., Sec. 13, of the Constitution of Pennsylvania, providing that no *law* shall increase or diminish the salary or emoluments of a public officer after his election or appointment does not preclude the passage of a *municipal*

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ordinance, whereby such an increase is made in the salary of a municipal officer.

The City Councils of Philadelphia may, by a municipal ordinance, increase the salary of the Commissioner of Highways, and also that of the Commissioner of Public Property during their respective terms of office.

Writs of error to the Common Pleas No. 3, of Philadelphia County.

Debt, by William Baldwin against the City of Philadelphia.

Debt, by William Dixey against the City of Philadelphia.

Both of these suits were brought to recover salaries alleged to be due by the defendant to plaintiffs, who occupied the positions, respectively, of Chief Commissioner of Highways and Commissioner of the City Property.

In the case of Baldwin *v.* The City, the following facts were agreed upon and submitted to the Court:—

"By an ordinance of the Councils of the City of Philadelphia, approved December 23, 1874, the Department of Highways, Bridges, and Sewers for the City of Philadelphia was constituted, consisting of a Chief Commissioner and six assistants. The former at a salary of four thousand ($4000) dollars per annum, and the latter each two thousand ($2000) dollars per annum. The chief to be elected by *viva voce* vote of Councils in joint convention, to serve for two years, and with power to appoint his assistants, whose duty was to superintend all work done on the bridges, culverts, sewers, and highways in the city of Philadelphia, and enforce all ordinances relating to said Department.

"By an ordinance of said Councils, approved December 12, 1876, it was provided that 'the Chief Commissioner of Highways shall hereafter be elected for the term of three years.' On January 1, 1877, the plaintiff was elected by City Councils aforesaid in joint convention Chief Commissioner of Highways for three years from that date, and re-elected in like manner on December 30, 1879, for three years. By an ordinance of said Councils, approved December 19, 1877, making an appropriation for 1878, to said Department, item one provides, *inter alia:* 'For salaries of the officers of said Department, Chief Commissioner, three thousand six hundred ($3600) dollars.' The plaintiff's salary was thus reduced during his term of office, and for the year 1878 and thereafter he received but thirty-six hundred ($3600) dollars per annum. By ordinance approved December 31, 1880, making an appropriation to the Department of Highways, it was provided, *inter alia*, in item one, as follows: 'For salaries of officers of the Department, Chief Commissioner forty-five hundred ($4500) dollars.' The plaintiff's salary was thus increased during his term of service as Chief Commissioner of Highways. It is admitted that if the increase made by the above ordinance was lawful, that then the sum of three hundred and seventy-five ($375) dollars was and is due and owing by defendant to plaintiff as his salary for the month of January, 1881, and that the city has refused to pay the same."

In the case of Dixey *v.* The City, the following facts were agreed upon and submitted to the Court: "By ordinance of August 29, 1854, of the Councils of the City of Philadelphia it was ordained, 'That the Select and Common Councils shall, on the passage hereof (annually thereafter at their first meeting in the month of July), and whenever a vacancy shall occur by death, resignation, or otherwise, elect by *viva voce* vote a Commissioner of (City Property); he shall hold his office until his successor be chosen and duly qualified, unless sooner removed by resolution of Councils . . . ; he shall be the head of the Department of City Property; he shall be charged with the renting and collecting the rents of all the real estate belonging to the corporation . . . ; he shall prepare and keep a rent-roll of the said property, and quarterly furnish a copy of the same to the committee on city property and the Controller.'

"By direction of an ordinance of December 7, 1854, the office of Superintendent of Wharves and Landings was created. . . . By ordinance of October 19, 1854, the Department of Market Houses was created, the head of which was called the Commissioner of Market Houses. . . . By ordinance of September 20, 1856, the Department of Wharves and Landings was abolished, and the duties of the Department charged on the Commissioner of Markets. By ordinance of December 7, 1867, the Department of Markets, Wharves, and Landings was consolidated with the Department of City Property, and the duties of this Department charged on the Commissioner of City Property, . . . and it was ordained therein that he should be elected by Councils in joint convention on the second Thursday of February in each year, to serve for one year from the first Monday of March succeeding any such election, and that his salary should be two thousand ($2000) dollars per annum.

"By an ordinance of May 6, 1876, it was provided 'That from and after the passage of this ordinance the term of the Commissioner . . . of City Property shall be for the period of three years from the date of his election.' On February 8, 1877, the plaintiff was elected Commissioner . . . of City Property for a period of three years by City Councils in joint convention, and re-elected for a similar period by the same bodies February 12, 1880. By an ordi-

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nance approved January 7, 1878, making an appropriation to the Department of . . . City Property for the year 1878 it was provided as follows in item one: 'For salary of Commissioner, one thousand eight hundred ($1800) dollars.'

"The plaintiff in the year 1878 and since has only received the sum of $1800 per annum. It was the only sum appropriated each year for his salary. In each appropriation to this Department there was placed an item for keep of horse and carriage of Commissioner seven hundred ($700) dollars.

"By an ordinance approved December 31, 1880, the Councils of the said city made the salary of the plaintiff as Commissioner three thousand four hundred ($3400) dollars, which included the cost of keep of horse and carriage. This was an increase of plaintiff's salary during the period of time for which he was elected by City Councils.

"It is admitted that if the increase made by above ordinance was lawful, that then there is due the plaintiff, on account of his salary for the month of January, 1881, the sum of $283.33, and that defendant has refused to pay the same."

It was in both cases understood and agreed that if the Court was of opinion that the plaintiff was not a public officer within the meaning of Article III., Sect. 13, of the Constitution of Pennsylvania, so that his salary could be lawfully increased during the period for which he was elected, that then judgment should be entered in his favor for the sum admitted to be due on account of salary for the month of January, 1881, at the increased rate. If, however, the Court was of opinion that the plaintiff was a public officer, and that his salary could not be lawfully increased as aforesaid, then judgment was to be entered in plaintiff's favor in the case of Baldwin *v.* The City for $300, and in the case of Dixey *v.* The City for $208.33.

The Court, in an opinion by LUDLOW, P. J., entered judgment in favor of the plaintiffs for the lesser sums last specified, being at the rate fixed for plaintiffs' salaries prior to the passage of the ordinance raising the same.

Plaintiffs thereupon took these writs, assigning for error the action of the Court in not entering judgments for them in the sums of $375 and $283.33, respectively.

George S. Graham, for the plaintiffs in error.

The plaintiffs are in no sense "public officers" within the meaning of the Constitution. They are mere agents of the municipality appointed to perform certain services for and on behalf of the corporation, which it is bound to perform.

They are, at any rate, only county officers, whose salaries, by Art. XIV., Sect. 5 of the Constitution, are to "be regulated by law." Such officers are not public officers.

Commonwealth *v.* Burrell, 7 Barr, 37.
Commonwealth *v.* Jones, 2 Jones, 367.
Kilgore *v.* Magee, 4 Norris, 411.

A public officer is one who is appointed by the governor or elected by the people of a State.

Commonwealth *v.* Burrell, 7 Barr, 37.
People *v.* Devlin, 33 N. Y. 288.
Conner *v.* Mayor, 1 Seld. 285.
Evans *v.* Commonwealth, 24 Smith, 124.

Councils, having already reduced plaintiffs' salary during their term, should be permitted to increase it to a just compensation.

Plaintiffs' salaries were raised by virtue of a municipal ordinance. This is not a "law" within the meaning of the Constitution.

R. R. Co. *v.* Ervin, 7 WEEKLY NOTES, 73.

Charles B. McMichael (with whom was *Wm. Nelson West*, City Solicitor), for the defendant in error.

The plaintiffs were public officers within the meaning of the Constitution. They were appointed by the Councils of the city, who represent the whole community.

Their duties are essentially public in their nature.

Donohugh's Appeal, 5 WEEKLY NOTES, 196.
Alcorn *v.* City of Phila., 8 Wright, 352.
Dean *v.* New Milford T'p., 5 W. & S. 545.
Erie City *v.* Schwingle, 10 Harris, 384.
Freeman *v.* City of Phila., 7 WEEKLY NOTES, 45.
Dillon on Municipal Corp., §§ 5, 22, and 233.

Both plaintiffs collect and disburse public moneys by virtue of licenses under the police power of the Commonwealth delegated by her to the municipality. This constitutes them public officers.

Commonwealth *v.* Evans, 24 Smith, 124.
Southwark R'y Co. *v.* City of Phila., 11 Wright, 314.
Phila. & Trenton R. R. Co., 6 Whart. 25.
Branson *v.* City of Phila., 11 Wright, 329.

In addition the appropriations made by Councils for these officers are collected by taxation, a power delegated by the Commonwealth to the municipality, to be used and employed for public purposes only.

BALDWIN *v.* CITY OF PHILADELPHIA. Nov. 17, 1881. THE COURT. It appears from the case stated that when the plaintiff was first elected Chief Commissioner of Highways for the City of Philadelphia, the salary of the office was $4000 per annum. Subsequently, and during his first term of said office, the salary was reduced to thirty-six hundred dollars. This reduction was acquiesced in by the plaintiff, no one doubting the power of Councils to make it. During his second term Councils increased his salary to four thousand five hundred dollars, which increase the city declined to pay, and it forms the subject of this contention.

The Court below held that the plaintiff was a

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public officer within the meaning of section 13 of Article III. of the Constitution, which declares that "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment,"

We need not discuss the question, whether the plaintiff is a public officer, as it is not necessarily involved in the case. The error into which the learned Judge below inadvertently fell was in applying the above section of the Constitution to this case. The language of that instrument is: "No *law* shall . . . increase or diminish his salary," etc. The word "law" has a fixed and definite meaning. In its general sense it implies "a rule of action;" in the particular sense in which we are now considering it, it means "a rule of civil conduct, prescribed by the supreme power in the State, commanding what is right, and prohibiting what is wrong." (Blackstone). A law is an emanation from the supreme power, and cannot originate elsewhere. It is a rule which every citizen of the State is bound to obey.

The ordinance of Councils by which the plaintiff's salary was increased is not a law, and therefore does not come within the constitutional prohibition. It is a mere local regulation for the city of Philadelphia. It has, perhaps, the force of law in the community to be affected by it, but it is not prescribed by the supreme power, it concerns only a subdivision of the State, and does not rise to the dignity of a law.

There is no ambiguity in this section of the Constitution. It is clear and explicit. But when we consider it in connection with the other portions of the third article there is no room for doubt. It is the article upon "Legislation," and is very elaborate. It contains thirty-three sections, and is throughout a restraint upon the powers of the General Assembly. It imposes numerous restrictions upon the mode by which laws shall be passed, and prohibits legislation upon a large variety of subjects. When, therefore, section 13 declares that "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment," the obvious meaning is, that the General Assembly shall not pass such a law. There is nothing in the article, even by implication, that would justify us in extending the word "law" to the ordinances of a city. Such an interpretation would not be expounding the Constitution, it would be altering it.

The judgment is reversed, and judgment is now entered in favor of the plaintiff for the sum of three hundred and seventy-five dollars ($375).

Opinion by PAXSON, J.

DIXEY *v.* CITY OF PHILADELPHIA. Nov. 17, 1881. THE COURT. This case is ruled by Baldwin *v.* The City of Philadelphia, just decided.

The judgment is reversed, and judgment is now entered for the plaintiff in the sum of two hundred and eighty-three dollars and thirty-three cents ($283.33).

Opinion by PAXSON, J.

Oct. '81, 263. Oct. 11, 1881.

Pusey v. City of Allegheny.

Constitutional law — Eminent domain — Art. XVI., sect. 8, of the Constitution of Pennsylvania — Construction of — Liability of corporation for consequential damages resulting from exercise of power of eminent domain — Practice — Certiorari — Damages — Road law — Grading — Appeal from viewers — Act of June 13, 1874 — Act of May 1, 1876.

Under the provisions of Article XVI., sect. 8, of the Constitution of Pennsylvania, corporations to which the right of eminent domain is delegated are liable for *consequential* damages resulting to private property from the construction, use, or alteration of their works, ways, or other improvements.

A municipal corporation is therefore liable to the property owners through whose land it has caused a street to be opened for compensation, not only for the actual property appropriated for the street, but also for such as it may injure or destroy by such opening.

Where a property owner through whose land a street has been run is injured, both by reason of the taking of part of his land for the construction of said street, and also by reason of the cutting and grading thereof, he must in proceedings to recover damages submit his whole claim to the viewers and the Court, and that part thereof which he neglects so to submit must be taken to have been waived, and no second process can be had for its recovery.

Semble that where the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of the damages at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained in a subsequent proceeding instituted in accordance with the provisions of the Act of May 1, 1876 (P. L. 86).

The Supreme Court will not, on error to a judgment in an appeal under the Act of June 13, 1874 (P. L. 283), from the report of viewers appointed to assess damages resulting from the opening and grading of a street, take notice of the fact that such grading was done subsequently to the report of the viewers appealed from, where nothing to that effect appears upon the record.

Error to the Common Pleas No. 2, of Allegheny County.

Appeal by William B. Pusey, and Jane his wife, from a report of viewers appointed by the Court of Quarter Sessions of Allegheny County to assess damages suffered by Pusey and wife, and others by reason of the taking of a portion of their property in the opening and construction of Charles Street.

The Councils of the city of Allegheny passed

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an ordinance authorizing the opening of said street on March 12, 1874. The report of the viewers appointed by the Court of Quarter Sessions to assess damages and benefits to Pusey and wife, and others, was filed September 11, 1875. On October 9, 1875, Pusey and wife demanded a trial by jury, by virtue of the provisions of the Act of June 13, 1874 (P. L. 283), and an order was accordingly made certifying the record to the Court of Common Pleas No. 2, of Allegheny County. Subsequently this order was vacated, but was reinstated by a decree of the Supreme Court in Pusey's Appeal (2 Norris, 67). The record was accordingly certified, and on March 24, 1877, an issue was framed by order of the Court, wherein Jane Pusey, her husband having meantime died, was plaintiff, and the city of Allegheny defendant.

On the trial before KIRKPATRICK, J., the defendant presented the following point:—

"3. That the measure of damage is the difference between the value of the property as a whole with the street located thereon, and the property as it was before the street was located, without regard to grades afterwards made." *Answer.* Refused.

The jury under the direction of the Court rendered a special verdict as follows:—

"We find the damages resulting to the plaintiff over and above all advantages resulting from the opening of Charles Street, and the appropriation of the necessary ground therefor and as taken by the city of Allegheny, defendant, and also and in addition thereto resulting from the construction of the said street, its grades, cuts, fills, slopes, walls, etc., to be twelve thousand five hundred dollars ($12,500). For which amount of $12,500 we render a verdict for the plaintiff and against the defendant, subject to the opinion of the Court upon the question of law reserved, viz.: Whether or not there can be a recovery in this action over and above the actual value of the ground taken by defendant for the use of said street, and the location and opening of the same, and if the Court should be of the opinion that there can be no recovery over and above the damages resulting from the location and appropriation of the ground actually taken for said street, then judgment to be entered for the smaller amount, viz., the sum of five thousand four hundred and fifty eight ($5458) dollars; *non obstante veredicto.*"

Subsequently the Court entered judgment *non obstante veredicto* for the plaintiff in the sum of $5458. Whereupon plaintiff took this writ, assigning for error the entry of judgment by the Court for the amount aforesaid.

Thomas M. Marshall (with him *J. S.* and *A. P. Morrison*), for the plaintiff in error.

Under the provisions of Article XVI., sect. 8, of the Constitution the plaintiff is entitled to compensation not only for property actually taken but also for property injured by defendant in the construction of the highway. The Act of June 13, 1874 (P. L. 283), allowing the right of appeal, of which plaintiff here availed herself, was intended to give force and effect to this constitutional provision.

Pusey's Appeal, 2 Norris, 67.
Williams *v.* Pittsburgh, Id. 71.
Reading *v.* Althouse, 9 WEEKLY NOTES, 24.

W. B. Rodgers, for defendant in error.

No grading was done until after the report of the viewers appealed from. The viewers could not therefore include this item of damage in their report.

In re Ridge Street, 5 Casey, 391.

The plaintiff on appeal from such report cannot submit to the jury what such viewers could not have passed upon.

The plaintiff must proceed under the Act of May 1, 1876 (P. L. 86), to recover damages done her by the grading, and has in fact proceeded under this Act, the proceedings thereunder being still pending, awaiting the final determination of the present case.

Nov. 7, 1881. THE COURT. Under the 8th section of the 16th article of the Constitution of this Commonwealth, municipal, as well as other corporations, in whom is vested the right of eminent domain, are required to make just compensation for property taken, injured, or destroyed, by the construction, or enlargement of their works, highways, or improvements. This is an advance upon the limitation of the right of eminent domain, as found in the Bill of Rights, both of the present Constitution, and that of 1838. Corporations, in whom the Legislature has vested this right, are, by this section, made liable for damages, resulting to private property, from the construction, use, or alteration of their works, ways, or other improvements; in other words, to such damages, as are ordinarily called *consequential.* This being now the supreme law of the land, it must govern the case under consideration; and it is idle to recur to decisions and legislation, the authority of which, as to all present and future cases, is, by this provision, annulled. The report of viewers, from which the appeal in this case was taken, was filed, as we are informed by the statement of the plaintiff in error, on September 11, 1875; and the ordinance for the opening of Charles Street bears date March 12, 1874. Whether the cutting and grading complained of, were done between these dates, or subsequently to the former, we do not know, as we have nothing in the shape of a record from which to inform ourselves. Neither, for the same reason, do we know the amount of damages accorded by the viewers, or how they

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were made up. It is for this reason, that we cannot entertain the allegation of the counsel for the defence, that there had been no grading done until after the report of viewers; nor his argument based on this hypothesis, that it was improper for the jury to consider what the viewers could not have passed upon. No such question appears to have been raised in the Court below, and we cannot agree to discuss what is not before us.

The third point of the defendant develops the material subject of controversy, and is as follows: "That the measure of damages is the difference between the value of the property as a whole, with the street located thereon, and the property, as it was before the street was located, without regard to grades afterwards made." This point was refused; and we think, for the reasons already given, it was properly refused. But to this decision the Court did not adhere. A special verdict was directed, and the jury found that the damages resulting over and above all advantages from the appropriation of the land alone, were $5548; that the damages to the remainder of the property, consequent upon the construction of the street, its grades, cuts, fills, slopes, and walls, and including the value of the land, were equivalent to the sum of $12,500. Upon this verdict, the Court entered judgment for the amount first named, and rejected the larger amount, which included consequential damages. This judgment was erroneous. As we have seen, the Constitution in positive terms requires compensation to be made, not only for the private proverty that a corporation may appropriate to its own use, but also for such as it may injure, or destroy. Hence, the plaintiff was entitled to recover whatever damages she had suffered at the hands of the city, whether direct, or consequential; and the contention that she must divide her claim, and recover for the property appropriated for the street under the Act of 1870, and for the injury, resulting from the cutting and grading, by a different process under the Act of 1876, cannot be sustained. Such a method of splitting up damages, resulting from a single transaction, and thus multiplying suits, is contrary to all legal policy; neither can it be supported by the Act cited. Under this statute, where the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of the damages, at the time of the appropriation, cannot include those resulting from the grading, the latter may be ascertained by a second view, but not so where both can be assessed at one and the same time. The taking, and the injury to the remaining land, form but a single subject of complaint, and for them, there can be but one assessment.

From this it follows, that the property owner not only may, but must, submit his whole claim to the viewers and to the Court, and that part thereof, which he neglects so to submit, must be taken to have been waived and no second process can be had for its recovery.

The judgment of the Court below is now reversed, and it is ordered, that judgment be entered for the plaintiff in the sum of $12,500; the full amount of the special verdict, with interest, and costs.

Opinion by GORDON, J.

Oct. & Nov. '81, 183. Oct. 7, 1881.

Appeal of McCandless et al., Executors.

Partition—Owelty—Lien of, entitled to priority over mortgage on purpart given before partition—Act of March 23, 1867—Act of March 29, 1832, sect. 38.

Owelty in partition constitutes a first lien on the purpart of the former tenant in common, and is entitled to priority over a mortgage of his undivided interest given by said tenant before the partition.

Appeal of Wilson McCandless *et al.*, Executors of Robert W. Mackey, deceased, from a decree of the Common Pleas No. 1, of Allegheny County, dismissing their exceptions to the report of an auditor distributing the proceeds of a sheriff's sale, and confirming the report.

The facts were as follows: Ann Eliza Mackey, being tenant in common with her brothers and sisters of a large tract of land, executed a mortgage, her husband joining, of her undivided interest therein to Robert W. Mackey, the appellants' testator, for $2000. Subsequently in proceedings in equity in partition the land was divided into seven purparts of unequal value.

Mrs. Mackey's interest as appraised, was $5923.05. Purpart No. 6, valued at $9480, was allotted to her, charged with owelty of partition for the excess, $3556.95.

Subsequently, Robert W. Mackey (who had no notice of the partition) issued a sci. fa. on his mortgage, and Mrs. Mackey's purpart was sold at sheriff's sale for $1600. The auditor, to whom the proceeds were referred for distribution, awarded the fund to the parties entitled to the owelty of partition *pro rata* according to their several owelties. Robert W. Mackey's executors, claiming that they were entitled to have their mortgage paid out of the fund as a first lien, filed exceptions to the report, which were dismissed by the Court and the report confirmed. They thereupon took this appeal, assigning for error the action of the Court.

Geo. W. Guthrie, for the appellants.

We admit that the mortgagee of the undivided

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interest of a co-tenant takes subject to the right of the co-tenants to compel partition, and that the mortgagee has no right to be heard in the partition. Also that in case of an *equal* partition the lien of the mortgage is drawn from the undivided interest and attaches to the purpart held by the mortgagor in severalty. But we contend where the mortgagor receives in severalty a purpart greater than the value of his share, subject to owelty of partition, that the mortgage remains a first lien to the extent of the mortgagor's original interest, and that the owelty charged is a first lien on the excess over such equal interest, and a second lien as to the remainder. Otherwise the mortgage is converted from a first lien on the mortgagor's interest to a second lien on that interest plus the excess which he has received in the partition; and the owelty whose lien dates only from the partition is made a prior lien on the entire purpart. Thus the mortgagee is deprived of his security without a hearing, and without compensation.

If one of two co-tenants mortgages his undivided interest and then *purchases* his co-tenant's interest, the purchase-money would not be a first lien on the whole tract, and the mortgage a second lien on the whole tract. Yet this is what it amounts to, where one co-tenant having mortgaged his undivided interest elects in partition to take a purpart, exceeding in value his interest, subject to owelty. The mortgagee takes subject to the right of the co-tenants to enforce partition; but the right to take such larger purpart is a privilege to a co-tenant, not an obligation which can be enforced by his co-tenants, and owelty is but the purchase-money of the excess. If the owelty remains a first lien on the excess, the co-tenants receive a *quid pro quo;* moreover, the Court has the discretion, under our Acts, to require additional security for the owelty. It is argued that the lien of the mortgage may be entirely divested by a sale in partition, but such sale is public, and the mortgagee may protect his interest by bidding. If each of two co-tenants mortgage his undivided interest, and in a subsequent partition A. takes the whole land at a valuation, the mortgage given by B. would, according to the doctrine of the Court below, be converted practically into a first lien on the whole land, and slipped ahead of the mortgage given by A.—as the owelty charged on the whole would stand to its use. The anomalous result is reached of the lien of a first mortgage being opened up, not only to let in a prior lien, but also to become a second lien on an after-acquired interest. A mortgage given by all the co-tenants prior to partition on a particular part of the land would, on this doctrine, be spread over the whole land, and given precedence of a mortgage on an undivided interest which at the time it was given was entitled to undisputed priority. There is no precedent directly in point, but Randell *v.* Mallett (14 Maine, 51) is analogous in principle in favor of our contention.

Slagle (with him *Wiley, Barton,* and *Whitesell & Son*), for the appellees.

The appellants' arguments are fallacious. In admitting that the mortgagee of an undivided interest takes subject to partition, he necessarily admits that he takes subject to all the lawful incidents of partition of which the liability to have owelty charged on the mortgagor's whole purpart as a first lien is one.

Allen *v.* Reesor, 16 S. & R. 10.
Cubbage *v.* Nesmith, 3 Watts, 314.
Riddle and Pennock's Appeal, 1 Wright, 177.
Pauley *v.* Pauley, 7 Watts, 159.

This liability to partition and its incidents exists from the origin of the co-tenancy. (Wright *v.* Vickers, 31 Sm. 122.) The object of partition is partition, but the appellants' theory would give the tenant entitled to owelty a lien upon an uncertain undefined interest, undivided and indivisible. The rule as adopted in the Court below does no injustice to any one. The owelty is the exact value of the accession to the original interest of the mortgagor. If the mortgagor pays off the owelty, then undoubtedly the increased security enures to the benefit of the mortgagee; but this is only an incident, just as if the mortgagor were to pay off any other prior incumbrance. If the mortgagee had proceeded on his mortgage before partition and bought the mortgagor's undivided interest, he would have held it subject to partition, and if he had taken the purpart it would have been subject to owelty. By leaving the interest in the mortgagor, he must be held to have authorized similar action by the mortgagor.

October 31, 1881. THE COURT. Neither a judgment nor a mortgage lien against one tenant in common prevents a partition either at his instance, or at that of any other of the tenants (Bavington *v.* Clarke, 2 P. & W. 115). The mortgagee of an interest in an undivided estate is not entitled to be made a party to a proceeding in partition (Long's Appeal, 27 P. F. Smith, 151). He has an incumbrance only on the land; but no estate in it. He has no right whereby he can elect to take or to refuse a purpart, nor can he give security for owelty. (Id.) The primary object of partition is to divide the land among the tenants, according to their respective shares therein. If such a partition is not practicable without prejudice to the whole, then only should it be partitioned into purparts of unequal value. In case of a lien on the interest of a co-tenant to whom a purpart is allotted in severalty, the lien follows the separation and attaches only to

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the estate so taken: but is discharged as to the other purparts (Jackson *v.* Pierce, 10 Johns. 414; Bavington *v.* Clarke, *supra;* Long's Appeal, *supra;* Wright *v.* Vickers Admin., 31 P. F. Smith, 122).

The rights of tenants in common to make partition, and to enjoy all the incidents connected therewith, are paramount to the rights of a lien creditor against any one of the tenants. If necessary to effect the legitimate purpose of partition, such a lien must yield some of its former binding force, and may even be wholly divested. Hence, notwithstanding the Act of 23d March, 1867, declares that the lien of a first mortgage shall not be destroyed or in any way affected "by any judicial or other sale whatsoever," yet where, after the commencement of proceedings in partition, one of the co-tenants executed a first mortgage on his undivided interest, and the proceedings in partition resulted in a sale by the sheriff, it was held that the lien of the mortgage was thereby divested (Wright *v.* Vickers Admin., *supra*). The case was not ruled on the ground that the mortgage was executed during the pendency of the proceedings in partition, but on the broader ground of the paramount right of tenants in common to make partition, and to enjoy all the incidents flowing therefrom.

The 38th section of the Act of 29th March, 1832 (Pur. Dig. 436, pl. 150), provides, in case equal partition in value cannot be made, and the Court orders the purparts to those entitled thereto, it shall award them "subject to the payment of such sum or sums of money as shall be necessary to equalize the value of said purparts according to the said appraisement thereof." The purpart, of which the proceeds are now in contention, was so allotted, "subject to the payment as owelty in partition" of sums sufficient to equalize the valuation. The lien of the recognizance then attached to the whole estate thus taken (Long *v.* Long, 1 Watts, 265; Cubbage *v.* Nesmith, 3 Id. 314).

Liens for owelty of partition in the Orphans' Court in several respects stand on a different footing from liens of judgments in the Common Pleas. The former are in the line of title, and must be looked for in the proceedings of partition; liens in the latter Court are outside of the line of title. A judgment docket is required to be kept in the Common Pleas for the information of subsequent lien creditors and purchasers. None is required in the Orphans' Court. To ascertain in regard to a lien there, the proceedings in partition must be examined (Riddle and Pennock's Appeal, 1 Wright, 177).

A purpart taken in severalty is allotted as an entirety. Whether the tenant's previous interest in the whole was large or small it matters not when he takes a purpart charged with owelty. He takes it as a whole. The recognizance to secure the payment thereof attaches to the whole. Why shall it not become the first lien thereon? A co-tenant for whose benefit the recognizance is taken, may be divested of his whole estate in all the land partitioned. His only security for payment is the recognizance. There is no line of separation or division running through a purpart by which it can be divided to apportion liens. Presumably, the tenant thus taking acquires an estate in land of a value as much greater than his previous estate as the amount of the owelty is charged thereon. Hence, although a previous lien on an undivided interest may in form be displaced by the lien of the owelty in partition, yet the effect is more imaginary than real. It will practically bind land of a value equal to that on which it was a lien before partition. The partition has added to the value of the estate of the tenant a sum equal to the amount of the owelty charged thereon. Conceding, however, that a second lien is not as desirable as a first one, yet when a person obtains a lien against the estate of a tenant in common, he assumes that risk. He knows the estate is subject to partition and all its incidents. He cannot impair any of the rights of the co-tenants. Their rights are superior to the rights of a lien creditor of one tenant. Such a lien will not deprive them of any right incident to a partition that they might otherwise have enjoyed.

The case of Randell *v.* Mallett (14 Maine) is not applicable to the present case. That was not a partition subject to owelty charged on a purpart. The lien there in contention was not in the line of the title, but merely an incumbrance on the land. It was therefore correctly held that it was not in the power of the mortgagor by sale of part of the land and subsequent partition to extinguish the liens on the parts sold without the consent of the mortgagees. We have thus considered the only question urged on the argument, and discover no error in the record.

Decree affirmed, and appeal dismissed at the costs of the appellants.

Opinion by MERCUR, J.

May, '81, 156. June 7, 1881.

Brenner, Trucks & Co. v. Moyer.

Former recovery—Act of March 17, 1869—Attachment—Construction of Act—When suit begun by attachment becomes personal action—Practice.

Where a plaintiff institutes two suits for the same cause of action, a recovery of judgment in one constitutes a bar to the recovery of judgment in the other.

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A. instituted a suit in assumpsit against B. for the value of certain goods, wherein he afterwards recovered judgment. On the same day A. issued an attachment against B. for the same goods under the Act of March 17, 1869 (P. L. 8), which writ was served on B., to whom the goods were delivered on his giving the customary security. Subsequently a narr. was filed in said last-named attachment suit by A. claiming the same indebtedness which constituted the cause of action in the former suit, and in addition containing an allegation of fraud on B.'s part. To this narr. B. pleaded, and the case went to issue:

Held, that the attachment suit was to be regarded as a mere personal action for the same cause as the former suit in assumpsit, and that, therefore, the recovery of judgment in said last-named action precluded a recovery in the attachment suit.

Error to the Common Pleas of Clinton County.

Attachment, under the Act of March 17, 1869, by Peter Moyer against Brenner, Trucks & Co. The material facts of the case as they appeared on the trial, are set forth as follows in the opinion of the Supreme Court:—

"On April 30, 1874, the plaintiff below issued a summons in assumpsit against the defendants, and on the same day filed a narr. and an affidavit of claim, alleging his cause of action to be an indebtedness due by the defendants to him in the sum of $1303.19, for making and delivering 13,506 cubic feet of square timber. The narr. contained only the common counts, but subsequently an amended narr. was filed, declaring on a special contract in writing for making and delivering square timber, the quantity delivered and price therefor being the same as set forth in the affidavit of claim. The pleas of non-assumpsit, payment, and set-off being filed, the cause was tried on December 21, 1876, and a verdict was recovered for the full amount of the claim and interest, for which judgment was entered on December 28, 1876. This suit was No. 305, May Term, 1874.

"On the same 30th day of April, 1874, upon which the summons in the above case was issued, the same plaintiff issued an attachment, under the Act of 17th of March, 1869, against the same defendants, claiming the same indebtedness which constituted the cause of action in the previous suit. This proceeding was No. 306, May Term, 1874. The affidavit and bond required by the Act were filed, together with a præcipe for a writ of attachment, directing the sheriff to attach two rafts of timber, the property of the defendants. A writ of attachment was issued, served, and returned, all on the same 30th day of April, and the rafts attached were delivered to the defendants, from whom, with sureties, a bond was taken for the surrender of the rafts, in the event of a recovery in the said attachment suit No. 306, of May Term, 1874.

"On December 20, 1878, a narr. was filed declaring on the same written contract which was set out in the amended narr., in the case No. 305, and also on the common counts, and alleging in addition thereto, that the defendants were about to remove their property out of the jurisdiction of the Court, with intent to defraud their creditors. The cause subsequently went to issue on the pleas of non-assumpsit, payment with leave, etc., and a denial that the defendants were about to remove their property."

The defendants presented, *inter alia*, the following point:—

(3) That the proceedings in suit in the Court of Common Pleas of Clinton County, to No. 305, May Term, 1874, wherein Peter Moyer is plaintiff, and Brenner, Trucks & Co. are defendants, commenced April 30, 1874, and the judgment entered therein December 28, 1876, the record of all which being offered in evidence by the plaintiff, and being for the same cause of action as that declared on in this suit, are a bar to a recovery in this suit. *Answer:* We refuse to affirm that point.

The Court (Orvis, A. L. J.), charged, *inter alia*, as follows:—

"In 1876 the action to No. 305 was tried before a jury, and the question of the right of the plaintiff to recover was settled, by verdict and judgment. All the questions, whether the amount that the plaintiff claimed was due at the time of the bringing of the suit, whether he had fulfilled his contract, and how much was due, were submitted to a jury of this Court, and passed upon by them. They returned a verdict in favor of the plaintiff; judgment was entered upon that verdict, which remains to this time. Therefore, no question as to whether this claim was due at the time of the institution of this suit is now open for investigation; that was settled and determined. The defendants are concluded by that verdict and judgment. We instruct you as matter of law that that verdict and judgment are conclusive of the right of the plaintiff to recover the amount of that finding by that jury in that action; that that is conclusive of his right to recover in this attachment. All you have to do is to render a verdict for the plaintiff for the amount of that verdict with interest from that time to the present."

Verdict for the plaintiff accordingly, and judgment thereon. The defendants took this writ assigning for error, *inter alia*, the refusal of the defendants' third point, and the portion of the charge above quoted.

C. G. Furst (with him *P. S. Merrill*), for plaintiffs in error.

The former judgment merged and extinguished the cause of action, and was a bar to the recovery in this. The maxim *nemo debet bis vexari pro eadem causa* applies as well where the one action is on a statute and the other at common law, be-

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cause the statutory remedy is cumulative. But a plaintiff having elected one and having recovered judgment therein, is barred from recovering judgment in the other. He cannot subject the defendant to double costs.

Garvin *v.* Dawson, 13 S. & R. 247.
Wilson *v.* Hamilton, 9 S. & R. 429.
Hess *v.* Heeble, 6 S. & R. 61.
Marsh *v.* Pier, 4 Rawle, 289.
Duffy *v.* Lytle, 5 W. 132.
Brown's Legal Maxims, 331.

The Act of March 17, 1869, gave a statutory remedy, but where the defendant appears, the attachment suit does not differ from a common law personal action. Where in such case the plaintiff has recovered a prior judgment, the only question is, was it tried on the merits for the same cause of action, and if so it is a bar.

Blyler *v.* Kline, 14 Sm. 133.

Such judgment may be given in evidence as a bar, in an action of assumpsit, under the general issue, although judgment was not entered in the first suit until after the institution of the second.

Finley *v.* Hanbest, 6 Casey, 194.
1 Greenleaf on Ev., § 530, and cases cited.

The principle of this case is ruled by—

Baxley *v.* Linah, 4 Harris, 250.

H. T. Harvey, for defendant in error.

The judgment in the former action of assumpsit adjudicated, simply, that the defendants are indebted to the plaintiff in a certain sum. The judgment in the present attachment suit adjudicates that the plaintiff is entitled to proceed on the bond given by defendants with sureties, under the provisions of the Act of 1869, to recover the amount of the indebtedness found due by the former judgment. There is no inconsistency between the two, nor do the two judgments afford one and the same remedy, although if either judgment is satisfied, both will be.

If the Court should hold the first judgment to be a bar, we will be deprived of our statutory remedy under the Act of 1869, which arose not merely because of the defendants' indebtedness, but because of their acts which that statute declared to be fraudulent, and by reason whereof we have a specific lien on the goods attached, or we can proceed on the bond given in lieu thereof, in addition to our general common law right of execution.

Tams *v.* Lewis, 6 Wr. 402.

We adopt as our argument the remarks of ALLISON, P. J., in Swartz *v.* Lawrence, C. P. No. 1, of Phila. Co. (34 Leg. Int., 114), viz.: "But is a proceeding by attachment, under the Act of 1869, inconsistent with the action which had been brought on the claim? The two are not in conflict as to purpose, nor are the two modes of proceeding inconsistent with one another; they are not more unlike, as remedies seeking the same end, than a suit on a mechanic's lien, instituted by scire facias, and an action on a promissory note given for the same debt; in the first instance, a judgment binds only the property against which the lien is filed, and in the second proceeding, it is general, and binds all the land of a defendant. These two proceedings do not conflict, because they look to the accomplishment of the same purpose, for though there may be two recoveries, there can be but one satisfaction."

This Court can control the costs, to prevent injustice to the defendant.

[SHARSWOOD, C. J. Only in proceedings in equity, not in common law actions.]

The case of Baxley *v.* Linah does not apply. That was a foreign attachment in which the judgment of a foreign State was held, under the Constitution, to be conclusive, and therefore a bar. Here both actions were in the same Court, and the execution remained under the control of the Court.

Oct. 3, 1881. THE COURT (after stating the facts *ut supra*). On the trial the record of the judgment in the case No. 305 was given in evidence, and the Court was asked, amongst other things, to charge that this judgment was a bar to a recovery in the present suit. This the Court declined to do, and that refusal is assigned, *inter alia*, for error here. We are of opinion that the learned Court below erred in thus ruling, and that the judgment must be reversed for that reason. We would have been very willing to sustain the judgment if we could do so, especially as we are informed that a practice prevails in some portions of the State to proceed in this class of cases in the same manner as done here, and doubtless the learned counsel for the plaintiff followed the practice usual in his vicinity. But we are quite clear that this method is erroneous upon very familiar legal principles which cannot be overlooked.

It is without question that the cause of action in these two proceedings is the same. Considered as personal actions between the same parties, it is manifest that a recovery in the first worked an extinguishment of the right to recover in the second. We said in Wilson *v.* Wilson's Admin. (9 S. & R. p. 429), that "to permit a party to recover in a second action what was included in, and might have been recovered in the first action, would be against the policy of the law, and unjust, because it would harass a defendant and expose him to double costs." And in Marsh *v.* Pier (4 Rawle, on p. 289), it was held that "a judgment of a proper Court, being the sentence of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and be-

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comes the law of the case." In Duffy & Mehaffy *v.* Lytle (5 W., on p. 132), KENNEDY, J., said that "the first judgment when given, whether it be in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher order."

These principles, which are very familiar, dispose of the question at issue, if in fact as well as in law, the two proceedings are for the same identical cause of action, and if the first judgment really determines every essential element involved in the second action. It is argued, however, and not without force, that the two proceedings are not essentially the same, that the first action is founded upon, and results in a judgment for the mere personal liability of the defendant, while the second is a special proceeding against particular personal property only of the defendant. If this were strictly so, there would be much weight in the argument. An examination, however, of the Act of 1869 develops that the view thus presented is not a correct interpretation of its provisions. The first section authorizes the issuing of a writ of attachment in any *pending action*, because it provides that it may issue against any *defendant* upon the application of any *plaintiff* upon filing the necessary proof and bond. It is, therefore, in aid of an action which has already been commenced, and in case no such action is pending may be issued in the first instance. But in either event, under the third and fourth sections of the Act, it becomes an ordinary personal action, if either there is a personal service of the writ, or if the defendant is a resident of the county, or appears to the action. In this case the defendants appeared and made defence after a bond was given to the sheriff for the return of the rafts in the event of recovery. From that time it is entirely clear that the proceeding became and was a mere personal action against the defendants, with a right to bring an action on the bond taken by the sheriff, if the rafts were not returned according to the condition of the bond. If they were surrendered there would be, of course, a right to have process of execution levied upon them as upon any other property of the defendants. These being the characteristics of the proceeding, it is entirely clear that, independently of authority, it must be regarded, in the circumstances of the present case, as a mere personal action, and hence subject to be barred by the recovery of a judgment in a personal action previously brought for the same cause. We consider, moreover, that the question has been practically settled by previous decisions of this Court. In Baxley *v.* Linah (4 Harris, 241), we held that a judgment in a sister State is to be deemed to have the effect of a domestic judgment in relation to the cause of action, and where the defendants have notice, it is conclusive of the subject-matter, and the original cause of action is merged in it; therefore a suit pending in the State of Maryland and a judgment subsequently obtained therein, is a bar to a proceeding between the same parties and for the same cause of action by foreign attachment, instituted in Pennsylvania after the bringing of the suit and before judgment therein. On p. 250, CHAMBERS, J., said: "It is settled that where a judgment has been already obtained in a prior action by the plaintiff against the defendant for the *identical* demand, contract, or obligation, it is merged by the superiority of the record security acquired by the judgment; *transit in rem judicatam*, and the creditor can no longer prosecute suit upon the original demand, though it were a specialty." In Blyler *v.* Kline (14 P. F. S. 130) it was expressly ruled that a judgment in a foreign attachment case, where the attachment is dissolved or is contested without dissolution, has the like force and effect as in case of an action commenced by a summons. See also the case of Garvin *v.* Dawson (13 S. & R. 247) and the authorities there cited.

We are of opinion that the judgment in the Case 305, May Term, 1874, being for the same cause of action in a suit between the same parties, extinguishes the cause of action in the present case, and hence constituted a good bar to any recovery in the latter suit, and therefore the judgment is reversed.

Opinion by GREEN, J.

Common Pleas—Law.

C. P. of Lebanon Co. Sept. 26, 1881.

Anspach v. The Guardian Mutual Aid Society of Pennsylvania.

Practice—Life and Accident Insurance Companies—Service of process on—Act of April 24, 1857,—Act of April 8, 1868.

Sur rule to show cause why service of the writ should not be set aside—

Debt, by W. S. Anspach against the Guardian Mutual Aid Society of Pennsylvania upon a policy of insurance effected by said plaintiff upon the life of his father, Jacob Anspach. Said company was incorporated under the laws of Pennsylvania, and did business at Pine Grove, Schuylkill County. Jacob Anspach was at the time the said policy was issued, a resident of

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Lebanon County, and remained domiciled therein until his death. The summons was directed to the Sheriff of Schuylkill County, in accordance with the provisions of the Act of April 24, 1857 (P. L. 318), as extended by the Act of April 8, 1868 (P. L. 70). It was returned served on the President, Treasurer, and Secretary of the company defendant. Said defendant thereupon obtained this rule to which plaintiff filed an answer.

Miller and *Ulrich*, for plaintiff.

J. P. S. Gobin, for defendant.

November 7, 1881. THE COURT. The defendant is a life insurance association incorporated under the laws of this State. The writ issued out of this Court, and was directed to the Sheriff of Schuylkill County. The summons was served on the President, Treasurer, and Secretary of the society and so returned. Under the motion we are asked to say that the service of said writ is illegal, and without authority of law. It is answered that it was properly and lawfully served under the Act of April 24, 1857 (P. L. 318), as extended by the Act of April 8, 1868 (P. L. 70).

The construction of the Act, read as including the defendant society, must settle this question. It is perhaps a trite saying that statutes in derogation of the common law, or contrary to general public policy, must be strictly construed. The Act in question authorizes suit to be brought in any county where the property insured may be located, and process to be served upon the president or other chief officer of the company against whom the same issued, or upon the agent of any company not incorporated by the Legislature of this Commonwealth. This is an Act relating to insurance companies, and the Act of 1868 enacts that all its provisions shall apply to life and accident insurance companies. The defendant is a home corporation for the insurance of lives. The service of process was upon officers; was it authorized—legal? It was outside of the jurisdiction of the Court. But the suit may be brought in any county where the property insured may be located, and process may be directed to and served by the Sheriff of any county in the State. In this case there is no property insured, and hence no location in the county. The cause of action may exist, but the right of suit in this county—the jurisdiction of this Court—is not fixed by anything that is before us. This was not an insurance on property, but on the life of a human being. This is not property of any kind. Judge PEARSON, in Keller *v.* The Mutual Protection Life Insurance Company of Philadelphia (No. 175, January Term, 1876, Dauphin Common Pleas), said, the objection to such service, as is shown here, is that the insurance is not on property, but on the life of a human being.

But it is said if effect cannot be given to this service, the Act is meaningless as to the class of corporations to which the defendant belongs, and that the Act of 1868 is a nullity. This may or may not be so. Perhaps we might say it does not apply to any corporation, life or accident, that does not insure property. It is not, however, our purpose at this time to inquire. It is not alleged or pretended that any *property insured* was located in this county. The life insured is not property. The dead body is and can in no sense be the location of property so as to give jurisdiction over persons and property outside of the forum. Is it life or death that fixes the location so as to give the jurisdiction here invoked? Is it the animate being or the inanimate thing? When—at the time of insurance, or at the time of loss or death? The attempt to apply this dogma of property to life or accident insurance companies, is simply a *reductio ad absurdum*. The lost limb or the inanimate member of the body, may indeed be located in one county, whilst the animate creature may seek within the limits of the State a jurisdiction of his choice without reason in fact or in law, and against general public policy. If laws are written in the language of the people, we know of no canon of construction that justifies the arbitrary, strained, and artificial use of the words contended for by the plaintiff. We cannot believe that such an application of the Act of 1857 was ever contemplated by the Legislature.

We are of the opinion that the service of the writ in this case was not authorized, and must therefore be set aside. It is so ordered.

Opinion by HENDERSON, A. J.

C. P. No. 2, of Allegheny Co. Oct. 1881.

A. C. v. B. C.

Divorce — Impotency — Libel for divorce on ground of impotency must state, inter alia, that such impotency is incurable—Demurrer.

Libel in divorce, filed March 21, 1881, by A. C. against B. C., his wife, setting forth a marriage between the parties in September, 1876, "that at the time of entering into said marriage contract the said B. C. was, and still is, naturally impotent and incapable of procreation, and, by reason of the malformation of her sexual organs, was, and is, under a natural incapacity of discharging her matrimonial vow;" and praying a divorce *a vinculo matrimonii*.

Demurrer.

Stewart, for the libellant.

Pflaum, for the respondent.

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November 12, 1881. THE COURT (after stating the facts). The ground of demurrer is that the libel does not allege the impotency or malformation to be *incurable*. Is that an essential allegation?

Counsel for libellant contend that they are not bound to either allege or prove incurability. That it is sufficient to prove that impotency existed at the time of the contract of marriage, and still exists, to entitle the libellant to a divorce, even though it be proven that the defect is curable or has been cured since filing the libel.

The words of the statute are "was and still is naturally impotent or incapable of procreation." What is the meaning? Taken literally the word "naturally" would exclude an impotency caused by an injury after birth. Yet it certainly does not exclude such a case. While the law of divorce in this and the other States is founded on statute, yet in the administration it adopts largely the law of the English Ecclesiastical Courts. (Bishop on Divorce, Vol. 1, Sect. 71; Butler *v.* Butler, 1 Parson's Eq. 337; Clark *v.* Clark, 6 W. & S. 85; 5 Paige, 557; 5 Foster (N. H.), 267; 1 Johnson's Ch. 488.)

The uniform ruling of the English courts has been that the impotency must be incurable and that it must be proven affirmatively to be so. The same interpretation has been given to the same words and words similar to those of our statute in the courts in this country in every case in which the question has been raised, so far as we have been able to examine the cases. (Ferris *v.* Ferris, 8 Conn. 166; Kempf *v.* Kempf, 34 Mo. 211; Devanbagh *v.* Devanbagh, 5 Paige (N. Y.), 557.) If this were not the true interpretation of the statute it would follow that a divorce could be demanded in every case where a slight malformation existed impeding the immediate consummation of the marriage contract, although such impediment was till then unknown and might be removed by an easy surgical operation.

From examination of medical authorities we are safe in assuming that in the present state of medical and surgical skill the presumptions are that impotency or malformation in the sexual organs of a woman is ordinarily curable. On authority and reason we have no doubt that our statute means *incurable* impotency.

Must incurability be alleged in the libel, or is it sufficient that it be proven without being specifically alleged? With the aid of diligent counsel we are unable to find any Pennsylvania authority on either branch of our subject.

The second section of our Act of Assembly of March 13, 1815, regulating proceedings in divorce, directs "that the libellant shall set forth *particularly and specially* the causes of his or her complaint." It is not always safe pleading to set forth the complaint in the words of the statute. Every material allegation should be set out unequivocally. And if a word or phrase has different meanings it should appear either directly or by the context in what sense the pleader uses it. Adultery is a ground for divorce, but it is necessary either to specify the paramour or state that he is unknown. That the marriage was procured by "fraud, force, and coercion" is ground for divorce but it is not sufficient to set forth in the libel that the marriage was so procured. The circumstances must be particularly set forth. (Hoffman *v.* Hoffman, 6 Casey, 417). Pleadings should be so accurate and unequivocal that when they are required to be verified by oath a conviction for perjury might follow a false oath.

The Act of Assembly requires the libellant to make oath that "the facts set forth in the libel are true." If it should turn out that the libellant in this case knew that the impotency was curable when he made his affidavit, he could not be convicted of perjury, because he speaks of impotency in the common sense and not in the statutory sense. As said by Judge THOMPSON, in Hoffman *v.* Hoffman, above cited, "It advances not the morals of society to treat lightly or loosely the obligations of the matrimonial contract. Courts ought to be careful to see that all the requirements of the law in such proceedings be complied with both as to *form and substance*, so that divorces may not be obtained through fraud or collusion." We are not called on to decide a case where no question is raised on the pleadings *in limine*. Due proof and finding of the facts by the Court might be sufficient after testimony taken in the case. In such cases as the present the proceedings for proof are of such a character as to be taken only when good cause may be shown. A corporal examination by an expert is usually necessary. Neither public nor private morals are to be advanced by proceeding to such examination and testimony, when, from all that appears affirmatively on the pleadings, the presumptions are that they will result in nothing more than scandal and uncalled for exposure of personal defects.

The weight of authority is also on the side of the demurrer. The English authorities are uniform in holding that incurability must be alleged and proved. Mr. Bishop says (vol. 2, p. 576) that he has never seen an English precedent that did not set forth that the defect was incurable. The only American case we have found to the contrary is that of Kempf *v.* Kempf (34 Mo. 211, *supra*), in which the Court held it unnecessary to allege in the bill that the impotency was incurable, that, as the impotency intended by the statute is incurable, the libellant would be supposed to use the word in that sense. No counsel

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appeared for the respondent, and the learned Judge appears to have ignored all the precedents in such cases. There is also this difference, that the provision of our statute requiring the libellant to set forth particularly and specially the ground of his complaint is entirely lacking in the Missouri Statute. In Devanbagh *v.* Devanbagh (5 Paige, 577), the bill set out the physical incapacity of the respondent without in terms asserting its incurability (though it may be inferred from the whole bill). *The bill had been taken pro confesso.* No question was raised on the pleadings. No counsel appeared for the respondent, but Chancellor Walworth refused to grant a divorce on the ground that there was no affirmative proof that the incapacity was incurable, holding that although the statute did not in words demand that it should be incurable, yet that it must be interpreted in the light of the well-known rulings of the English courts, and further saying: "Impotence on the part of a female that cannot be cured by proper medical or surgical treatment is a case of very rare occurrence." The case was referred to a master for proofs and was finally refused, because the proof did not show the defect to be incurable (6 Paige, 6).

In Ferris *v.* Ferris (8 Conn. 116) the point is raised, and in a well considered opinion is squarely decided, that the bill must allege that the impotence is incurable. A demurrer to the bill was sustained for the failure to so allege.

We prefer to follow in the interpretation of our Act of Assembly, the precedents which are most likely to avoid unnecessary scandal, and are also in our opinion the correct interpretation, and require the libellant to set forth unequivocally and specially the ground of his complaint. It is not necessary, however, that the cause of the alleged impotence be further specified.

The demurrer is sustained, with leave, however, to the libellant to amend within sixty days.

Opinion by EWING, P. J.

C. P. No. 2. Oct. 8, 1881.

Henry, Executor, etc., v. Fawrest.

Warrant of attorney to confess judgment—Warrant over twenty years old—Practice.

Rule to show cause why judgment should not be entered on a bond by virtue of a warrant of attorney.

The affidavit upon which the rule was granted set forth that a bond was executed by John School and Charles Fawrest, on March 30, 1850, for the payment of $2375.00 in favor of the present plaintiff's testator, that the principal moneys remained unpaid with interest, etc.

It was shown to the Court that notice of the rule was served on defendant Fawrest.

Thomas A. Gummey, for the rule, cited, Court Rule No. 40.

THE COURT. Rule absolute as to Fawrest.

Orphans' Court.

October 17, 1881.

Armstrong's Estate.

Partition—Act of March 29, 1832—Where issue directed to Court of Common Pleas—Burden of proof—Practice.

Sur petition for inquest in partition and answer.

The petition of one Armstrong set forth that the decedent, Jane Armstrong, died June 23, 1878, intestate, seised in fee of certain real estate, leaving surviving her a husband, Thomas (who had since, on October 20, 1880, died), and two children, the petitioner and his brother, Thomas Armstrong; that by reason of the decedent so dying intestate, and the death of her husband, the said real estate has become vested in the petitioner and his brother, as tenants in common in fee; he, therefore, prayed for an inquest to make partition. The answer of Thomas Armstrong alleged that he is the only surviving child of George L. and Jane Armstrong, and that the petitioner's name is Henry Matthews, he having been adopted by Mr. and Mrs. Armstrong from a foundling asylum in Dublin. A replication having been filed, an examiner was appointed who took testimony as to the facts.

Harrington, for petitioner.

To the point as to what are proofs of pedigree and of descent and birth, cited—

Kingston *v.* Lesley, 10 S. & R. 383.
Carskadden *v.* Poorman, 10 W. 82.
Watson *v.* Brewster, 1 B. 381.
Davis's Estate, 9 WEEKLY NOTES, 380.

Alexander (with whom was *J. G. McKenna*), contra.

October 29, 1881. THE COURT (after stating the facts of the case). Upon the face of the pleadings it will be readily observed a grave issue of fact arises, most material to the petitioner, and which must necessarily be determined before an inquest can be awarded. That respondent is a son of decedent is admitted, but the kinship of the petitioner and his right to participate in the estate are strenuously denied. The burden of proof is, therefore, cast upon the petitioner. We have

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carefully examined the testimony, and in view of its conflicting character, together with the importance to both the contending parties of the question involved, which could be more satisfactorily determined by a jury, we have reached the conclusion that a proper case is presented for the exercise of the authority vested in the Court by the Act of March 29, 1832, sec. 55 (Purd. Dig. 1108, pl. 45), which provides that the Orphans' Court shall have power to send an issue to the Court of Common Pleas of the same county for the trial of facts by a jury, whenever they shall deem it expedient to do so.

A precept for an issue is, therefore, directed, further proceedings to stay until the result is certified to this Court.

Opinion by HANNA, P. J.

October 18, 1881.

Shore's Estate.

Guardian and ward—Claim on guardian for maintenance—Jurisdiction—Act of June 16, 1836, gives Orphans' Court no authority to make distribution of a minor's estate, or creditors any right to demand it.

Sur exceptions to Examiner's report.

Petition for an order on a guardian to pay an allowance for board of minor. The petitioner, Samuel Shore, brother of the minor, prayed for an order on the Fidelity, Trust, and Safe Deposit Company, guardian, for payment of one hundred and ninety-six dollars, being the unpaid balance of a sum alleged to be due petitioner for two years, eight months, and twenty-three days (Oct. 1876, to June, 1879), board of minor at four dollars a week, which allowance was made by order of Court dated May 15, 1878, in pursuance of a petition presented by the aforesaid Samuel Shore.

The answer of the Fidelity, Trust, and Safe Deposit Company alleged (1) over-payment from date of order of Court, May 11, 1878, to Nov. 1879, at about which time the minor ceased to live with petitioner; (2) petitioner's misconduct towards the minor; (3) want of jurisdiction.

The matter was referred to an examiner, who found (the 1st and 2d points not being pressed) that full jurisdiction is conferred on the Orphans' Court by the Act of June 16, 1836 (Purd. 1104, pl. 8), and that the claim for boarding the minor from October, 1876, until the order of Court of May 11, 1878, was a just one and should be paid.

To this finding exceptions were filed by the guardian.

J. W. M. Newlin, for petitioner.

John Dolman, for respondent.

This is a suit against the minor for necessaries, and should be brought in the Common Pleas.

This Court has no jurisdiction unless on petition of the guardian.

This Court has jurisdiction to settle guardian's accounts, but none to allow a contested claim.

Mohney *v.* Evans, 1 Smith, 80.

Call *v.* Ward, 4 W. & S., 118.

In the petition of May 11, 1878, for an allowance, no claim being made by the petitioner, none can be presented now.

There being no evidence of any contract or express promise on the part of the guardian, none can be implied for payment of board to minor's brother before the aforesaid order of Court.

October 29, 1881. THE COURT. The language of the Act of June 16, 1836, § 19, clause 8, conferring jurisdiction upon the Orphans' Court in "all cases within their respective counties, wherein executors, administrators, guardians, or trustees may be possessed of, or in any way accountable for any real or personal estate of a decedent," is very general, but in the light of other provisions of the Act and of subsequent legislation, we do not think it was intended to embrace the case of a creditor of a minor's estate seeking to compel payment of a debt which the guardian, who would thus be deprived of his right of trial by jury, denied the existence of. It was thought necessary to give the right to make *distribution* of a decedent's estate in the same Act by an express provision, notwithstanding the generality of the language of the clause referred to; and even then, it was not until the Act of 13th of April, 1840, § 1, that the right of a creditor of a solvent estate to demand distribution was made certain. (Hammett's Appeal, 2 Norris, 394.)

There is nothing in this Act, or in any other, which gives the Orphans' Court authority to make distribution of a *minor's* estate, or which confers upon creditors the right to demand it.

How far the petitioner is precluded from demanding payment by reason of his making no suggestion of the indebtedness which he now alleges when he presented his former petition, and how far the principle of Seitz's Appeal (6 Norris, 159); Douglass's Appeal (1 Norris, 169); Duffey *v.* Duffey (8 Wright, 402), etc. etc., applies to his claim, are questions upon which we express no opinion.

Exceptions sustained, and petition dismissed at the costs of the petitioner, without prejudice to his right to proceed at common law.

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RICHARD C. DALE, Esq.

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AMENDMENT—*Continued.*
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Where an amended narr. is filed, but the original is not withdrawn, there is a presumption that the case went to trial upon the amended narr., and the mere fact that the Court below did not order the plaintiff to elect upon which narr. he would try, affords no ground of reversal. Carn *v.* Fillman, 152.

Upon an alternative order giving leave to amend, otherwise judgment for defendant, an amendment will be permitted at any time before judgment is actually entered, though not within the same term. (C. P.) Barry *v.* Salt Co., 259.

In an action against nine defendants, members of a beneficial society, upon a plea in abatement that there were thirty-five other members, the plaintiff may amend by bringing in the names of the other defendants and issuing an alias summons as to them. (C. P.) Hirsch *v.* Kohn, 237.

Amendment of affidavit under attachment Act of 1869, by inserting Christian name, when permitted. (C. P.) Swezey *v.* Brown, 207.

The Act of June 11, 1879, authorizing the amendment of mechanics' claims is not retroactive. Smith *v.* Stokes, 6.

When an amendment to a return to an order of sale will not be allowed by the Orphans' Court. (O. C.) Fritz's Estate, 51.

APPEALS. See ERRORS AND APPEALS.

Appeal from Justice of Peace. See JUSTICE OF PEACE.

APPORTIONMENT of Ground Rent. See LANDLORD AND TENANT. Quigley *v.* Molineaux, 118.

ASSIGNMENT FOR BENEFIT OF CREDITORS. An unrecorded assignment of property in trust for the benefit of a single creditor is invalid as against a subsequent general recorded assignment for the benefit of all the assignor's creditors. If, therefore, the assignees under the last named assignment take and sell the property named in the first assignment, the assignee under the first assignment cannot recover the proceeds of such sale. Kern *v.* Powell, 547.

In the distribution of the funds in the hands of an assignee for the benefit of creditors, no one can share who does not claim under the assignors. Strickler's Appeal, 535.

An assignee for the benefit of creditors is under no obligation to let the real estate included in the assignment, and therefore where he allowed the assignor to retain possession and use the real estate, it was held that the assignee was not chargeable in his account with the rental value thereof. Detweiler's Appeal, 246.

ASSUMPSIT. An action for money had and received will lie in any case where the goods of one come into the possession of another without consideration and are sold by the latter, who then fails to account for the proceeds. (C P.) Whitney *v.* Bruner, 239.

Although the voluntary payment of the debt of another will not raise an assumpsit, yet if one is compelled to pay another's debt in consequence of the latter's omission so to do, there is a legal presumption of a request by the latter to the former to make the payment; and assumpsit may be maintained for the amount so paid. Hogg *v.* Longstreth, 95.

Where a terre-tenant permits taxes to fall into arrear, which a mortgagee is subsequently compelled to

ASSUMPSIT—*Continued.*
pay upon taking title to the premises after a sheriff's sale, the terre-tenant is liable in assumpsit to the mortgagee for the amount of taxes so paid. Ib.

ATTACHMENT, EXECUTION. See EXECUTION.

ATTACHMENT, FOREIGN. See FOREIGN ATTACHMENT.

ATTACHMENT FOR CONTEMPT. See COURTS. Leiter's Appeal, 225.

ATTACHMENT UNDER ACT OF 1869. An affidavit in general terms charging that goods were purchased upon false representations is sufficient to support an attachment. (C. P.) Swezey *v.* Brown, 207.

The fact that the fraud was perpetrated by the deceased partner of the defendant is no answer to the plaintiff's right to an attachment. Ib.

The insertion in the plaintiff's affidavit, after the attachment issued, of the Christian name of a member of the defendant firm, charged with fraud, which had been left blank in the affidavit when filed, is not such an amendment as will support a motion to dissolve the attachment. Ib.

Where the plaintiff's affidavit contains a general allegation of fraud, the burden of proof is on the plaintiff, and he must take depositions, if the defendants deny the fraud by affidavit; but where the plaintiff's affidavit contains specific allegations of fraud, the burden of contradiction is on the defendant. (C. P.) Matthews *v.* Dalsheimer, 371.

Upon an attachment under the Act of 1869, the sheriff is not justified in seizing the goods of the person named therein as garnishee. Rothermel *v.* Marr, 421.

The bond given by the plaintiff in such suit is intended merely as a security for the defendant in the attachment, that the plaintiff shall within a reasonable time prosecute his suit, and if he fails therein, that he will pay the costs and the defendant's damages. It in no case operates as a security for the garnishee. Ib.

When the sheriff is directed to seize goods claimed by some person other than the defendant, the sheriff should either demand from the plaintiff a bond of indemnity, or frame an interpleader between the plaintiff and the claimant under the Act of January 30, 1871, to determine the true ownership thereof. Ib.

An attachment under the Act of 1869 cannot be prosecuted after the recovery of judgment in an action of assumpsit for the same cause of action. Bruner *v.* Moyer, 565.

ATTORNEY AND CLIENT. The power of county commissioners to contract with counsel for the payment of fees is limited to binding the county to the payment of a reasonable compensation, hence an agreement for the payment of a large contingent fee is invalid. Chester County *v.* Barber, 350.

An attorney-at-law employed to collect a debt has no right, having made the collection, to set off against the client an antecedent debt or claim of his own. Simpson *v.* Pinkerton, 423.

Bequest to attorney by client, when fraudulent. See WILL. Cuthbertson's Appeal, 69.

AUDITOR. Although an auditor may not make a collateral inquiry into the validity of a judgment, he may make full investigation as to the amount equitably due upon such judgment. Gray's Appeal, 458.

An auditor appointed to distribute the proceeds of the sale of real estate of a decedent, may inquire into the validity of a deed which it is alleged was obtained

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AUDITOR—*Continued.*
by fraud from a distributee, whereby the share of such distributee passes to the grantee named in the deed. McGettrick's Appeal, 460.

The finding of an auditor upon a question involving matters of fact as well as matters of law, having been confirmed by the Court and remaining unappealed from, is conclusive in subsequent proceedings. It is *res adjudicata*. (O. C.) Hoopes's Estate, 223.

Auditor's finding of facts, when reviewed in the Supreme Court. See ERRORS AND APPEALS. Milligan's Appeal, 203.

Exceptions to report of auditor, hearing of. See PRACTICE. (C. P.) *In re* Nathans's Estate, 138.

AVERAGE. See SHIPPING.

BAILMENT. A bailee for hire is liable for slight negligence, while a gratuitous bailee is liable only for gross negligence. In the absence of evidence to the contrary, there is a presumption that every bailee is to be compensated for the service he performs. Swartz *v.* Hauser, 434. See COMMON CARRIERS.

BANKS AND BANKING. The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is a trust fund for the benefit of creditors. Macungie Savings Bank *v.* Bastian, 71.

The board of directors of an insolvent bank, having duly made an assessment on unpaid stock subscriptions for the purpose of meeting the liabilities of the bank, a depositor cannot set off the amount due him on account of his deposit against the amount of assessment due by him on account of unpaid stock subscriptions. Ib.

A bank cannot set off unmatured paper of an insolvent depositor against the balance due him on his deposits. (C. P.) Jones *v.* Bank, 102.

National Banks. The reservation by a national bank of usurious interest works a forfeiture of the right to claim any interest upon the loan made. (U. S. C. C.) Farmers and Mechanics' Nat. Bank of Mercer *v.* Hoagland, 123.

The fact that the bank has taken renewal notes which include usurious interest upon previous notes will not enable a recovery of the face of such renewal notes. The entire amount which can be recovered is the principal amount first advanced. Ib.

Effect of an unaccepted draft as a specific appropriation of funds in bank. See BILLS AND NOTES. Jordan and Porter's Appeal, 37.

BILLS AND NOTES. Where a maker signs a note as "agent" without naming a principal, but the principal is in fact known to the payee, who takes the note upon the credit of such principal, then the agent is not personally liable. (C. P.) Janeway *v.* Moss, 337.

A lunatic who is an accommodation indorser without consideration upon a promissory note, and who has derived no advantage from his indorsement, is not liable thereon even to a *bona fide* holder of the note, who has no knowledge of the lunacy. Wirebach *v.* Bank of Easton, 143.

No protest of a promissory note is necessary in order to fix the liability of an indorser. Allen *v.* Bank, 188.

Although any material alteration in a note after indorsement will discharge the indorser, yet if at the time of the indorsement, the date be blank, and be subsequently filled in by the maker, the law necessarily presumes that the indorser authorized such filling up, and will not discharge him from liability. Hepler *v.* Mt. Carmel Bank, 127.

BILLS AND NOTES—*Continued.*
Where a note has been altered in any material part, the circumstances attending such alteration must be explained to a jury; judgment cannot be entered for want of a sufficient affidavit of defence. (C. P.) Van Dusen *v.* Thomas, 190.

An unaccepted draft, which does not designate that it is to be paid out of a particular fund, or that it is to operate as a transfer of a balance standing to the credit of the drawer in the hands of the drawee, will not work a legal or equitable assignment of a corresponding amount of the drawer's funds in the hands of the drawee. Appeal of Jordan and Porter, 37.

If before acceptance or payment of such a draft, the drawer executes an assignment for the benefit of creditors, the funds in the hands of the drawee pass by the assignment, as assets of the insolvent's estate to his assignees in trust for creditors, and the payee has no right of action against the drawee, nor can he claim the fund as against the assignees. Ib.

Where a note is taken for a debt, the presumption is that it was taken as a conditional payment, and only in satisfaction if and when the debt is paid. (O. C.) Graham's Estate, 83.

The acceptance of unmatured negotiable paper as collateral security for the payment of a dishonored check does not deprive the holder of his right to immediately enforce his legal rights upon the original debt. (C. P.) Bank *v.* Chaney, 137.

Although a note given in payment for the purchase-money of a patent right is invalid, and cannot be used as evidence of an indebtedness between the original parties unless drawn in conformity with the Act of 1872, still the seller of the patent right may recover the price agreed to be paid if he is able to prove his case without the aid of the note. (O. C.) Graham's Estate, 83.

The United States Government when dealing with commercial paper must exercise the same degree of vigilance which under the law is required by private parties. (U. S. D. C.) United States *v.* Central Bank, 84.

Where a copy of a promissory note is filed, the defendant who proposes to deny his signature, should demand inspection of the original, and after inspection explicitly deny the signature. If an affidavit of defence evasively denies the signature, judgment will be entered for want of a sufficient affidavit of defence. Allen *v.* Bank, 188.

Agreement to give time upon a promissory note must be definite, otherwise it is incapable of enforcement. (C. P.) Sickel *v.* Dillon, 337.

The maker of a non-negotiable paper may defeat a recovery upon it in the hands of a third person to whom it has been transferred for a valuable consideration, by setting up want of consideration, where the note has been given to the payee for his accommodation, and expressly to enable him to raise money upon it. Wetter *v.* Kiley, 59.

Effect of reservation of usurious interest by a national bank. See BANKS AND BANKING. (U. S. C. C.) Bank *v.* Hoagland, 123.

See AFFIDAVIT OF DEFENCE LAW.

BILL OF REVIEW. See ORPHANS' COURT.

BOND. The bond and warrant of a married woman given to secure a loan of money employed in purchasing real estate are void. Grosser *v.* Hornung, 463.

Construction of a bond given to secure the City of Philadelphia against the defaults of the Receiver of Taxes for the Twenty-third Ward. Waters's Appeal, 146.

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BROKER. A general custom that a broker may pledge his customer's stock for the purpose of raising money to carry it, is valid. Van Horn *v.* Gilbough, 347.

When the market value of stock so pledged falls below a price that will reimburse the broker for all expenses, a custom of brokers to sell out the customer's stock without notice, and hold the latter for the loss, is valid. Ib.

Contracts for the purchase and sale of stocks on margins, invalidity of. See CONTRACTS Ruckizky *v.* De Haven, 109. Dickson *v.* Thomas, 112.

See STOCK EXCHANGE.

BUILDING ASSOCIATIONS. A borrowing stockholder of a building association may apply his stock to the payment of his loan, and the value of the stock for this purpose is the amount of the payments thereon. Watkins *v.* Workingmen's Building Association, 414.

In estimating the value of building association stock during the running of the association, the Court will not take into consideration the value of the stock to wind up, nor its value as affected by the forfeiture of stock of other stockholders. Ib.

Taxation of. See TAXES AND TAXATION. Building Association *v.* Commonwealth, 161.

BURDEN OF PROOF. See PRESUMPTIONS. SHIPPING.

CHALLENGE OF JURORS. See PRACTICE. Wirebach *v.* Bank, 143.

CHARITIES. When a discretion as to the application of a fund for charitable purposes is vested in executors, and the executors die during the pendency of the prior life estate and before the occasion for the exercise of the discretion arises, the power is dead. Children's Hospital's Appeal, 313.

The Act of April 26, 1855, is inoperative to enable the Court to appoint a trustee to exercise the discretion in a case where the testator died prior to 1855. Ib.

COLLATERAL INHERITANCE TAX. See DECEDENTS' ESTATES.

COLLATERAL SECURITIES. See AFFIDAVIT OF DEFENCE LAW. BILLS AND NOTES. DEBTOR AND CREDITOR.

COMMISSIONS. See DECEDENTS' ESTATES.

COMMON CARRIER. See RAILROADS.

CONFIDENTIAL ADVISER. Bequest to, when fraudulent. See WILL.

CONSTITUTION OF PENNSYLVANIA.

Art. I. § 8,	135, 466.
Art. III. § 3,	498.
Art. III. § 13,	559.
Art. IX. §§ 1, 2,	168, 170, 328, 498.
Art. XVI. § 5,	491.
Art. XVI. § 8,	561.

CONSTITUTION OF THE UNITED STATES.

Art. XIV. § 1,	156.
Amendment 4,	135.

CONSTITUTIONAL LAW. A statute in derogation of the right of trial by jury should be strictly construed. Heidelbaugh *v.* Thomas, 141.

Colored children have a constitutional right to be admitted without discrimination into the public schools. (C. P.) Commonwealth *v.* Davis, 156.

A search warrant for stolen articles, describing them as "jewelry and other personal effects," is a sufficient compliance with Art. I., § 8, of the Constitution of Pennsylvania, requiring that no search warrant

CONSTITUTIONAL LAW—*Continued.*

shall issue unless the goods are described as near as may be. Moore *v.* Coxe, 135.

The provisions of the Fourth Amendment to the Constitution of the United States, requiring greater particularity of description, relates only to Federal legislation or process. Ib.

The provision in the Bill of Rights that no warrant to seize any person shall issue without a preliminary oath, does not prevent a justice of the peace, whose process is obstructed, from holding the offender to bail to answer in Court. (Q. S.) Commonwealth *v.* McClure, 466.

The provisions of Art. IX., §§ 1 and 2, of the Constitution of 1874, do not execute themselves so as to repeal any existing laws providing for the assessment and collection of taxes. They merely imposed restrictions on future legislation when it should thereafter be enacted. Coatesville Gas Co. *v.* Chester County, 328. Ruth's Appeal, 498.

An Act of Assembly which provides merely a modification of an existing remedy, does not violate the constitutional prohibition against impairing the obligation of contracts. Phelps's Appeal, 525.

Under the provisions of Art. XVI., § 8, of the Constitution of 1874, corporations to which the right of eminent domain is delegated are liable for consequential damages resulting to private property from the construction, use, or alteration of their works, ways, or other improvements. Pusey *v.* Allegheny, 561.

Hence a municipal corporation is liable to the property owners through whose land it has caused a street to be opened, not only for property actually appropriated, but also for damages caused to adjacent property by reason of a change of grade. Ib.

An Act entitled "A further supplement to an Act to incorporate the city of Scranton," which provides for a repeal of a clause in a special Act relating to the collection of taxes in said city, is unconstitutional and void, because it does not clearly express the subject thereof in the title. Ruth's Appeal, 498.

The right of a State bordering on public navigable waters to legislate on the subject of pilotage, with respect to vessels bound to her ports, is not exclusive, but is shared by the other States bordering on such waters. (U. S. D. C.) Chambers *v.* Clymene, 537.

A law of a State prohibiting any one from acting as a pilot on such waters without its license is invalid so far as it interferes with the performance of pilotage service by persons licensed by the other States bordering thereon. Ib.

Right of State to impose tax upon inter-State commerce. See dissenting opinion of GREEN, J., in Commonwealth *v.* Gloucester Ferry Co., 509.

Art. III., § 13, of the Constitution, providing that no *law* shall increase or diminish the salary of a public officer after his election or appointment, does not preclude the passage of a *municipal ordinance* whereby an increase is made in the salary of a municipal officer. Baldwin *v.* Philadelphia, 558.

Exemption from taxation. See TAXES AND TAXATION. Miller's Appeal, 168. Church *v.* Montgomery County, 170.

CONTRACT. A proposal may be withdrawn before acceptance, but after acceptance the terms of the contract are so far fixed that neither party can vary the essential conditions. Hence, the insertion in a contract of a provision not mentioned in the proposal, that a portion of the consideration-money shall be retained after its completion as security for the due performance of the work, does not bind the non-

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CONTRACT—*Continued.*
assenting party. (C. P.) Campbell *v.* Philadelphia, 221.

Mutual promises for an extension of time for the performance of a contract are a sufficient consideration for the agreement. McNish *v.* Reynolds, 24.

An order by a customer to a stock broker to sell a hundred shares "short," when it appears from all the evidence in the case that there was no intention to deliver real stock, is manifestly a wagering transaction, and cannot be made the basis of an action by the broker against the customer to recover the loss upon the transaction. Dickson *v.* Thomas, 112.

Where an infant deposits moneys with a broker as margins to protect the broker in speculations upon the infant's account, such margins may be subsequently recovered by the infant, even though the speculations result in a loss. Ruchizky *v.* De Haven, 109.

A contract by county commissioners to pay attorneys a large contingent fee in the event of success in a litigation in which the county is interested is void, as against public policy. Chester County *v.* Barber, 350.

A contract made by a physician with another physician purchasing his practice, not to practice his profession within a radius of five miles of a certain place, will be specifically enforced by injunction. Bett's Appeal, 431.

If one deliver money or personal property to another under the promise of the latter to deliver it over to a third person who has a beneficial interest therein, or to convert it into money and pay him the proceeds, the third person can maintain an action therefor against the promisor. Wynn *v.* Wood, 345.

The doctrine that where an infant has executed a contract and enjoyed the benefit of it, and afterwards, on coming of age, seeks to avoid it, he must first restore the consideration received, applies in certain cases, but as a general rule is unsound. Ruchizky *v.* De Haven, 109.

Contract of suretyship construed under particular phraseology to be a continuing contract. (O. C.) Bentz's Estate, 16.

A contract to marry without specification of time is a contract to marry within a reasonable time, and a refusal to fulfil the engagement may be manifested as unmistakably by conduct as by words. When so manifested, a formal demand is not a necessary prerequisite to bringing an action for breach of promise. Wagenseller *v.* Simmers, 353.

A delivery of personal property on credit, at stipulated prices, to be paid for by instalments under a written agreement that the goods shall remain the property of the vendor until paid for, is a sale, not a bailment, and a *bona fide* purchaser from the vendee without notice of the agreement takes a good title as against the vendor. Stadtfield *v.* Huntsman, 216.

A sale and delivery of personal property with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, will enable the creditors of the vendee to seize and sell the same for the payment of his debts. Brunswick *v.* Hoover, 219.

Contract to waive right of appeal, when not enforced. Wetter *v.* Kiley, 59.

Lunatic, liability of upon accommodation indorsements. See BILLS AND NOTES. Wirebach *v.* Bank, 143.

See ASSUMPSIT. FRAUDS, STATUTE OF.

CONTRIBUTION. See EQUITY.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONVERSION. The rule that the surplus proceeds of the land of a decedent sold at sheriff's sale, shall be paid to his executor or administrator and by him be distributed as real estate, is confined to the first transmission, and the money having once vested in the persons entitled, is no longer to be treated as real estate. Squire's Appeal, 118.

Where land descending to an infant from his father was sold by the sheriff under a prior incumbrance, and the surplus proceeds paid to the guardian of the minor; upon the death of the minor, his mother was entitled to this fund to the exclusion of the heirs *ex parte paterna*. Ib.

Where the proceeds of sale of realty are impressed with a trust, those who are entitled to it may follow and claim the fund wherever it can with certainty be recognized and identified, no matter what alteration of form it may have undergone. (C. P.) Wynkoop *v.* Wynkoop, 65.

COPYRIGHT. The violation of the provisions of § 4965 of the Revised Statutes by an agent does not render the principal liable to the penalty imposed by the Act of Congress. (U. S. D. C.) Schreiber *v.* Sharpless, 403.

CORPORATIONS. An association organized to pay premiums to members upon marriage, is not a beneficial association within the meaning of the Act of 29 April, 1874. (C. P.) In re Quaker City Marriage Benefit Association, 467.

The formation of such associations is not to be encouraged, and a charter will be refused, as against public policy and morality. Ib.

Any man or a number of men who are the owners of any kind of property may form an association with others, and sell that property to the association at any price that may be agreed on between them, no matter what it may have originally cost, provided there be no fraudulent representation made by the vendors to their associates. They are not bound to disclose the profits which they may realize by the transaction. There is no confidential relation between the parties and they deal at arm's length with each other. Pennell's Appeal, 297.

The writ of *quo warranto* is not issuable upon the suggestion of a private relator where the question involves the existence of the corporation. Commonwealth *ex rel.* Hoffman *v.* Phila. and Chester County R.R. Co., 400.

Under the charter of the Philadelphia and Reading R.R. Co., it is not necessary that a majority of the stockholders should be present at a meeting called specially under section 5 of the charter to elect officers when the annual meeting was not held at the appointed time. Gowen's Appeal, 85.

During the pendency of a writ of error to proceedings upon a *quo warranto* to determine the title to an office, the title to the office legally remains in doubt. Runkle *v.* Commonwealth, 2 3.

The capital stock of a corporation whether fully paid up or partly outstanding in the hands of subscribers thereto, is a trust fund for the benefit of creditors. Macungie Savings Bank *v.* Bastian, 71. Stang's Appeal, 409.

Hence, stockholders who diminish that fund without first providing for the payment of all indebtedness, receive it impressed with the trust which a court of equity will enforce. Stang's Appeal, 409.

This principle depends upon the receipt of the funds, hence a stockholder who has not shared in the distribution is not subject to its application. Ib.

The trust is enforceable in favor of a creditor whose claim was not liquidated, nor even in suit, at the time

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CORPORATIONS—*Continued.*
when the distribution among the stockholders was made. Ib.

Although all of the stockholders who have shared in the distribution of funds, impressed with this trust for creditors, are liable to contribute their proportion eventually to the payment of the demands of the complaining creditor, yet each stockholder is bound to restore his part *in toto*, and the equity of the creditor being superior to the equity of the stockholders sued for contribution from those not sued, it is not necessary that all the stockholders should be joined in the suit. A creditor is entitled to a decree against the stockholders sued for the full amount of the shares respectively received by them. Ib.

A cash dividend declared by a corporation out of the proceeds of sale of a portion of their property and franchises, is to be treated as capital and not income in the settlement of an estate between a life tenant and the remainder man. (C. P.) Estate of Sarah Vinton, 49.

The proceeds of the sale of an option to subscribe to a new issue of the stock of North America Ins. Co., is to be treated as capital and not income in a contest between a life-tenant and a remainder man. (O. C.) Condy's Estate, 319.

Fraudulent pledge of corporation stock by agent entrusted with its possession and muniments of title; what sufficient evidence of notice to pledgee. (C. P.) Wallace *v.* Boyd, 256.

The power of a railroad company to borrow money does not include the power to issue irredeemable income bonds entitling the holder merely to a contingent interest in the net profits. (U. S. C. C.) McCalmont *v.* Phila. and Reading Railroad Company, 338.

Foreign. A corporation chartered by Congress and doing business in Pennsylvania is not a foreign corporation under the 16th section of the Act of 7 June, 1879, and hence is not liable to pay a license tax. Commonwealth *v.* Texas and Pacific Railway Company, 405.

If a foreign corporation doing business in this State does not file in the office of the Secretary of the Commonwealth a statement showing, *inter alia*, its location and the name of its authorized agent, a service made upon it in accordance with the Act of 21 March, 1849, is good. Hagerman *v.* Empire State Co., 491.

A foreign corporation neglecting to comply with the provisions of the Act of April 22, 1874, cannot be permitted to reap the benefit of its own wrong. Ib.

Service of process cannot be made upon a life insurance company outside of the county in which the writ is issued. The provisions of the Acts of 24 April, 1857, and 8 April, 1868, only apply to fire insurance companies. (C. P.) Anspach *v.* Guardian Aid Society, 568.

See BANKS AND BANKING, BUILDING SOCIETIES, INSURANCE, RAILROADS, TAXES AND TAXATION.

COSTS. An attorney's fee is not taxable in proceedings before a justice of the peace. (C. P.) Larkins *v.* Coffee, 537.

Upon a sheriff's interpleader, the claimant having obtained a verdict for the goods, may on entering a judgment issue a fi. fa. for the costs. (C. P.) Craig *v.* Building Association, 296.

An appeal from the prothonotary's taxation of costs brings up the merits of the taxation. (C. P.) Ballinger *v.* Killam, 372.

COUNTY. Where a county is divided, pending proceedings before a referee appointed under the Act of April 6, 1869, in an ejectment, a certified copy of the record may be transferred to the Common Pleas of

COUNTY—*Continued.*
the new county, and proceedings taken therein to enforce the award of the referee as fully as in the Court where the action was instituted. Heath *v.* Gardner, 495.

County Commissioners have no power to bind the county to pay an excessive contingent fee to attorneys employed to prosecute a suit for the county. Chester County *v.* Barber, 350.

COURTS. Effect of division of county on pending litigation. See COUNTY. Heath *v.* Gardner, 495.

Where a court of equity has jurisdiction of a defendant's person, it has authority to enjoin proceedings at law, and may use the writ of injunction to prevent the commencement of oppressive and unjust litigation before other tribunals. But, where suits have actually been begun, and are pending before another tribunal having full power to grant equitable relief, then no other Court can interfere by injunction with the prosecution of such suits. (C. P.) Fallon *v.* Remington, 119.

The Courts of Common Pleas have no jurisdiction to pass upon exceptions filed to the report of a referee under the Act of May 14, 1874. Such report can only be reviewed directly by the Supreme Court upon a writ of error taken to the referee's report when filed. Philadelphia *v.* Linnard, 148.

Although Associate Judges have no power to overrule the previous act of the President Judge, where the question of the granting of a new trial is referred by the President to the Associate Judges, they have the power to pass upon the question, and their order when made is conclusive. Van Vliet *v.* Conrad, 464.

Waiver of right to appeal from justice of peace, agreement for, when not enforced. Wetter *v.* Kiley, 59.

Under the Act of June 16, 1836, the Court of Quarter Sessions has jurisdiction in cases of indictment for the receiving of stolen goods. The Act of March 31, 1860, is but a re-enactment of the former provision, and under its terms a like jurisdiction exists. Fulmer *v.* Commonwealth, 437.

Under what circumstances a defaulting guardian will be attached as for a contempt, see GUARDIAN AND WARD. Leiter's Appeal, 225.

See ORPHANS' COURT.

CRIMES, CRIMINAL LAW, AND PROCEDURE. Upon a trial for larceny, the father of the defendant, in order to show lack of motive to perpetrate the crime, having testified that he supplied his son with money every time he asked for it, it was competent for the Commonwealth in cross-examination to ask the witness, if the defendant was not in need of money and owed pressing debts. Fulmer *v.* Commonwealth, 437.

Obstructing the process of a justice of the peace is an indictable offence, and the justice has power summarily to hold the offender to bail to answer in court. (Q. S.) Commonwealth *v.* McClure, 466.

A principal is not liable to the penalty imposed by the Act of Congress for a violation of the copyright laws, where the act is the act of an agent committed without the knowledge of the principal. (U. S. D. C.) Schreiber *v.* Sharpless, 403.

A search warrant for stolen articles, describing them as "jewelry and other personal effects," is a sufficient compliance with Art. I., § 8, of the Constitution, requiring that no search warrant shall issue, unless the goods are described as near as may be. Moore *v.* Coxe, 135.

A count in an indictment for larceny charging the defendant with the larceny of several distinct arti-

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CRIMES, CRIMINAL LAW, AND PROCEDURE—*Continued.*
cles belonging to different owners, when the time and place of the taking of each are the same, is good, and will not be quashed for duplicity. Fulmer *v.* Commonwealth, 437.

An indictment for obstructing process of a justice, need not set forth particularly in what way the justice was obstructed. (Q. S.) Commonwealth *v.* McClure, 466.

A conviction under an indictment for conspiring to cheat A. of $2400, by inducing him to deposit the money in a bank under false representations of its solvency, does not authorize a judgment of restitution under the 179th section of the Act of 1860. Huntzinger *v.* Commonwealth, 98.

To warrant an order of restitution, the record should show that the money has been taken by the defendants. Ib.

Where an allocatur for a writ of error in a criminal case is refused by the Supreme Court, this cannot be considered as an adjudication that error does not exist. Hence when such an allocatur is allowed subsequently, and a writ of error taken in consequence, the action of the Court in the first instance presents no bar to a review of the case upon its merits. Ib.

The provisions of the Act of February 18, 1785, relating to the discharge of prisoners under the two-term rule only applies to the interval between the commitment and the first trial. Commonwealth *v.* Superintendent, 53.

CUSTOM. See EVIDENCE. SHIPPING. BROKER.

DAMAGES, MEASURE OF. Where a mill was destroyed through the careless construction of the defendant's dam, the plaintiff is entitled to show the original cost of each item of property destroyed, but the measure of damages is the value of the property at the time of loss. Minnequa Springs Co. *v.* Coon, 502.

Where a lessor fails to give to the lessee possession of a portion of the demised premises, the measure of the lessee's right to damages is the amount of money actually expended by him on the faith of the contract, and if no such money has been paid, the damages are but nominal. Allegaert *v.* Smart, 29.

The Act of March 24, 1824, imposing treble damages upon any one cutting and converting to his own use timber upon the land of another without the owner's consent, applies even though the offender did not know at the time that the cutting was not on his own land. Kramer *v.* Goodlander, 469.

But treble damages cannot be recovered where the owner of the land has misled the one cutting as to the extent of his title. Ib.

Measure of damages in salvage cases. See SALVAGE. (U. S. D. C.) The Mary E. Long, 192.

Eminent domain. In a proceeding to recover damages for property taken by the widening of Chestnut Street, in the city of Philadelphia, the measure of damages was the difference between the market value of the property as it stood before the alteration, and the market value as it stood after the alteration. Philadelphia *v.* Linnard, 148.

Inconvenience to occupants caused by the recession of the front, and the difficulty of procuring tenants, are both to be considered as elements of damage; but if the building as set back is of greater value than the building as it stood on the old line, no damages are recoverable. Ib.

The damage is to be estimated as of the date when the injury was complete and compensation was due; but the possibility that the adjoining houses would

DAMAGES, MEASURE OF—*Continued.*
be set back at some future period, should be considered as an element of the present value. Ib.

In proceedings under the Act of March 24, 1869, to appropriate turnpike roads to the use of the public, a corporation owning such road will still be entitled to damages for the taking thereof, though its stock may have no market value, and the property itself be unproductive. *In re* Kensington & Oxford Turnpike Co., 177.

See ROADS, HIGHWAYS, AND BRIDGES.

DEBTOR AND CREDITOR. Whether an assignment of securities by a debtor to a creditor is in payment or as collateral security is a question of intention. In the absence of evidence of intention, it is a presumption of law that the assignment was only as collateral. The duty of establishing the contrary is affirmative, and it rests upon the debtor. Eby *v.* Hoopes, 315.

The fact that the transaction was between husband and wife, and that the assignment of a security was absolute in form, affords no ground to rebut the presumption. Ib.

While it is true that taking a security as collateral for an antecedent debt does not make the creditor a holder for value so as to give him the rights of a *bona fide* purchaser, yet the rule is otherwise where it is taken in payment or extinguishment of the debt. Dovey's Appeal, 389.

Where the pledgee of collateral securities refuses to surrender them after the satisfaction of the debt for which they were pledged, the owner may proceed to recover them specifically by a bill in equity. (C. P.) Ward *v.* Mooney, 256.

The rule of law which, in the absence of appropriation by the parties, appropriates payments in the way most advantageous to the creditor, will not be applied to the prejudice of a surety. Weightman's Appeal, 155.

The mere receipt of an account without returning an objection is only *prima facie* evidence of its correctness; it does not necessarily preclude the debtor from setting up the bar of the Statute of Limitations, and does not amount to an equitable estoppel. Verrier *v.* Guillou, 477.

A bill in equity to set aside a fraudulent conveyance may be filed by creditors, even though the grantor be dead. (C. P.) Saving Fund *v.* Dillon, 506.

Whether a debtor assigning his property has done so with fraudulent intent as against his creditors, is a question for the jury. Barr *v.* Boyles, 253.

Rule in Twyne's case. Whether a contract is to be regarded as a sale or bailment. See CONTRACT. Stadtfeld *v.* Huntsman, 216. Brunswick *v.* Hoover, 219.

Circumstances under which it is for the jury to say whether a vendor of personalty has so far made delivery of the possession thereof as to render the sale good as against subsequent execution creditors. Barr *v.* Boyles, 253. Rothermel *v.* Marr, 421.

See JOINT DEBTORS.

DECEDENTS' ESTATES. An adopted child, although possessed of the right to inherit, has no right to demand letters of administration upon the estate of the adopted parent. McCully's Appeal, 80.

In granting letters of administration, the Register is not at liberty to disregard the clearly expressed wishes of the parties preferred by the law and entitled to the estate, even if they be non-residents. If a total stranger has been appointed, the Register, upon application of the next of kin, should vacate the letters granted and appoint some suitable nominee of

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DECEDENTS' ESTATES—*Continued.*
such parties in whom they can confide. Jones's Appeal, 249.

Where the class primarily entitled to administration upon a decedent's estate consists of several persons, it is the duty of the Register to grant letters to such one or more of them as he shall judge will best administer the estate. He may thus grant letters to them all jointly, if they so desire; or in his discretion, he may select one of them, and commit the administration to him alone to the exclusion of the others, and when properly exercised, this discretion is not the subject of review. Brubaker's Appeal, 251.

An executor de son tort, while liable to creditors and legatees as well as to the rightful executor for such assets as may come into his hands, is not liable to citation before the Orphans' Court. (O. C.) Power's Estate, 208.

The Orphans' Court has no power to direct the Register to issue letters testamentary to an executor named in a will only upon condition of his entering security for the faithful performance of his duties. Harberger's Appeal, 281.

It is only in the case of non-resident executors that a bond can be required of an executor, before the issuing of letters; the Acts of Assembly authorizing the requiring of security from insolvent executors only apply to proceedings to be instituted after the granting of letters. Ib.

Executors cannot be required to enter security for the protection of remaindermen in the absence of proof of insolvency, waste, or mismanagement. (O. C.) Lindsay's Estate, 36.

Under what circumstances a bailee of securities is justified in surrendering them to the foreign executor of the bailee. Shakespeare *v.* Fidelity Co., 17.

Bonds of the United States, wherever deposited, are simply evidences of indebtedness, and cannot, therefore, acquire a situs different from the domicile of their owner. Orcutt's Appeal, 164.

Presumptively an executor makes an honest use of the assets of the estate coming into his possession. Fishburn's Appeal, 489

A devise to executors in trust to hold for purposes mentioned, then to sell at discretion and to divide the proceeds among children, is a power of sale to make distribution vested in the executors virtute officii; and such a power survives to an administrator *c. t. a.* Dorff's Appeal, 335.

An appraisement of real estate must be demanded by a widow in order to entitle her to the $300 exemption out of the proceeds of the real estate of her husband. (O. C.) Andress's Estate, 52.

When a purchaser proceeds in the Orphans' Court by bill or petition under the Act of February 24, 1834, to enforce specific performance of a decedent's contract for the sale of land, notice to the heirs or devisees of the real estate is requisite as well as notice to the executors or administrator. Hoffner *v.* Wynkoop, 3.

As to heirs or devisees not so notified, the proceedings are void. Their title will not pass by the deed executed in pursuance of the decree of the Orphans' Court. Hoffner *v.* Wynkoop, 3.

What not sufficient evidence to charge an executor with the receipt of property known to have been in the possession of the testator a short time prior to her death. Milligan's Appeal, 203.

The Act of 1834, which makes wages for one year a preferred claim, is not inconsistent with the presumption that, when a servant leaves the employ of his master without demanding wages, there has been a payment of such wages as they were earned. The

DECEDENTS' ESTATES—*Continued.*
Act was not intended to change the rules of evidence or regulate the quantum of proof, but to make the claim a preferred claim when established in the ordinary mode. McConnell's Appeal, 1.

Construction of a bequest of a residuary estate for the construction of a monument. See WILL. Bainbridge's Appeal, 443.

Legacy charged on land, when discharged by a sheriff's sale. See LEGACY. Woods *v.* White, 19.

Distribution of balance of proceeds of sheriff's sale of real estate of a decedent after payment of liens of record. See CONVERSION. Squire's Appeal, 118.

Power of an auditor to inquire into the validity of a deed conveying the interest of a distributee of an interest in decedent's estate, alleged to have been fraudulently obtained. See AUDITOR. McGetrick's Appeal, 460.

The collateral inheritance tax is payable only upon estates passing by a will operative within this State, or under the intestate laws thereof, or by deed or grant intended to take effect after the death of the decedent. Orcutt's Appeal, 164.

The collateral inheritance tax does not attach to the very articles of property of which the deceased died possessed; it is only imposed upon what remains for distribution after payment of expenses and debts. Ib.

Bonds of the United States belonging to one who died domiciled in New Jersey, but left for safe keeping with a trust company in Philadelphia, are not subject to a collateral inheritance tax in Pennsylvania. Ib.

The collateral inheritance taxes imposed upon the estates of the life-tenant and remainder-man are separate and independent. (O. C.) Wharton's Estate, 105.

Although under ordinary circumstances, in case of deficiency of assets, all legacies must abate proportionately, the rule does not apply to a legacy given in consideration of services rendered. (O. C.) Gassman's Estate, 275.

Stock dividends, whether to be awarded to life-tenant or remainder-man. See CORPORATIONS. (C. P.) Vinton's Estate, 49. (O. C.) Condy's Estate, 319.

Where the contest as to the validity of a testamentary paper is substantially between two sets of legatees the executor has no right to espouse the interests of either party, and will not be entitled to credit for legal expenses incurred by him in successfully maintaining the validity of the instrument. Rankin's Appeal, 235.

An agreement by one of two executors to charge no commissions is not binding upon the co-executor. (O. C.) Porter's Estate, 276.

An executor who converts the funds of the estate to his own use and fails to account until compelled so to do is not entitled to commissions. Milligan's Appeal, 203

See ORPHANS' COURT. WILL.

DEED. Evidence of misdescription of property covered by a mortgage is inadmissible where the purpose is to make the mortgage a lien upon property against which, after the execution of the mortgage, judgment creditors have obtained a lien. Wentz's Appeal, 284.

A deed of trust authorizing the trustee to mortgage the premises with the consent of the cestui que trust, a married woman, in order to pay off part of the purchase-money, does not validate a bond and warrant given by the cestui que trust and married woman to secure a party advancing money to pay off the purchase-money. Grosser *v.* Hornung, 463.

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DEED—*Continued.*

An indenture of apprenticeship, whereby a man and wife covenanted that the apprentice was to be their adopted child, and to be brought up and educated as their own child, is not such a deed of adoption as will confer the right of inheritance; its effect is limited to the lifetime of the adopting parents. McCully's Appeal, 80.

A conveyance, absolute upon its face, but in fact intended as security for money loaned, is in fact a mortgage. Distribution of proceeds of sale of mortgaged property as between judgment creditors of the mortgagor and a mortgagee of the interest of the grantee under the deed having notice of the facts. Merkel and Smith's Appeal, 116.

Acknowledgment of married woman, sufficiency of. See HUSBAND AND WIFE. McCully's Appeal, 80. Powell's Appeal, 485.

DIVORCE. See HUSBAND AND WIFE.

DOWER. See HUSBAND AND WIFE.

EJECTMENT. A bill quia timet to set aside an agreement concerning lands, on the ground that the same is a cloud upon complainant's title, will not lie where there is no allegation of fraud, accident, or mistake. The right of a party to have a trial by jury cannot be taken away by this expedient. Meck's Appeal, 397.

Where surveys have been made and returned as a block, the location of each tract therein may be proved by proving the location of the block. The inquiry is not where a tract should or might have been located, but where it was actually located. Every mark on the ground tending to show the location of any tract in the block is some evidence of the location of the whole block, and therefore of every tract therein. Coal Co. *v.* Clement, 321.

A practical surveyor is competent to testify whether, in his opinion, certain marks on trees, piles of stones on the ground, were intended as monuments of boundaries. Ib.

The location of a junior warrant may throw light upon the location of a senior warrant which it calls to adjoin, where the division-line between the two was returned as of the same length in each return, and where both warrants having been in the surveyor's hands at the same time were located by the same surveyor. Ib.

Where the location of a tract long before surveyed has, up to the time of bringing a suit in reference thereto, been generally recognized to be as claimed by one of the parties, evidence to the effect that surveyors and other parties interested, including the opposite party, had formerly recognized its location to be such, is admissible to prove that that is its true location, even though there may be other evidence in the case showing that that is not the true location. Kramer *v.* Goodlander, 469.

The declarations of a deceased surveyor, made by him on the ground and at the time of examining a line, are admissible in evidence. Kramer *v.* Goodlander, 474.

Where a party claims title to real estate under a sale of an unseated tract, whereof it is alleged to be a part, for taxes, evidence that said real estate was included at the time of sale within the described limits of an adjoining seated tract whereon taxes had been regularly paid, is admissible to show want of title thereto in the party claimant. Kramer *v.* Goodlander, 469, 474.

In ejectment for purchase-money, a referee under the Act of April 6, 1869, may file a report having the same effect as a conditional verdict. Heath *v.* Gardner, 495.

EJECTMENT—*Continued.*

In ejectment for purchase-money, a conditional verdict or report of a referee may be entered providing that on failure of defendant to comply with the terms therein stipulated, the plaintiff shall be entitled to a sale of the real estate in question in order that from the proceeds he may realize the balance due him. Ib.

Before a party can obtain the benefit of the Act of June 11, 1879, compelling a purchaser at sheriff's sale to bring an ejectment within ninety days, the rule taken under the Act must be made absolute, and final judgment entered thereon. Hence an ejectment brought pending a rule under the Act to show cause is in time, although issued more than ninety days after service of the rule to show cause upon the purchaser. Dewees *v.* Letchford, 61.

Practice in proceedings under a rule upon a sheriff's vendee to bring an ejectment, under the Act of June 11, 1879. When rule to be made returnable. (C. P.) Love *v.* Building Association, 257.

A rule to bring a second ejectment cannot be taken against the parties successful in the first suit. (C. P.) Wynkoop *v.* Hoffner, 173.

ELECTIONS. See CORPORATIONS. Gowen's Appeal, 85.

EMINENT DOMAIN. See DAMAGES, MEASURE OF, RAILROADS, ROADS, HIGHWAYS, and BRIDGES.

EQUITABLE EJECTMENT. See EJECTMENT

EQUITY. Specific performance will not be decreed in favor of a vendee, unless he is able to offer a title marketable beyond a reasonable doubt; nor against a vendee where he is able to show any circumstances which would make it inequitable to do so. Mitchell *v.* Steinmetz, 43.

A court of equity has power to compel executors to carry out the provisions of a will in reference to the building of a church, and where a discretion is vested in the trustees which they fail to exercise, the Court will exercise the discretion in their place. (C. P. Swinney *v.* Fidelity Co., 290.

An interpleader will not be granted in equity unless the plaintiff show that he is ignorant of the rights of the respective parties who are called upon by him to interplead, or at least that there is a reasonable doubt in point of fact as to which claimant is entitled to the money, so that he cannot safely pay a fund in his hands to one without risk of being required to pay again to another. Jordan's Appeal, 37.

A bill, quia timet, to set aside an agreement concerning lands on the ground that the same is a cloud upon complainant's title, will not lie where there is no allegation of fraud, accident, or mistake. Meck's Appeal, 397.

A bill in equity may be maintained to secure redemption of collaterals when the debt for which they were pledged has been satisfied. (C. P.) Ward *v.* Mooney, 256.

A contract for the sale of land will be rescinded in equity only where there has been mutual mistake, misrepresentation and fraud; unless the evidence of these be so clear as to leave no room for hesitation or doubt in the mind of the Court, the parties should be remitted to their legal remedies. Lynch's Appeal, 36.

A chancellor may refuse to enforce the execution of a contract on the ground of improvidence, surprise or hardship; but shall not rescind a contract only for fraud, illegality, or mistake. Ib.

Under what circumstances a decree will be made ordering the satisfaction and cancellation of a mortgage. (C. P.) Clark *v.* Gibson, 522.

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QUITY—*Continued.*
A court of equity has jurisdiction to set aside a ed fraudulent as to creditors, even though the antor be dead. (C. P.) Saving Fund *v.* Dillon, 6.
The affirmance of proceedings before a road jury nen brought before the Supreme Court by certiorari es not oust the jurisdiction of a court of equity to cree a restitution of money obtained from the city rough a fraud perpetrated in the proceedings before e jury. (C. P.) City *v.* Kensington and Oxford rnpike Co., 357.
Proceedings against directors in a joint stock comny to make them personally liable for negligence managing its affairs, when not maintainable. (C.) Adams *v.* Manning, 448.
What a sufficient earmarking of a fund in equity. rdan's Appeal, 37.
What circumstances sufficient to create a resulting ust. See TRUSTS AND TRUSTEES. Cross and Gault's ppeal, 226.
Where a junior encumbrancer seeks to claim an quity at the hands of a prior encumbrancer, he must ve the latter express notice of his intention to claim ich equity, and warn him to deal with the security) as not to prejudice the second encumbrance. Wilar's Appeal, 133.
Method of enforcing contribution among joint owns of property covered by a common judgment. helps's Appeal, 525.
Contribution among stockholders to raise means to quidate indebtedness of corporation. See CORPORAION. Stang's Appeal, 409.
See SUBROGATION.
Injunction. A court of equity is bound under the ict of April 19, 1871, to restrain by injunction the rossing of one line of railroad by another at grade, if n the judgment of the Court it is reasonably practiable to avoid such grade crossing. Baltimore, etc., R. R. Co.'s Appeal, 530.
The findings of fact of the Court sitting as a Master on the question of the reasonable practicability of an overhead crossing will not be set aside on appeal, except on the ground of palpable error. Ib.
A preliminary injunction to restrain the building of a railroad where it was claimed that the franchises of the company had been forfeited by non-user, was properly refused. Hoffman's Appeal, 401.
An injunction will be granted to restrain a physician from violating an agreement not to practice within five miles of a certain town. Betts's Appeal, 431.
The running of a factory with heavy machinery on Sundays and during the night will be enjoined where it causes annoyance to neighboring residents. (C. P.) Burke *v.* Meyers, 481.
A court of equity will not restrain the obstruction of a public street by a railroad company at the suit of a private citizen who suffers no particular damage thereby, and has acquiesced in the obstruction for over thirty years. (C. P.) Cox *v.* Phila., Wilmington & Balt. R. R. Co., 552.
At the suit of the Commonwealth, the erection of a bay window projecting into the highway will be enjoined, even though the municipal councils, by ordinance, have granted permission to the owner of the property to make the encroachment. (C. P.) Commonwealth *v.* Harris, 10.
Where a preliminary injunction is granted to restrain the pulling down of a party wall, pending an appeal from the Building Inspectors to the Board of Surveyors, no further order will be made. (C. P.) Magrath *v.* Cooper, 173.

EQUITY—*Continued.*
An injunction will not be granted against proceedings in another tribunal possessing equal equity powers. (C. P.) Fallon *v.* Remington, 119.
An injunction granted in the Court below to restrain the collection of taxes on Roman Catholic parish schools, when dissolved. Miller's Appeals, 168.
An injunction will not be granted to restrain a tenant from surrendering possession to an adverse claimant of title. (C. P.) Trust Co. *v.* Kelly, 173.
Under what circumstances an injunction should not be granted to restrain the sale of land for taxes. Cohen's Appeal, 230.
Equity Pleading and Practice. Where several complainants have each a separate cause of action against one or another of several defendants, on the ground of misrepresentations made by the several defendants to the several complainants with reference to a common enterprise, and the circumstances of each several misrepresentation differ and there is an ascertained legal measure of damages applicable to each, the proper remedy is an action at law by each person injured against each person who injured him. A bill in equity filed by all so injured against all who injured them to enforce their rights, is multifarious and defective for misjoining of parties. Objections to it on this ground, however, if not made until after final hearing, are probably too late. Pennell's Appeal, 297.
Although in one bill, a plaintiff cannot join several demands of a different nature against several defendants, nor several distinct and independent demands against one defendant, yet if the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction, or series of transactions, forming one course of dealing and all tending to one end, the objection does not apply. (C. P.) Adams *v.* Manning, 448.
Under what circumstances the Court will give an examiner the powers of a master for the purpose of suppressing scandalous testimony which it is attempted to introduce. (C. P.) O'Malley *v.* O'Malley, 32.
ERRORS AND APPEALS. A writ of error issued one day after the expiration of two years from the date of the judgment in the Court below is too late and will be quashed. The fact that the præcipe was dated and mailed on the last day of the two years, but not received by the Pro honotary until the following day will not cure the defect. Bair *v.* Black, 156.
Where a writ of error was taken to a judgment of nonsuit, and the record of the Court below failed to show that a rule had been obtained and discharged to take the nonsuit off, but an affidavit that such was the case was read to the Court, it was ordered that the case be continued until a full and complete record should be brought up by certiorari. Handley *v.* R. R., 8.
The Courts of Common Pleas have no jurisdiction to pass upon exceptions filed to the report of a referee under the Act of May 14, 1874. Such report can only be reviewed directly by the Supreme Court upon a writ of error taken to the referee's report when filed. City *v.* Linnard, 148.
The findings of a referee upon a question of fact will not be reviewed in the Supreme Court, they are as conclusive as the verdict of a jury. Camden Ferry Co. *v.* Monaghan, 46. City *v.* Linnard, 148.
An auditor's finding of fact confirmed by the Court below will be reversed by the Supreme Court, where there is no evidence to support it, and more especially where the finding is only an inference deduced from other facts about which there is no dispute. Milligan's Appeal, 203.

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ERRORS AND APPEALS—*Continued.*

Quære. Whether a writ of error lies to an order discharging a rule to show cause why a sheriff's vendee should not bring an ejectment within ninety days. Dewees *v.* Letchford, 61.

A decree entered *pro forma* is not a final decree from which an appeal can be taken. Wilbur's Appeal, 101.

A refusal to set aside the return of service upon a writ of summons is not such a final judgment as to be the subject of a writ of error. Lycoming Ins. Co. *v.* Storrs, 304.

Remarks made by counsel to the jury in summing up are *dehors* the record, and no matter how improper, constitute no ground of reversal on error. Fulmer *v.* Commonwealth, 437.

Where a Court has under general objection admitted book entries in evidence, the judgment rendered will not be reversed on error because the book entries comprised improper and lumping charges. If, however, they be rejected by the Court under the general objection, this will not constitute ground for reversal. Baumgardner *v.* Burnham, 445.

The legal discretion of the Orphans' Court in the appointment of guardians of minors is not subject to review in a court of error. Gray's Appeal, 248.

An order confirming a sheriff's sale is within the discretionary power of the Court and will not be reviewed except for an abuse of the power. Griffith *v.* Edwards, 271.

Where a sale of real estate takes place in accordance with the order made in proceedings before a referee in ejectment under the Act of April 6, 1869, the power of the Court to make such an order cannot be inquired into on error to the action of the Court in confirming the sale. Heath *v.* Gardner, 495.

Road cases are reviewable only by writ of certiorari, which brings up nothing but the record. The Supreme Court can therefore only examine and pass upon the regularity of the proceedings as disclosed by the record and cannot look into the evidence, though incorporated in the opinion of the Court below. In re Kensington and Oxford Turnpike Co., 177.

In such a case the opinion of the Court below is no part of the record. In re Germantown Ave., 433.

The admission of evidence which, although incompetent and irrelevant at the time, afterwards became admissible, and which certainly did not deceive or mislead the jury, will not constitute adequate ground for reversal. Carn *v.* Fillman, 152.

On an appeal from a decree in a suit in equity refusing to grant a preliminary injunction, it is a general rule of the Court to express no opinion upon the merits. Hoffman's Appeal, 401.

An objection to the inconsistency of two counts in a narr. must be taken advantage of by demurrer; it will not be inquired into on error. Schmidt *v.* Owens, 5.

The pendency of a writ of error to a judgment upon a quo warranto to determine the title to an office, leaves the validity of the title as an open question. Runkle *v.* Commonwealth, 213.

The penalty imposed by the Act of 1874 for taking a writ of error for purposes of delay will not be imposed, where any of the Judges of the Supreme Court dissent from affirmance of the judgment. Camden Ferry Co. *v.* Monaghan, 48.

ESTOPPEL. The affirmance of proceedings in a road case upon a certiorari does not operate as an adjudication of a question involved in the merits of the controversy. (C. P.) City *v.* Kensington, etc., Turnpike Co., 357.

Where the real owner of land has ignorantly misled another as to the extent of his boundary, he cannot recover treble damages under the Act of March 29, 1824, from the party thereby misled to cut lumber within the boundary. Kramer *v.* Goodlander, 469.

ESTOPPEL—*Continued.*

Where the owner of a judgment represents that his claim is of a limited amount, upon the strength of which representation a party makes advances upon junior liens, the holder of the senior judgment is estopped from setting up that his claim is for a greater amount than he has represented. Gray's Appeal, 458.

Under what circumstances a married woman is estopped from setting up the invalidity of her acts. See HUSBAND AND WIFE. Powell's Appeal, 485.

Where a contractor builds works for a corporation, agreeing to receive in payment first mortgage bonds secured upon the property and guaranteed by another corporation, he is estopped from filing a mechanic's lien against the works which will interfere with the rights of the bondholders. Green's Appeal, 73.

The mere receipt of an account without returning an objection to it, only is *prima facie* evidence of its correctness, it does not necessarily preclude the debtor from setting up the bar of the statute, and does not amount to an equitable estoppel. Verrier *v.* Guillou, 477.

EVIDENCE. In order to defeat the title of one who holds the first incumbrance duly recorded, the evidence of notice of the existence of a prior unrecorded incumbrance must be clear and distinct. The burden of proof rests upon the party alleging the notice. Phillipsburg Savings Bank's Appeal, 265.

Upon the hearing of a rule for judgment for want of a sufficient affidavit of defence, the Court will not take judicial notice of the existence of a private Act of Assembly. (C. P.) Timlow *v.* Phila. and Reading R. R. Co., 436.

A person who is not a subscribing witness to a will, and who has testified to no facts indicating testamentary incapacity on the part of the testator, is not competent to give an opinion as to want of capacity on the testator's part to execute a will. Stokes *v.* Miller, 241.

Witnesses who testify to facts within their own knowledge may be permitted to express their opinion based on such facts. Minnequa Improvement Co. *v.* Coon, 502.

Where a witness produced as an expert is asked to give his opinion upon a hypothetical state of facts, the question of his competency is for the Court, and the exercise of its discretion will not be reviewed when it appears that the witness had any claims to the character of an expert. The weight of his opinion is wholly for the jury. Ib.

If by the terms of a policy, the application is made part of it, the policy is inadmissible without the application, unless it be shown that the application is in the possession of the other party, who refuses to produce it. Lycoming Ins. Co. *v.* Storrs, 304. Farmers, etc., Ins. Co. *v.* Meckes, 306.

Declarations of the defendant in an execution after levy made that he was not owner of the goods levied upon, are not competent evidence at the trial of an interpleader. (C. P.) Pond *v.* Cruse, 223.

Parol to vary writing. Evidence of loose conversations between contracting parties had prior to the time of putting a contract in writing are not admissible to vary the effect of the writing. Allegaert *v.* Smart, 29.

An insured may show by parol that he made truthful statements to the agent of an insurance company, and is not concluded by the intentional or negligent

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EVIDENCE—*Continued.*
answers of the agent. Farmers' Ins. Co. *v.* Meckes, 306.

Under what circumstances parol evidence is admissible to vary the effect of a judgment note. (C. P.) Wagner *v.* Wright, 483.

Parol evidence is not admissible to show that a magistrate misread to the obligor in a bail bond the contents of the bond signed, where the obligor could have read the bond if he chose. (C. P.) Drechman *v.* Lauer, 536.

Other matters. Where in order to contradict a witness as to a particular fact, the examiner before whom certain testimony in another branch of the case had been taken, was called to testify as to the witness's evidence before him in reference to the same fact, it is error to permit the examiner to read to the jury all his notes of the testimony of the witness. Only such portion should be read as tends to contradict the present evidence. Stokes *v.* Miller, 241.

When a witness is called to testify to the evidence formerly given by a witness since deceased, he may if he cannot recollect the very words of the deceased witness, state in his own language the facts as detailed by that witness, as they were impressed on his mind at the time; all that is required is that the recollection of the witness should be reasonably clear as to the facts testified to, and how, if at all, such testimony was affected by the cross-examination. Hepler *v.* Mt. Carmel Bank, 127.

Isolated letters and postal cards containing admissions by a party may be admissible in evidence against him, although they are in reply to others which are not produced in evidence. Frame *v.* Coal Co., 331.

It is proper to ask a witness "what knowledge he had that the firm with whom he was dealing, were dealing in their sales of coals as principals or agents." If the witness had no knowledge of the agency, the absence of such knowledge was of itself a fact, which it was competent for him to state. Ib.

Custom. A general custom that a broker may pledge his customer's stock for the purpose of raising money to carry it is valid. Van Horn *v.* Gilbough, 347.

The right of a mechanic to file a lien being purely statutory, evidence to prove a custom of trade relation thereto, is incompetent. Smith *v.* Stokes 6.

Evidence of motive in criminal cases. See CRIMES. Fulmer *v.* Commonwealth, 437.

The admission of evidence, which although incompetent and irrevelant at the time, afterwards became admissible, and which certainly did not deceive or mislead the jury, will not constitute adequate ground for reversal. Carn *v.* Fillman, 152.

An order will not be made upon a plaintiff residing out of the jurisdiction to appear at a trial in person. If the defendant desires the plaintiff's testimony, a commission should be directed to the place of his residence. (C. P.) Girard Life Ins. Co. *v.* Mutual Life Ins. Co., 136.

After witnesses in an equity proceeding have been permitted to depart without cross-examination, the party calling them in chief cannot be required to bring them back again. (O. C.) Whitaker's Estate, 139.

How exceptions must be taken to admission of evidence. See ERRORS AND APPEALS. Baumgardner *v.* Burnham, 445.

What evidence admissible to prove location of survey. See EJECTMENT. Coal Co. *v.* Clement, 321. Kramer *v.* Goodlander, 469.

Declarations of deceased surveyor, when admissible

EVIDENCE—*Continued.*
to prove location of survey. See EJECTMENT. Kramer *v.* Goodlander, 474.

Competency of witnesses. The provisions of the Act of 27 March, 1865, entitling a party to call the adverse party to testify in his behalf, is not affected by the Act of April 15, 1869. Ash *v.* Guie, 198.

The Act of May 25, 1878, providing that in actions against surviving partners, the plaintiff may testify as to transactions between himself and the surviving partner, is a remedial statute, and will be construed so as to embrace the case of the survivor of two or more who jointly contract, even though not strictly partners. Ib.

The proviso in the Act of April 15, 1869, does not prevent the plaintiff from making the requisite affidavit under the Attachment Act of March 17, 1869, in a proceeding against a surviving partner. (C. P.) Swezey *v.* Brown, 207.

The Act of March 27, 1865, does not permit one who is a party to a suit in a representative capacity, but personally interested on the side of his adversary to be called by him. Guldin's Administrator *v.* Guldin's Administrator, 395.

Where one called as a witness is interested on both sides of the issue, but his interest clearly preponderates in favor of one side, he is incompetent to testify at the call of that side, if the case is not within the enabling clause of the Act of April 15, 1869. Ib.

The Act of April 15, 1869, renders no one incompetent as a witness who was competent before its passage. Hence an assignor of a judgment, who, as was well settled prior to 1869, was competent to give evidence of any defence to its payment is not rendered incompetent since the passage of the above-mentioned Act by the death of his assignee. Mulford *v.* Downer, 446.

EXECUTION. Where a constable or sheriff is sued in trespass for levying upon and selling personalty, he may justify by putting in evidence an execution directed to him, regular in form and containing nothing on its face to indicate want of jurisdiction in the justice by whom it is issued, without showing the judgment or the regularity of the proceedings on which the execution is founded. Barr *v.* Boyles, 253.

In order to maintain the lien of a judgment upon land it must be revived on a sci. fa. issued thereon within five years from its entry; the issue of an execution is of no avail for the purpose. Reynolds's Appeal, 424.

An execution issued against partnership property upon a judgment note signed by one partner in the firm name, will be set aside where the other partners set up that the indebtedness for which it was given, was not firm indebtedness. (C. P.) Vandegrift *v.* Redheffer, 484.

Where a judgment is obtained against husband and wife on an indebtedness contracted by the wife before marriage, the execution can issue only against the estate of the wife. (C. P.) Whiteside *v.* Boardman, 136.

The Act of April 22, 1856, providing a mode to compel contribution among joint owners of real estate subject to a common incumbrance supersedes any course of proceeding in equity to effect that end. Phelps's Appeal, 525.

Exemption. A claim for exemption in an attachment execution, if made by defendant as soon as he has knowledge of the proceeding, is in time. (C. P.) Building Association *v.* Wisner, 137.

Where real estate is sold under a judgment prior to a mortgage, the defendant is not entitled to claim

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EXECUTION—*Continued.*
his exemption out of the proceeds thereof. Huffort's Appeal, 528.

Interpleader. A non-resident claimant of goods levied upon by the sheriff will not be permitted to file his own bond in an interpleader. (C. P.) Scatchard v. Landenberger Co., 452.

The value of the goods levied upon, not the amount of the judgment, determines the amount of the bond. (C. P.) Chandler v. Zeigler, 338.

There being several executions equally entitled to the fund arising from the goods levied upon, the claimant may give a bond in double the value of the goods for the benefit of all the plaintiffs, and need not enter a bond in each case. (C. P.) Richardson v. Brunswick, 81.

The costs follow the verdict in an interpleader in the same manner as in other proceedings. (C. P.) Craig v. Building Association, 296.

Attachment execution. Unpaid assessments upon premium notes due by policy holders and members to the Lycoming Mutual Ins. Co., are not the subject of an attachment by the judgment creditors of the company. (C. P.) Hays v. Lycoming Ins. Co., 31.

A garnishee is not chargeable with interest during the pendency of the attachment. (C. P.) Jones v. Bank, 102.

An attaching creditor of a distributive interest in the estate of a decedent is bound to bring his attachment to the notice of the Orphans' Court, or he will be bound by a decree distributing the share to other persons. Lex's Appeal, 209.

The fact that the garnishee has in his hands no funds subject to the attachment, is no ground for quashing the writ. (C. P.) Darlington v. Fleishner, 483.

Sheriff's sale and its incidents. It is the duty of the sheriff upon the receipt of costs and the production of searches, to make the special return provided for in the Act of April 20, 1846. (C. P.) Building Association v. Steel, 238.

An order confirming a sheriff's sale is within the discretionary power of the Court, and will not be reviewed except for an abuse of the power. Griffith v. Edwards, 271.

Where lands are devised to an executor in his own right, charged with the payment of a legacy, a sale upon a purchase-money mortgage given to the executor in part payment of the purchase money of a sale made by him discharged the land from the payment of the legacy. Woods v. White, 19.

A sale of land in parts by the sheriff, which was subject to a common ground-rent, does not effect an apportionment of the rent. Quigley v. Molineaux, 118.

Where land descending to a minor from his father was sold by the sheriff under a mortgage created by a former owner, and the surplus proceeds paid to the guardian of the minor, upon the death of the minor his mother was entitled to receive such proceeds as personalty, to the exclusion of the heirs *ex parte paterna*. Squire's Appeal, 118.

Rights of purchaser The Act of June 16, 1836, providing that three months' notice to quit may be given the defendant in execution after a sheriff's sale of the property, does not entitle the defendant to possession for that period, or deprive the purchaser of his right of peaceable entry. Leidy v. Proctor, 426.

In the summary proceedings by a purchaser under the Act of June 16, 1836, to obtain possession, an affidavit not strictly complying with the terms of the Act is invalid. First Nat. Bank of Carboudale v. Cowperthwaite, 532.

EXECUTION—*Continued.*

A purchaser at sheriff's sale of premises sold under proceedings upon a mechanic's lien is entitled to institute proceedings for possession, under the Act of June 16, 1836. Walbridge's Appeal, 76.

Proceedings to compel purchaser at sheriff's sale forthwith to begin an ejectment. See EJECTMENT. Dewees v. Letchford, 61. (C. P.) Love v. Building Association, 257.

EXECUTORS AND ADMINISTRATORS. See DECEDENTS' ESTATES.

Executor, de son tort. Liability of, to account in the Orphans' Court. (O. C.) Power's Estate, 208.

EXEMPTION. See EXECUTION.

EXPERT. See EVIDENCE.

FALSE IMPRISONMENT, action for. See TRESPASS. (C. P.) Reinhart v. Vaux, 222.

FEIGNED ISSUE. See EXECUTION.

FEME SOLE TRADER. See HUSBAND AND WIFE

FIXTURES. The rule whereby to determine whether that which was once part of the realty has become personalty on being detached is, that that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character. Leidy v. Proctor, 426.

Gas fixtures are personalty, and in the absence of a special agreement the purchaser, whether at public or private sale, acquires no title to them. (C. P.) Penn Mutual Ins. Co. v. Thackara, 104.

FOREIGN ATTACHMENT. Where the answers of a garnishee in foreign attachment to interrogatories admit the possession of assets, but suggest that they are claimed by other parties, and an interpleader is awarded and framed between the plaintiff in the attachment and the parties claimant, upon the issue raised by the interpleader being tried and a verdict rendered for plaintiff, judgment may at once be rendered on the answers of the garnishee to the interrogatories. Delaware, etc., R. R. Co. v. Hill, 461.

In such a case, the interposition of the plea of *nulla bona* will not entitle the garnishee to a trial of the question of his liability, or of the right of plaintiff to the fund, that question being already decided by the interpleader. Ib.

Goods in the possession of the custom-house officers are not subject to a foreign attachment. (C. P.) (U. S. C C.) Fischer v. Dandistel, 403, 555.

FOREIGN EXECUTOR, powers of. See DECEDENTS' ESTATES. Shakespeare v. Fidelity Co., 17. Orontt's Appeal, 164.

FORMER RECOVERY. Where a plaintiff institutes an action on the case beginning with a summons, and also by an attachment under the Act of 1869 for the same cause of action, a recovery of judgment in one constitutes a bar to the recovery of judgment in the other. Brenner v. Moyer, 565.

Where a judgment has been obtained against an unincorporated society, and no execution issued, and subsequently the members of such society are sued for the same claim, a plea of former recovery on their part is a nullity. Ash v. Guie, 198.

FRAUD. To render an act fraudulent, it need not necessarily be done with wrongful intent, or with improper motives. An act innocent in the intention may be so injurious in its consequences that the law declares it to be a fraud. Mitchell v. Buffington, 361.

Where the draftsman of a will, who is also the confidential adviser of a testator infirm in body and weakened in mind, although not shown to be wanting in testamentary capacity, takes under a will drawn

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FRAUD—*Continued.*
by himself the bulk of the testator's estate, the burden of proof will be thrown upon him to show that he exercised the utmost good faith in all his dealings. Cuthbertson's Appeal, 69.

The bequest to a confidential adviser of a small portion of the testator's estate does not throw upon such adviser the burden of proving that a will drawn by himself was made in good faith. Stokes *v.* Miller, 241.

Rule in Twyne's Case. See DEBTOR AND CREDITOR. Stadtfeld *v.* Huntsman, 216. Brunswick *v.* Hoover, 219. Barr *v.* Boyles, 253. Rothermel *v.* Marr, 421.

Evidence necessary to rescind contract on ground of fraud. See Lynch's Appeal, 366.

What conduct is fraudulent in promoters of corporation. See CORPORATION. Pennell's Appeal, 297.

When Statute of Limitations begins to run in action based upon a fraud. See LIMITATIONS, STATUTE OF. Mitchell *v.* Buffington, 361.

Trustee *ex maleficio*. See TRUSTS AND TRUSTEES.

FRAUDS, STATUTE OF. In order to take a parol sale of land out of the Statute of Frauds, the vendee must take actual, open, notorious, and exclusive possession of the premises in pursuance of the contract, and make such improvements thereon as cannot be compensated in damages. Detrick *v.* Sharrar, 287.

A contract by a succeeding firm to apply the purchase-money to pay the debts of its predecessor is not within the Statute of Frauds. Wynn *v.* Wood, 345.

FRAUDULENT CONVEYANCE, when set aside in equity. See EQUITY. (C. P.) Saving Fund *v.* Dillon, 506. See DEBTOR AND CREDITOR.

GAS FIXTURES. See FIXTURES. Ins. Co. *v.* Thackara, 104.

GROUND RENT. See LANDLORD AND TENANT.

GUARDIAN AND WARD. Where a guardian of a minor under fourteen has been appointed by the Orphans' Court, such minor, upon reaching fourteen, has no absolute legal right to make choice of another guardian. Gray's Appeal, 248.

The Orphans' Court has jurisdiction to direct the filing of an account by a testamentary guardian appointed by will in another State, where the guardian, ward, and estate are within the jurisdiction. (O. C.) Aaron Mayer's Estate, 261.

Under similar circumstances, an order will be made upon a guardian for the payment of an allowance to the minor for his support. (O. C.) Benj. Mayer's Estate, 264.

A guardian cannot be compelled to file an account unless funds are shown to have come into his hands. (O. C.) Portuondo's Estate, 174.

The Orphans' Court has no power to distribute a minor's estate among his creditors, even though the indebtedness was contracted in the maintenance of the minor. (O. C.) Shore's Estate, 572.

Where a guardian mingles his ward's funds with his own property, and subsequently becomes insolvent and unable to comply with a decree for the payment of the balance due the ward, he will be attached as for contempt. Leiter's Appeal, 225.

HABEAS CORPUS. Under what circumstances a prisoner is not entitled to his discharge under the two-term rule. See CRIMES, CRIMINAL LAW AND PROCEDURE. Commonwealth *v.* Superintendent, 53.

HIGHWAY. See ROADS, HIGHWAYS, AND BRIDGES. Encroachment on highway, when restrained in equity. See EQUITY. Commonwealth *v.* Harris, 10.

HUSBAND AND WIFE The mere fact of cohabitation is presumptive evidence of authority in the wife to act as the husband's agent in purchasing necessaries for herself, but this presumption may be rebutted by proof that he supplied her himself or made her an adequate allowance. (C. P.) Wiler *v.* Fiegel, 240.

In an action against husband and wife for necessaries furnished for the use of the joint family, in which it is sought to charge the separate estate of the wife, it is necessary to allege in the declaration that the debt sued for was contracted by the wife, and incurred for articles necessary for the support of the joint family, and if these averments be made in one count it is sufficient, though the other counts may be defective. Carn *v.* Fillman, 152.

Where judgment is obtained against husband and wife jointly for a debt of the wife contracted before marriage, execution can issue only against the estate of the wife. (C. P.) Whiteside *v.* Boardman, 136.

The fact that a transaction was between husband and wife creates no presumption that an assignment of securities from husband to wife was in payment of, and not as collateral for a debt contracted. Eby *v.* Hoopes, 315.

Where a husband confesses judgment in favor of his wife, it is necessary for her in a contest with the creditors of her husband to establish that the judgment was given in good faith to secure a debt due by the husband to the separate estate of the wife; in the absence of such proof, the judgment will be treated as fraudulent and void as to creditors. Wilson *v.* Silkman, 364.

Powers of married women. A married woman is incapable of binding herself by deed so as to confer a future right of inheritance in favor of an adopted child. Even if she were capable, the absence of a proper acknowledgment would be fatal to the validity of the instrument. McCully's Appeal, 80.

A married woman may assign her choses in action to her husband by an instrument without acknowledgment and without his joinder, his consent being presumed by his request. Powell's Appeal, 485.

A release of a legacy by a married woman is not under the Act of April 15, 1828, within the Recording Acts, if the acknowledgment fails to set forth that the contents thereof have been made known to the married woman. Ib.

Although an assignment executed by a married woman in favor of her husband, without consideration or knowledge as to what she was signing, will be void as to the husband and to volunteers claiming under him, the married woman will be equitably estopped from asserting her claim against judgment creditors of the husband who have been induced to lend money to him upon the faith of the assignment. Ib.

The Act of April 11, 1856, authorizing married women in cases of legacies or distributive shares in personalty coming to them to execute all necessary papers required by the executors, does not validate a letter of attorney given by a married woman to her husband to fully manage the property coming to her from the estate of her deceased father. Dampf's Appeal, 440.

Power of married woman to make a conditional sale of real estate upon ground-rent. (C. P.) Reeves *v.* Pritchard, 523.

The bond and warrant of a married woman given to secure a loan of money employed in purchasing real estate are void. Grosser *v.* Hornung, 463.

A married woman living apart from her husband,

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HUSBAND AND WIFE—*Continued.*
but not engaged in any trade or business, is not liable as a feme sole trader. Ib.

In order to hold a married woman liable as a feme sole trader, she must be declared against as such. Carn *v.* Fillman, 152.

The Orphans' Court has no power to authorize the discharge of a widow's dower by the payment of the principal thereof to the administrator. (O. C.) Soley's Estate, 67.

A wife has no such interest in the real estate of her husband sold during his life as to make it the basis of a resulting trust in her favor by reason of a purchaser at sheriff's sale contracting by parol to hold the property for her benefit. Bank *v.* Cowperthwaite, 532.

In order to enable a widow to sustain a claim for alimony from the estate of her deceased husband from whom she had been separated for twenty years, it is necessary that she should show that the separation was not caused by her misconduct or default. (O. C.) Lippincott's Estate, 122.

Action for breach of promise of marriage. See CONTRACT. Wagenseller *v.* Simmers, 353.

Divorce. Where a subpœna in divorce is served by the sheriff of another county upon a respondent there resident, it is necessary to first obtain an order authorizing such service from a Judge of the court of original jurisdiction. (C. P.) Fillman *v.* Fillman, 222.

Evidence that the respondent in divorce had allowed his wife to be driven away from the house of his mother where they had been residing together, and that he subsequently refused to provide a new home for her, is sufficient to send the case to the jury upon the question of wilful and malicious desertion. Dailey's Appeal, 420.

A libel for divorce, alleging as its foundation the impotency of the wife, must state distinctly that the impotency was incurable. (C. P.) A. B. *v.* B. C., 569.

A writ of sequestration will be granted to enforce obedience to an order for alimony. (C. P.) Mintzer *v.* Mintzer, 336.

Proceedings to vacate a decree in divorce begun eighteen years after the entering of the decree are too late. (C. P.) Potts *v.* Potts, 102.

INFANTS. See GUARDIAN AND WARD.

INJUNCTION. See EQUITY.

INSOLVENT LAW. An insolvent's bond is an instrument within the affidavit of defence law. (C. P.) Rusk *v.* Clifford, 238.

INSURANCE, FIRE. The Lycoming Mutual Insurance Company, by accepting an amendment to its charter authorizing it to do business upon the cash premium plan, ceased to be a company doing business upon the purely mutual plan, and therefore became liable to taxation under the Act of March 20, 1877. Lycoming Mutual Insurance Company *v.* Commonwealth, 228.

In levying an assessment upon premium notes, it is not necessary for the directors to make a separate assessment on each member by name, nor is it necessary to levy an ascertained sum upon each member; a general assessment upon all the members for a given percentage upon their premium notes is sufficient. Lycoming Ins. Co. *v.* Rought, 376.

Action for assessments on premium notes, certificate of assessment not an instrument within the affidavit of defence law. See AFFIDAVIT OF DEFENCE LAW. Lycoming Fire Ins. Co. *v.* Brierly, 45.

INSURANCE, FIRE—*Continued.*
The members of a mutual insurance company are not liable to an attachment execution at the suit of judgment creditors of the company. (C. P.) Hays *v.* Lycoming Ins. Co., 31.

It is not necessary that the insurer of property should have either a legal or equitable interest in it. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves any loss to him. Ins. Co. *v.* Meckes, 306.

One who has entered into possession of property under a parol agreement to purchase, and has paid part of the purchase-money, has an insurable interest in such property. Ins. Co. *v.* Meckes, 306.

Where by the express terms of a policy of insurance the application is made part thereof, the former is not admissible in evidence without the latter, unless it be shown that the latter is in the possession of the other party who refuses to produce it. Ins. Co. *v.* Meckes, 306. Ins. Co. *v.* Storrs, 304.

Untrue representations, when made a warranty, avoid a policy of insurance. Ward *v.* Lebanon Ins. Co., 518.

Where there has been a forfeiture of a policy by reason of breach of warranty, the forfeiture is not waived by the fact that the company after a fire levied an assessment upon the policy. Ward *v.* Ins. Co., 518.

An over-valuation of the property upon the part of the insurer, in order to avoid the policy, must be intentional and with fraudulent purpose. Ins. Co. *v.* Meckes, 306.

An agreement between the insured and an agent of the insurance company, that the latter should credit the premium on a debt owed by the agent to the insured, is beyond the powers of the agent, and does not bind the company. Lycoming Ins. Co. *v.* Storrs, 304.

Where the owner of a barn temporarily placed a steam threshing machine in its neighborhood, and the barn was destroyed through a fire caused by an explosion of the machine, a policy of insurance containing no special prohibition of the use of such machine, was not thereby avoided *ipso facto*, but the question to be submitted to the jury was whether the risk was thereby materially increased. Farmers' Ins. Co. *v.* Moyer, 129.

The notice of an assessment upon a mutual policy is properly sent to the original insurer, even though he has made an assignment for the benefit of his creditors. The assignee has no beneficial interest in the policy. If after notice sent to the assignor, the assessment is not duly paid, the policy becomes null and void. Lycoming Ins. Co. *v.* Storrs, 304.

Where the officers of an insurance company, having received immediately after the fire informal notice of the loss, pass a formal resolution not to pay the amount thereof, the question should be submitted to the jury whether by such action they have not waived the right to demand more formal proofs. Farmers' Ins. Co. *v.* Moyer, 129.

Where an insurance company denies its liability under a policy on the ground that the insured had no interest in the property covered by the policy, a waiver of notice and proof of loss will be presumed. Farmers' Ins. Co *v.* Meckes, 306.

What a sufficiently formal proof of loss to be submitted to the jury, and what facts would warrant the jury in finding a waiver of objection to any informality, discussed in Home Ins. Co. *v.* Davis, 373.

Life. What circumstances will be considered as a waiver of formal proofs of death. (C. P.) Eckel *v.* Association, 64.

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INSURANCE—*Continued.*

Marine. Where it is proved that there is a general custom to load a special kind of freight partly on deck and partly below deck, and the deck cargo is necessarily jettisoned for the safety of the rest, the general cargo is subject to contribution for the loss. (U. S. C. C.) Wood *v.* Phœnix Ins. Co., 277.

Service of process on company. Service of process cannot be made by the sheriff of a county other than where the action was brought, against a life insurance company under the provisions of the Act of 1867, authorizing the bringing of action in the county where the property insured was situated, and service of process in any other county. (C. P.) Anspach *v.* Guardian Aid Society, 568.

Taxation of Insurance Companies. See TAXES AND TAXATION.

INTEREST ON LEGACY. When not allowed. Powell's Appeal, 485.

INTERPLEADER. Effect of in foreign attachment. See FOREIGN ATTACHMENT. Delaware, Lackawanna & Western R. R. Co. *v.* Hill, 461.

See EQUITY. EXECUTION.

INTESTATE LAW. Who entitled to take under intestate law a fund paid to guardian of minor, being a balance after a sale under a prior incumbrance of real estate of minor's deceased father. Squire's Appeal, 118. See DECEDENT'S ESTATE.

ISSUE, devisavit vel non. See WILL. Cuthbertson's Appeal, 69. When directed by Orphans' Court. See ORPHANS' COURT. Armstrong's Estate, 571.

Feigned issue in sheriff's interpleader. See EXECUTION.

JOINT DEBTORS. Where a plaintiff sues several joint debtors, some of whom die after suit brought, the personal representatives of those who have died may be brought in, and judgment entered against them and the survivors at the same time. But the plaintiff cannot be compelled to do this, nor can the representatives of the deceased defendants come in and be substituted and have trial with the survivor without the plaintiff's assent. Ash *v.* Guie, 198.

Revival of judgment against joint debtors, some of whom are dead. See JUDGMENT. (C. P.) Millard *v.* Greeves, 222.

JUDGMENT. A judgment will be entered upon a warrant of attorney over twenty years old, when it is accompanied by an affidavit that the amount thereof remains unpaid, and notice of the intended entry is given to the defendant. (C. P.) Henry *v.* Fawrest, 571.

The lien of a judgment against land expires in five years from its entry, unless a sci. fa. to revive issue thereon; the issuing of an execution does not extend the duration of the lien. Reynolds's Appeal, 424.

The lien of a judgment against an equitable interest binds such interest, and if the equitable estate is subsequently merged in the legal estate, the lien upon it will relate back to the date of the judgment so far as parties are affected who had notice of the existence of the equitable estate. Merkel & Smith's Appeal, 116.

A scire facias to revive a judgment must issue against all the defendants. If any of them are dead, their personal representatives must be brought in. (C. P.) Millard *v.* Greeves, 222.

A restriction in a warrant of attorney, excepting from its general authority attorneys in the county of Philadelphia, does not prevent the entry of judgment in an adjacent county, and a transcript of the same

JUDGMENT—*Continued.*

being taken to Philadelphia County. Wilkinson *v.* Conrad, 22.

Where two tenants in common convey their estate to one who is a debtor of one of them, and take confessions of judgment for the purchase-money, which are entered of record the following day, the creditor grantor cannot, by having the amount of his existing debt included in the confession of judgment to him, participate in the proceeds of a sale of the land under his judgment to a greater extent than his former cotenant. Batz's Appeal, 172.

In such a case, the conveyance of the land on one day, and the entry of judgment on the next, must, as regards the tenants in common, be considered as a continuous transaction. Ib.

In order that a judgment may have the effect of a purchase-money incumbrance, it is not necessary that the fact should be so stated on its face. Cohen's Appeal, 544.

Under ordinary circumstances the assignee of a judgment stands in no better position than his assignor. Ib.

The setting off of one judgment against another is an exercise of the equitable power of the Court, and therefore within its discretion. It is therefore not demandable of right, and the justice and propriety of any application must be determined by the facts of the particular case. (C. P.) Windle *v.* Moore, 387.

Where the defendant in a judgment transferred to a county other than that in which it was entered has an equitable defence, he must apply for relief to the Court of the county where the judgment was entered. Wilkinson *v.* Conrad, 22.

The confirmation of an award of a road jury by the Quarter Sessions cannot be attacked in a scire facias on a municipal claim in the Common Pleas to recover the amount of the award; a party injured by the award has his remedy by certiorari. Scott *v.* Philadelphia, 317.

When judgment not conclusive. Power of an auditor to find that the owner of a judgment is estopped from claiming the amount apparently due thereon. Gray's Appeal, 458.

The Act of March 14, 1876, authorizing the satisfaction of judgments upon application of the defendant or his representatives upon proof being made that the same had been paid in full, is to be strictly construed, and does not authorize a petition by subsequent judgment creditors of the defendant. Heidelbaugh *v.* Thomas, 141.

A terre-tenant of land bound by the judgment or sureties of the defendant who had entered bail for stay of execution under the judgment would be within the purview of the Act. Ib.

The entry of satisfaction on a judgment by the assignor of the bond, which is secured by the judgment, is an actual fraud upon the assignee of the bond. The Statute of Limitations in such a case runs not from the fraudulent entry of satisfaction, but from the discovery of the fraud. Mitchell *v.* Buffington, 361.

JUDGMENT NOTE. The giving of a judgment note for the price of goods sold and delivered, is a merger of the original cause of action. Jones *v.* Ellison, 205.

The fact that the judgment note was given after an action of assumpsit had been begun does not prevent the pleading of the judgment under a plea of former recovery in such action. Ib.

The insertion by the payee of the words "with interest" in a judgment note after delivery to him is

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JUDGMENT NOTE—*Continued.*
such a fraudulent alteration as to render the note void. (C. P.) American Ins. Co. *v.* Black, 467.

A judgment note signed by one partner in the firm name and given in settlement of an individual debt cannot be enforced against partnership property. (C. P.) Vandegrift *v.* Redheffer, 484.

JUSTICE OF PEACE. Where the principal of a claim is less than $100, the plaintiff may relinquish interest in excess of $100, but unless this excess is formally relinquished, the justice has no jurisdiction. (C. P.) Quigley *v.* Quigley, 388.

A justice of the peace has power summarily to commit for trial in the Quarter Sessions one who unlawfully interferes with the execution of his process. (Q. S.) Commonwealth *v.* McClure, 466.

The Act of April 9, 1872, requiring bail absolute to be entered in cases of appeal in certain classes of wages suits, applies only to actions brought by "miners, mechanics, laborers, or clerks" employed by persons engaged in the operation of "any works, mines, manufactories, or business" of like character, and not to the case of a clerk employed in a drug store. (C. P.) Reichard *v.* Duryer, 189.

Where an appeal is taken in due time from the judgment of a justice of the peace, the plaintiff cannot get a lien upon the defendant's real estate by filing a transcript before the determination of the appeal. (C. P.) Myers *v.* Bott, 259.

LACHES. Acquiescence in the obstruction of a highway for over thirty years by a railroad company will debar an individual from obtaining an injunction against the continuance of the obstruction. (C. P.) Cox. *v.* Phila., Wilm. & Balt. R. R. Co., 552.

LAND. In a sale of growing timber, where no immediate severance is contemplated, the timber is to be regarded as still real estate. Wilson *v.* Douglass, 527.

A surveyor in executing a warrant may adopt the lines of older or contemporaneous surveys as boundaries without marking them afresh upon the ground. A survey so executed will not be deemed a chamber survey. Packer *v.* Schrader Mining Co., 549.

Where a survey has been returned and accepted without caveat, the presumption after twenty-one years, is *juris et de jure* that it was made on the ground. Ib.

When the regularity of a survey is legally fixed and absolute, it remains for a jury to determine whether upon the ground such lines, adjoiners, or other marks can be found as will, to a reasonable certainty, determine the location of the tract claimed under that survey. Ib.

Where two warrants of different date are located by the same surveyor, the former being returned as surveyed before, but not being returned until after the survey of the latter, the adoption of the junior warrant as an adjoiner of the senior survey ought to have no other effect than to aid in the location of the older warrant. Ib.

Improved land may be sold at a treasurer's sale for the payment of taxes assessed and remaining unpaid for more than two years, notwithstanding the fact that the land had since the assessment of the taxes been sold at sheriff's sale to a new owner. Cohen's Appeal, 230.

See FIXTURES. Leidy *v.* Proctor, 426.

See EJECTMENT.

LANDLORD AND TENANT. Where the lessees in a coal mining lease covenanted to pay all taxes and imposts whatsoever assessed or charged during the continuance of the lease upon the premises or coal mined, they are not obliged to pay the tax imposed upon the lessees as a corporation under the Act of 24 April, 1874. Chevington Coal Co. *v.* Lewis, 196.

A provision in a lease that the tenant shall make all necessary repairs, is not a sufficient written consent of the owner to warrant a mechanic in filing a claim for repairs ordered by the tenant. (C. P.) Howell *v.* Burns, 237.

Where a lessee has entered into possession of a part of the demised premises, but the lessor has, without *mala fides* on his part, failed to deliver up possession of another part thereof, the lessee cannot set up such failure as a defence to an action for the use and occupation of that portion of which he has had possession. Allegaert *v.* Smart, 29.

In such case the lessee may lawfully set off the damage he has sustained by reason of his failure to obtain possession of the whole of the premises demised, but such damages can only consist of the money actually paid by him on the faith of his contract, and if no such money has been paid, his damages are but nominal. Allegaert *v.* Smart, 29.

A sheriff's sale of the interest of a lessee in a leasehold does not discharge the lessee from his obligation to pay future accruing rent during the term of the lease, even though the lessor recognize the purchaser by accepting payments from him on account. Kerper *v.* Booth, 79.

An agreement by a lessor not to let the adjoining premises for a specified purpose, is a covenant, not a condition; and in case of breach the remedy of the tenant is an action for damages, not a suspension of the rent of the property occupied. (C. P.) Allegaert *v.* Smart, 260.

A lease providing that the tenant, so long as he shall carry on an iron furnace and pay a certain royalty for iron ore quarried, shall hold the property with all the rights and privileges of real ownership as in fee simple, confers upon the lessee the right to quarry limestone on the premises for use in connection with the manufacture of iron. Watterson *v.* Reynolds, 334.

Distress. Evidence of excessive distress is irrelevant in an action of replevin. The remedy for the wrong is by an action on the case founded on the Statute of Marlbridge. Jimison *v.* Reifsnyder, 381.

A landlord having distrained on property found on the premises demised, a portion whereof belonged to an under-tenant of the lessee, who was in without the landlord's consent, the under-tenant cannot compel the landlord to cause to be sold the goods of his lessee before satisfying the rent out of his own. Ib.

The position of the under-tenant is not helped by the fact that he has paid his rent in full to the tenant of the whole premises. Ib.

If the under-tenant replevy his property and enter security, the landlord is precluded from proceeding further against the goods replevied, and the exercise of his right to stay proceedings against the other goods distrained upon does not render invalid any act of his prior to the execution of the writ of replevin, which was valid when performed. Ib.

Therefore, the stay of proceedings is not such a release or discharge of the lessee as would relieve the under-tenant from liability. Ib.

Ground-rent. The executors of the owner of a ground-rent have no status to petition for the extinguishment of a ground-rent under the Act of February 5, 1821. (C. P.) Klage's Petition, 81.

The sale of land subject to a common ground-rent

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LANDLORD AND TENANT—*Continued.*
by the sheriff in parts does not effect an apportionment of the rent. Quigley *v.* Molineaux, 118.

What circumstances will be treated as a payment, and what as an assignment of a judgment for arrears of ground-rent. (C. P.) Fox *v.* Ketterlinus, 506.

What not a marketable title to a ground-rent. Mitchell *v.* Steinmetz, 43.

LEGACY. Where land is devised at a valuation or price to be paid by the devisee, the title passes subject to the charge or lien for the price, if the devise be accepted. Fishburn's Appeal, 489.

A devise of lands charged with payment of legacy; under what circumstances legacy is discharged by a sale under a mortgage. Woods *v.* White, 19.

A legacy charged upon land is not such an interest in realty as requires for its assignment the formalities requisite to pass real estate. Powell's Appeal, 485.

Under what circumstances interest is payable on a legacy. Ib.

A release of a legacy by a married woman is not, under the Act of April 15, 1828, within the Recording Acts, if the acknowledgment fails to set forth that the contents thereof have been made known to the married woman. Ib.

A bequest to a woman of an annuity for the rest of her unmarried life, and on her marriage day the sum of $3000 to be paid to her, and thereupon the annuity to cease, means an annuity until marriage and the legacy on marriage. Schleppi *v.* Koehler, 448.

The marriage before the death of the testator does not cause the legacy to lapse, but the condition having been fulfilled when the will went into effect, the legacy was absolute. Ib.

Legacy, preservation from lapsing by statute of May 6, 1844. (O. C.) Hook's Estate, 140.

Legacies of a general nature abate pro rata in case of a deficiency of assets; but if for any of them there be a valuable consideration, such legacy will be entitled to a preference in payment over other general legacies, which are mere bounties. (O. C.) Gassman's Estate, 275.

When less than twenty years have elapsed from the time when a legacy was demandable, the onus is on the executor to prove payment. (O. C.) Bentley's Estate, 224.

LETTER OF ATTORNEY. See HUSBAND AND WIFE.

LIMITATIONS, STATUTE OF. In an action by an assignee of a judgment against his assignor for fraudulently entering satisfaction thereon, the statute runs, not from the fraudulent entry of satisfaction, but from the discovery of the fraud. Mitchell *v.* Buffington, 361.

The liability of the recorder of deeds for issuing a false or erroneous certificate of search is, by the Act of April 13, 1872, limited to five years. (C. P.) Ashton *v.* Walton, 452.

The Statute of Limitations is a good replication to a special plea of set-off, where the credits claimed as set-off were paid more than six years before suit brought. Verrier *v.* Guillon, 477.

The Act of April 22, 1856, limiting the time within which resulting trusts can be enforced, applies to proceedings in equity as well as at law. (C. P.) Fricke *v.* Magee, 50.

In order to enable a defendant to take advantage of the Statute of Limitations, it must be specially pleaded; the defence cannot be set up on demurrer. (C. P.) Reeves *v.* Pritchard, 523.

Credits indorsed on a due bill by the holder thereof are not sufficient to bar the running of the statute

LIMITATIONS, STATUTE OF—*Continued.*
where the defendant denies in his affidavit of defence the payments which such credits represent. (C. P.) Murphy *v.* Holmes, 260.

In a suit on a promissory note, in order to remove the bar of the Statute of Limitations, it is not necessary that there should be an express promise to pay, but it is sufficient if a clear, distinct, and unequivocal acknowledgment of the existence of the debt be made to the creditor or his known agent by the debtor or some one authorized to act for him. Wesner *v.* Stein, 479.

In a suit against an accommodation maker of a promissory note upon which the Statute of Limitations has run, evidence may go to a jury in order to remove the bar of the statute, to show that the defendant, within six years before suit brought, obtained a judgment against the person whom he had accommodated in order to secure him if he should be compelled to pay the amount of the note, and that within the same time part payment of the debt was made on his behalf, and although not by his direction, yet in his presence and hearing, and without anything on his part to indicate that he did not participate in the transaction. Ib.

A writ of error issued one day after the expiration of two years from the date of the judgment in the Court below is too late, and will be quash d. Bair *v.* Black, 156.

Presumption of payment of legacy. See LEGACY. (O. C.) Bentley's Estate, 224.

LIQUOR. The local Act of April 3, 1872, regulating the sale of liquors in Allegheny County, is not repealed by the general Act of April 12, 1875, regulating the sale of liquors throughout the Commonwealth. Commonwealth *v.* McCallin, 520.

LIS PENDENS. The doctrine of lis pendens affects a purchaser from a party to a suit not, as was formerly considered, on the ground of notice, but because the law does not allow a litigant to give to others pending the litigation, rights to the property in dispute so as to affect any decree which might be made in the suit, to the prejudice of the opposite party. Dovey's Appeal, 389.

A *lis* in order to affect a person's power of alienation must be a *lis* in which a decree might be entered against him as to the property which is the subject matter of the contention. Ib.

Plea of. See PLEADING. Holtzner *v.* Byrne, 101.

LUNATIC, liability of, as indorser on note. See BILLS AND NOTES. Wirebach *v.* Bank, 143.

MAGISTRATE'S COSTS. See JUSTICE OF PEACE.

MALICIOUS PROSECUTION. Where the grand jury find a true bill in a prosecution for larceny but the defendant is subsequently acquitted, his remedy for a malicious prosecution is by an action upon the case and not by trespass *vi et armis.* Royer *v.* Swazey, 432.

MANDAMUS. Where one clothed with discretionary powers refuses to exercise his discretion, or act at all, he may be compelled by mandamus to act: but where he has exercised his powers according to his discretion, mandamus will not lie to compel a revision or modification of his decision. Runkle *v.* Commonwealth, 213.

The writ of mandamus is the appropriate remedy to enforce the right of a colored child to entrance to the public schools. (C. P.) Commonwealth *v.* Davis, 156.

Mandamus Execution, when an appropriate remedy. See ROADS, HIGHWAYS, AND BRIDGES. In re Kensington and Oxford Turnpike Co., 177.

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MARITIME LIEN. See ADMIRALTY, SHIPPING.

MARRIAGE. See HUSBAND AND WIFE.

Action for breach of contract of. See CONTRACT. Wagenseller *v.* Simmers, 353.

MARRIED WOMAN. See HUSBAND AND WIFE.

MASTER AND SERVANT. Where a person serves as a domestic servant, and no demand for payment of wages is made for a considerable period after such service is terminated, the inference is, either that the wages have been paid, or that the service was performed on the footing that no payment was to be made. McConnell's Appeal, 1.

Action against master for injuries suffered by servant in course of employment. See NEGLIGENCE. Philada. and Read. R. R. Co. *v* Shertle, 125. Green St. Pass. R. W. Co. *v.* Bresner, 379.

See PRINCIPAL AND AGENT.

MAYOR. Veto power of. See MUNICIPAL CORPORATIONS. Penn'a Gas Co. *v.* Scranton, 269.

MECHANICS' LIENS. Where a contractor agrees to accept first mortgage bonds of a corporation, the payment of which are guaranteed by another corporation, in payment for work done in the construction of a furnace, he is estopped from subsequently filing a claim against the property which will affect the rights of the bondholders or the guarantor. Green's Appeal, 73.

Materials furnished to a sub-contractor cannot be made the subject of a lien. The right of a mechanic to file a lien being purely statutory, evidence to prove a custom of trade in relation thereto is incompetent. Smith *v.* Stokes, 6.

Apportioned claims can only be filed against buildings adjoining each other and not separated by streets. (C. P.) Schultz *v.* Asay, 33.

A mechanic's claim which does not name the true owner will not bind the estate of such owner. (C. P.) Fox *v.* Ketterlinus, 506.

Under what circumstances work done at the order of a tenant in possession under an improvement lease will bind the estate of the owner. Ib.

A provision in a lease that the tenant shall make all necessary repairs does not enable the tenant to bind the estate of the landlord so as to validate mechanics' claims filed for repairs so ordered. (C. P.) Howell v. Burns, 237.

A bill of particulars is part of a claim and is to be regarded in determining its sufficient certainty. (C. P.) Schultz *v.* Asay, 33.

A plea by a defendant named as the owner in a claim that he is not the owner, is a nullity and will be stricken off. (C. P.) Spare *v.* Walz, 82.

The Act of June 11, 1879, authorizing the amendment of mechanics' claims is not retroactive. Smith *v.* Stokes, 6.

A purchaser at a sheriff's sale under proceedings upon a mechanic's claim has the same rights and remedies to enforce his right of possession as are allowed to purchasers at sales under other judgments by the Act of June 16, 1836. Walbridge's Appeal, 76.

An auditor appointed to distribute a fund produced by a sheriff's sale among mechanic's lien creditors has the power to define the curtilage subject to such liens in the manner provided in the Act of June 16, 1836, § 9. (C. P.) Fox *v.* Ketterlinus, 506.

MINES AND MINING. Construction of mining lease. See LANDLORD AND TENANT. Watterson *v.* Reynolds, 334.

MISDESCRIPTION. See DEED. Wentz's Appeal, 284.

MISREPRESENTATION. Rescission of contract. See EQUITY. Lynch's Appeal, 366.

MORTGAGE. The words "first mortgage" have a fixed definite meaning, and imply that the lien of the mortgage is prior to any other claim. Green's Appeal, 73.

A mortgage given without consideration, and still remaining in the hands of the original parties, will be decreed to be satisfied upon the application of a junior encumbrancer. (C. P.) Clark *v.* Gibson, 522.

Owelty in partition constitutes a first lien on the purpart of a former tenant in common, and is entitled to priority over a mortgage of his undivided interest given by the tenant before partition. McCandless's Appeal, 563.

To affect a mortgagee with notice of a prior unrecorded mortgage, such notice, if express, must be directly communicated in some form to the mortgagee or his agent who acquires the knowledge in the course of the transaction; if the notice be implied, the circumstances must be of such a character that a failure to make inquiry would be gross and culpable negligence on the part of the mortgagee. Appeal of Phillipsburg Savings Bank, 265.

A deed with a parol defeasance is a mortgage, and a judgment against the equitable interest of the grantor binds the same so far as relates to parties having notice of the facts. Merkel and Smith's Appeal, 116.

Under what circumstances a mortgage containing a misdescription will not be amended, where the rights of third parties would be thereby affected. Wentz's Appeal, 284.

Defence of usury to a mortgage, under what circumstances the execution of the mortgage to a straw mortgagee, who thereupon assigns it to the lender will prevent the defence of usury being successfully set up. Appeal of Phillipsburg Savings Bank, 265.

A mortgagor who has conveyed property subject to the lien of a mortgage, may set off the excess of usurious interest paid by him on such mortgage against other mortgages held by the same mortgagee. Parker *v.* Sulouff, 26.

The failure of the holder of a mortgage to comply with a collateral agreement with his assignor cannot be taken advantage of by the mortgagee as a defence to a sci. fa. (C. P.) Seidel *v.* Clark, 138.

Where a mortgagor conveys part of the mortgaged premises, the general rule is that the part remaining in his hands is primarily liable for the mortgage debt, but this rule will not apply where the conveyance of the part is made expressly subject to the mortgage. Wilbur's Appeal, 133

A terre-tenant in possession of lands subject to a mortgage is personally liable for the taxes levied on the lands while he is seized thereof, and has no right to create or suffer any incumbrance that will take preference of the mortgage. Hence where such terre-tenant allows taxes to fall in arrear during his occupancy, in consequence of which a mortgagee, purchasing the property, is obliged to pay them, the mortgagee may recover from the terre-tenant in assumpsit the amount thus paid. Hogg *v.* Longstreth, 95.

Where real estate is sold under a judgment prior to a mortgage, the defendant is not entitled to claim his exemption out of the proceeds thereof. Huffort's Appeal, 528.

Purchase-money Mortgage. See VENDOR AND VENDEE.

MUNICIPAL CLAIMS. A municipal claim filed against the Wistar Estate, owner or reputed owner, is valid. (C. P.) City *v.* Wistar, 275.

MUNICIPAL CORPORATION. The City Councils of Philadelphia may, by a municipal ordinance, increase the salary of the Commissioner of

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MUNICIPAL CORPORATION—*Continued.*
Highways during his term of office. Baldwin *v.* Philadelphia, 558.

An ordinance of City Councils is not a law within the prohibition of Art. III., § 13, of the Constitution. Ib.

In order that the return of an ordinance to councils by the mayor of a city of the third class may be effecti e as a veto, such return must be made within fifteen days after he has received the same. A return made after that period, although before the next meeting of councils is ineffective. Penna. Globe Gaslight Co. *v.* Scranton, 269.

The City Controller, under the Act of 23 May, 1874, is not merely a ministerial officer, but is invested with discretionary powers. When called upon to countersign a warrant he must approve it as one having deliberative and discretionary powers, and as the guardian of the city treasury, and his judgment thereon is not reviewable by the Courts. Runkle *v.* Commonwealth, 213.

The filing of a duly approved bond by the Clerk of Select Councils of Reading, is a condition precedent to his entry upon his office, and until it is done, his predecessor is entitled to hold over. Howell *v.* Commonwealth, 215.

Liability of for damages for opening streets. See ROADS, HIGHWAYS, AND BRIDGES. Pusey *v.* Allegheny, 561.

Collection of taxes in Scranton. See TAXES AND TAXATION. Ruth's Appeal, 498.

NECESSARIES. Action for. See HUSBAND AND WIFE. Carn *v.* Fillman, 152.

NEGLIGENCE. Where a passenger on a ferry boat, standing in the cabin door was thrown down by the shock produced by the boat striking the slip with violence, a referee found that the company was guilty of negligence, and that the plaintiff was not guilty of contributory negligence. Upon error, the Supreme Court held that the referee's findings upon these questions of fact were equivalent to a verdict of a jury. Camden Ferry Co. *v.* Monaghan, 46.

A railroad company is not liable for damages resulting from the ordinary, legitimate, and lawful use of their road. Hence, when a horse, being driven by the side of a track is frightened by escaping steam, runs off and injures the occupants, the railroad company is not liable. Drayton *v.* North Penna. R. R. Co., 55.

Although a master does not warrant the safety of his servants, he is under an implied contract to furnish such instruments, means, and places for conducting the business, that they can perform their duties safely and without exposure to danger which is not within the reasonable scope of their employment. Green St. P. R. W. Co. *v.* Bresner, 379.

In an action against a passenger railway company to recover damages for an injury occasioned by the kick of a vicious mare belonging to the defendant, evidence is admissible in order to show that the company knew of the character of the mare, that the defendant's stable-boss knew of it, and had a conversation with the company's superintendent relative to her sale. Ib.

When in an action to recover damages for the death of another, alleged to have been caused by the negligence of the defendant or his servants, there is no evidence of such negligence, or, at most, a scintilla only, it is the duty of the Court to give the jury binding instructions to find for the defendant. Phila. and R. R. Co. *v.* Schertle, 125. Baker *v.* Fehr, 56.

There is no duty on the part of a railroad company to ballast its track for the safety of its employés, and

NEGLIGENCE—*Continued.*
except, perhaps, at a crossing, it owes no such duty to the public. Ib.

The jumping by a passenger from a street car while it is in motion is contributory negligence on his part, for which the refusal or neglect of the conductor to stop when requested is no justification. (C. P.) Hagan *v.* Phila. and Gray's Ferry Pass. R. W. Co., 360.

Where in an action for the loss of a mill alleged to have been destroyed by the negligent construction of the defendant's dam, the defence is that the loss was occasioned by a storm of unprecedented character, which swelled the creek upon which the dam was situated, evidence is inadmissible to show that other neighboring creeks were at the same time violently and unprecedently swelled by the same storm. Minnequa Springs Co. *v.* Coon, 502.

The taking of an acknowledgment by a notary public, under the law of this State is a judicial act, and his liability for issuing an erroneous or false certificate is only that of any officer performing a judicial act. Commonweal h *v.* Haines, 392.

A gratuitous bailee is liable only for gross negligence, while a bailee for hire is liable for slight negligence; whether the bailment is gratuitous or for hire is a question for the jury. Swartz *v.* Hauser, 434.

NEGOTIABLE INSTRUMENT See BILLS AND NOTES.

NONSUIT. Where a plaintiff has been nonsuited in a former action for the same cause, the proper practice is to take a rule for stay of proceedings. (C. P.) Keen *v.* Bockius, 260.

NOTARY PUBLIC. Liability of, for false certificate of search. See NEGLIGENCE. Commonwealth *v.* Haines, 392.

NOTICE. Of unrecorded mortgage, when sufficient. See MORTGAGE. Phillipsburg Savings Bank's Appeal, 265.

To agent, when binding on principal. See PRINCIPAL AND AGENT. Phillipsburg Savings Bank's Appeal, 265.

See LIS PENDENS. Dovey's Appeal, 389.

NUISANCE. Injunction to restrain. See EQUITY.

ORPHANS' COURT. The Orphans' Court has no jurisdiction over an executor de son tort. (O. C.) Power's Estate, 208.

The Orphans' Court has sole jurisdiction over the settlement of the accounts of executors, and hence where a distributive share is claimed by an attaching creditor of the distributee, and also by his assignee, they must present their claims in that Court. Lex's Appeal, 209.

A guardian cannot be compelled to file an account unless funds have come into his hands as such. (O. C.) Portuondo's Estate, 174.

The Orphans' Court has jurisdiction to compel a testamentary guardian to file an account, even though the will was proved in another State, when the guardian, ward, and estate are within the jurisdiction. (O. C.) Aaron Mayer's Estate, 261.

The legal discretion of the Orphans' Court in the appointment of guardians is not reviewable in the Supreme Court. Gray's Appeal, 248.

A minor upon arriving at the age of fourteen has not the naked legal right to make choice of a new guardian in the place of one previously appointed. Ib.

Where a purchaser proceeds in the Orphans' Court by bill or petition under the Act of 24 February, 1834, to enforce specific performance of a decedent's contract for the sale of land, notice to the heirs or

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ORPHANS' COURT—*Continued.*
devisees of the real estate is requisite, as well as notice to the executors or administrators. Hoffner *v.* Wynkoop, 3.

As to heirs or devisees not so notified, the proceedings are void. Their title will not pass by the deed executed in pursuance of the decree of the Orphans' Court. Ib.

The Act of 1836 confers upon the Orphans' Court no power to make distribution of a minor's estate among parties making claim against it as creditors. (O. C.) Shore's Estate, 572.

Under what circumstances an issue will be directed from the Orphans' Court to the Common Pleas to determine the kinship of a petitioner, claiming partition, to the deceased owner of the estate. (O. C.) Armstrong's Estate, 571.

The Orphans' Court has no power to discharge a dower right charged upon real estate sold under the order of the Court, by directing payment of the principal sum to the administrator. (O. C.) Soley's Estate, 67.

Under what circumstances an order will be made for the payment of an allowance to a minor. (O. C.) Mayer's Estate, 264.

Under what circumstances an amendment of a return to an order of sale will not be allowed. (O. C.) Fritz's Estate, 51.

Where an error has been made in a decree of Court as to the nature of the recognizances to be given by one to whom land has been adjudged in partition, and the allottee enters with surety into the recognizances as specified in the decree, the Court will not subsequently, on a bill of review, decree that the surety shall enter into any different or new recognizance whereby his liability may be different from or extended beyond that incurred by him on the former ones. Shearer's Appeal, 273.

The Orphans' Court has no jurisdiction upon a petition for a review under the Act of Oct. 13, 1840, to vacate a decree confirming an auditor's report distributing a fund, after actual payment to the distributees in accordance with the decree. Lehr's Appeal, 282.

Under what circumstances a guardian will be attached for a contempt. Leiter's Appeal, 225.

PAROL TRUSTS. See TRUSTS AND TRUSTEES. Fricke *v.* Magee, 50.

PARTITION. Owelty in partition constitutes a first lien on the purpart of the former tenant in common, and is entitled to priority over a mortgage of his undivided interest given by the tenant before the partition. Appeal of McCandless's Executors, 563.

Discharge of dower by decree of Orphans' Court. See ORPHANS' COURT. (O. C.) Soley's Estate, 67.

PARTNERSHIP. The members of an incorporated Masonic lodge are not as such partners, and so liable for all debts contracted on account of the lodge; but each member of a committee of the lodge giving an order, and each member of the lodge assenting to the action of the committee, is liable. Ash *v.* Guie, 198.

Acts of Assembly relative to competency of witnesses in actions against surviving partners construed. See EVIDENCE. Ash *v.* Guie, 198.

A promise by partners who purchase the assets of a firm for a fixed price to be distributed among the creditors of the old firm pro rata is not a promise to pay the debt of another, and hence need not be in writing. Wynn *v.* Wood, 345.

In the distribution of a fund produced by the sale

PARTNERSHIP—*Continued.*
of partnership assets under an assignment for the benefit of creditors, no one is entitled to share but a firm creditor. Strickler's Appeal, 525.

Partnership property cannot be taken in execution upon a judgment-note signed in the firm name by one partner, and given for his individual indebtedness. (C. P.) Vandegrift *v.* Redheffer, 484.

PASSENGER RAILWAY. Taxation of horses and cars of. See TAXES AND TAXATION. (C. P.) Citizens' Pass. R. W. *v.* Donohugh, 62.

See NEGLIGENCE.

PAYMENT. Presumption of. See JUDGMENT. LEGACY.

PHILADELPHIA. The City Councils cannot by ordinance, granting to an individual a special privilege, authorize an encroachment upon a highway. (C. P.) Commonwealth *v.* Harris, 10.

PILOTAGE. See CONSTITUTIONAL LAW. (U. S. D. C.) Chambers *v.* The Clymene, 537.

PLEADING. In an action by the Commonwealth to the use of Martin, City Treasurer, a declaration, averring an indebtedness to Martin, is bad. (C. P.) Commonwealth *v.* Leonard, 537.

A replication which neither pursues the declaration nor fortifies it, is bad on demurrer. (C. P.) Eckel *v.* Association, 64.

An objection to the inconsistency of two counts in a narr. must be taken advantage of by demurrer; it will not be inquired of on error. Schmidt *v.* Owens, 5.

Where a defective narr. is pleaded to, and afterwards the plaintiff files an amended narr., and the case goes to trial without further pleas, the presumption is that the trial was had on the amended narr., and that the mere fact that the Court did not order the plaintiff on the trial to elect under which narr. he would try, afforded no ground of reversal. Carn *v.* Fillman, 152.

Pleas in abatement cannot be joined with those in bar. (C. P.) Gallagher *v.* Thornley, 189.

A plea by a defendant in a mechanics' lien as owner that he is not the owner is bad. (C. P.) Spare *v.* Walz, 82.

A plea of lis pendens is a plea in abatement, and not in bar. (C. P.) Holtzner *v.* Byrne, 101.

Where a judgment has been obtained against an unincorporated society, and no execution issued, and subsequently the members of such society are sued for the same claim, a plea of former recovery on their part is a nullity. Ash *v.* Guie, 198.

Evidence that after the bringing of an action, the defendant signed a judgment note for the same cause of action, upon which judgment was subsequently entered, is good under a plea of former recovery. Jones *v.* Ellison, 205.

Evidence of "former recovery," though not admissible under the plea of "accord and satisfaction," is admissible under the general issue in assumpsit. Ib.

A plea of *puis darrein continuance* is a waiver of all former pleas of the party pleading it. Woods *v.* White, 19.

A replication must be filed to a plea concluding with a verification, or the cause will not be at issue. (C. P.) Klein *v.* McGeough, 482.

See CRIMES.

POWER. A devise to executors to hold in trust for a period specified, and then at their discretion to sell the land devised and the proceeds to divide among parties named, is a power of sale to make distribution vested in the executors virtute officii, and survives to an administrator *d. b. n. c. t. a.* Dorff's Appeal, 335.

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POWER—*Continued.*

When a discretion as to the application of a fund for charitable purposes is vested in executors, and the executors die during the pendency of a prior life estate, and before the occasion for the exercise of the discretion arises, the power is dead. Appeal of Children's Hospital, 313.

Although there be a clause in the will authorizing the executors to fill vacancies occurring among them, and conferring upon such successors "all the power and authority" of the original executors, yet in the absence of executors so nominated, an administrator *d. b. n. c. t. a.* cannot exercise the discretion. Ib.

It is not necessary that in the execution of a power there should be a recital of the fact that it is an execution of such power. It is enough if from the entire transaction an intent to execute it is shown. (C. P.) Wynkoop *v.* Wynkoop, 65.

A power of revocation contained in a deed of trust is well executed by a will whereby the trust estate is devised to other uses than those declared in the deed, even though in the will there is no express allusion to the deed or the power of revocation. Taylor's Appeal, 48.

PRACTICE. Service of process upon corporations. See CORPORATIONS. Ins. Co. *v.* Storrs, 304. Hagerman *v.* State Co. 491. Anspach *v.* Ins. Co., 568.

The right of a defendant arrested upon a capias to enter a plea of freehold is not limited to the quarto die post. It may be done within any reasonable time. (C. P.) Ingersoll *v.* Campbell, 553.

A discontinuance will not be permitted if done to vex the defendant. (C. P.) Brooks *v.* Prentzel, 319.

A non pros. for want of a narr. entered through the negligence of the plaintiff's attorney will not be taken off after the lapse of over three years. (C. P.) Baxter *v.* Seeley, 208.

The Court will not direct the Prothonotary to set out in full upon the appearance docket matters which are contained in the original papers constituting the record. (C. P.) Myer *v.* Verner, 138.

Depositions read in a cause belong to the Court, and must be filed forthwith. (C. P.) O'Conner *v.* Weeks, 372.

An order will not be made upon the application of the defendant requiring the personal attendance of the use plaintiff at the trial. (C. P.) Girard Life Ins. Co. *v.* Mutual Life Ins. Co., 136.

Before service of a subpœna in divorce by the sheriff of a county other than that in which the libel was filed, an order must be made in the Court of original jurisdiction. (C. P.) Fillman *v.* Fillman, 222.

Plea of former recovery, when good. See PLEADING. Ash *v.* Guie, 198. Jones *v.* Ellison, 205. Keen *v.* Bockius, 260.

Trial and its incidents. The fact that a person drawn as a juror is the second cousin of the husband of a daughter and legatee of defendant's decedent, constitutes good ground for a principal challenge by the plaintiff. But if the plaintiff challenge the juror to the favor, and the question be by agreement of the parties submitted to the Court in place of trial, its decision rests upon the conscience and discretion of the Court, and is not reviewable. Wirebach's Executor *v.* Bank, 143.

An application to have a case improperly on the trial list stricken off should be made to the Judge sitting for that period. (C. P.) Burke *v.* Allen, 138.

Under what circumstances a nonsuit entered in the absence of the plaintiff's counsel will be stricken off. (C. P.) Klein *v.* McGeough, 482.

An amendment of the plaintiff's bill of particulars

PRACTICE—*Continued.*

at the trial may be pleaded as surprise, and the defendant will be then entitled to a continuance. (C. P.) Atwater *v.* Hagar, 189.

Where parties proceed to trial with the pleadings in a defective condition, every presumption will be taken hold of to sustain a verdict. Carn *v.* Fillman, 152.

Method of objecting to the admission of incompetent evidence. See EVIDENCE. Baumgardner *v.* Burnham, 445.

A misdirection by which the rights of a party are not prejudiced is not the ground for a reversal of the judgment. Swartz *v.* Hauser, 434.

Remarks made by counsel to the jury in summing up are *dehors* the record; and, no matter how improper, constitute no ground of reversal on error. Fulmer *v.* Commonwealth, 437.

Judicial comments disparaging to witnesses or parties, and not grounded upon facts in evidence, or any other judicial remarks similarly without foundation, which may tend to mislead and prejudice the jury, are improper and erroneous, and constitute ground for reversal. Stokes *v.* Miller, 241.

Province of Court and jury in negligence cases. See NEGLIGENCE. Baker *v.* Fehr, 56. Phila. & Read. R. R. Co. *v.* Schertle, 125.

A Court has power after verdict to strike out surplus matters erroneously introduced into it by the jury. Watkins *v.* Building Association, 414.

Associate Judges. Practice sur motion for a new trial in counties having Associate Judges. Van Vliet *v.* Conrad, 464.

Reserved point. It is error for the Court to reserve a point of law without a finding of facts by the jury, or a statement agreed upon, so that they may appear upon the record. Verrier *v.* Guillou, 477.

A motion in arrest of judgment is technically a waiver of a motion for a new trial; but where the established practice has been to allow both motions, the Court will not depart from it. (C. P.) Rohrbacker *v.* Pugh, 275.

Other matters. An appeal from the Prothonotary's taxation of costs brings up the merits of the taxation. (C. P.) Ballinger *v.* Killam, 372.

Under what circumstances it is the duty of a sheriff to make a special return. (C. P.) Building Association *v.* Steel, 238.

Exceptions to a report of a referee appointed under the Act of May 14, 1874, should be taken directly to the Supreme Court. Philadelphia *v.* Linnard, 148.

An auditor's report should be filed and exceptions thereto heard by the Court in the first instance. (C. P.) In re Nathan's Estate, 138.

Rule upon a purchaser to bring ejectment within ninety days. See EJECTMENT.

See AFFIDAVIT OF DEFENCE LAW. AMENDMENT. ATTACHMENT. EQUITY. ERRORS AND APPEALS. EXECUTION. EVIDENCE. JUDGMENT. JUSTICE OF THE PEACE. ORPHANS' COURT. PLEADING.

PRESUMPTION. In favor of the existence of a separate estate of a wife, there is no legal presumption; the husband on the contrary is presumed to be the owner of the property of which he and his wife have joint possession. Wilson *v.* Silkman, 364.

The fact that a transaction was between husband and wife in no wise tends to rebut the presumption that an assignment of securities was intended as collateral and not in absolute payment of a debt. Eby *v.* Hoopes, 315.

There is a presumption in favor of the regularity and correctness of a judicial act, and the burden of

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PRESUMPTION—*Continued.*
proving negligence is on him who asserts it. Commonwealth *v.* Haines, 392.

Presumption of payment of legacy. See LEGACY. Bentley's Estate, 224.

PRINCIPAL AND AGENT. Where a master directs a servant to write a letter in terms capable of a double construction, he is bound to see that the servant has in writing the letter placed such a construction on his orders as the master intended. If the master fail to do this, he will be bound by a contract entered into by him in such letter, even though the opposite construction of his orders to what he intended has been placed upon them by the servant in writing the letter. McConn *v.* Lady, 493.

Where a person assuming without authority to act as agent for another, enters into a contract either in his own name or in that of his alleged principal, the party with whom he contracts upon discovering the lack of authority may sue in tort, or elect to consider him as the principal in the contract, and hold him liable thereon. Ib.

The infringement of the copyright laws by an agent does not render a principal ignorant of the acts of such agent liable to the penalty imposed by the Revised Statutes. (U. S. D. C.) Schreiber *v.* Sharpless, 403.

What not sufficient evidence to charge one whom it is sought to hold liable as an agent. Milligan's Appeal, 203.

Where one accepts a note signed by the maker as agent with the understanding that the principal is to be looked to for payment, no recovery can be had against the agent. (C. P.) Janeway *v.* Moss, 337.

What not sufficient evidence of agency, to charge the principal with notice of facts brought home to the agent in the course of his employment. Phillipsburg Savings Bank's Appeal, 265.

Where a person deals *bona fide* with an agent as owner without knowledge of his agency, he may set off any claim he may have against the agent in answer to the demand of the principal. Frame *v.* William Penn Coal Co., 331.

Confidential relation between promoters of a corporation and the corporation. See CORPORATION. Pennell's Appeal, 297.

As between stock broker and customer. See CONTRACT.

PRINCIPAL AND SURETY. See SURETY.

PRISON INSPECTORS. Action against for false imprisonment. (C. P.) Reinhart *v.* Vaux, 222.

PURCHASER FOR VALUE. While taking a security as collateral for an antecedent debt does not make the creditor a holder for value so as to give him the rights of a *bona fide* purchaser, yet the rule is otherwise where it is taken in payment or extinguishment of the debt. Dovey's Appeal, 389.

QUO WARRANTO. The writ of quo warrante is not issuable upon the suggestion of a private relator where the question involves the existence of a corporation. Commonwealth ex rel. Hoffman *v.* Philadelphia and C. C. R. R. Co., 400.

RAILROADS. The grant of a right to construct a railroad carries with it, by necessary implication, the right to construct all works and appendages usual in the convenient operation of a railroad. Sidings leading to manufacturing or mining establishments held by private owners are among such works, and for this purpose the corporation may take, by virtue of the delegated power of eminent domain in it re-

RAILROADS—*Continued.*
posed, the interjacent lands belonging to other parties. Getz's Appeal, 453.

A railroad company in the absence of express charter authority has no power to issue an irredeemable obligation. (U. S. C. C.) McCalmont *v.* Phila. and Read. R. R. Co., 338.

Where the net earnings of a railroad company which is under a receivership are sufficient to purchase necessary rolling stock and equipments, they should be so applied, and the receivers will not be authorized to create a loan secured by a car trust for their purchase, merely in order to allow the earnings of the road to be applied to the interest due the bondholders. (U. S. C. C.) Taylor *v.* P. & R. R. R. Co., 554.

Action against by owner of horse frightened by a locomotive. See NEGLIGENCE. Drayton *v.* North Penna. R. R. Co., 55.

Action against passenger railway by one injured in jumping from a car in motion, See NEGLIGENCE. (C. P.) Hagan *v.* Phila. and Gray's Ferry P. R. W. Co., 360.

Action against passenger railway by one kicked by a horse. See NEGLIGENCE. Green and Coates Passenger Railway Co. *v.* Bresmer, 379.

Action against railroad by brakeman thrown under train. See NEGLIGENCE. Phila. & Read. R. R. Co. *v.* Schettle, 125.

Injunction to restrain work of construction. See INJUNCTION. Hoffmann's Appeal, 401.

Injunction to restrain grade crossing. See INJUNCTION. Baltimore & C. R. R. Co.'s Appeal, 530.

Injunction to restrain obstruction of highway. See INJUNCTION. (C. P.) Cox *v.* P. W. & B. R. R. Co., 552.

RECEIVER. See RAILROAD.

RECORDER OF DEEDS. Limitation of liability of recorder of deeds for false search. See LIMITATIONS. (C. P.) Ashton *v.* Walton, 452.

REFEREE. Findings of facts by a referee are as conclusive as the verdict of a jury. Camden Ferry Co. *v.* Monaghan, 46.

Exceptions to the report of a referee under Act of May 14, 1874, should be taken directly to the Supreme Court. Philadelphia *v.* Linnard, 148.

Conditional award of a referee in ejectment. See EJECTMENT. Heath *v.* Gardner, 495.

REGISTER OF WILLS. See DECEDENTS' ESTATES.

RELIGIOUS SOCIETY. Enforcement of a trust for the erection of a church. See EQUITY. (C. P.) Swinney *v.* Fidelity Co., 290.

REPLEVIN. Set off in, when permissible. (C. P.) Reeves *v.* Prichard, 523.

Where a plaintiff in replevin fails to comply with an order to furnish additional security, the proper practice is to move to enter a nonsuit. (C. P.) Strouse *v.* McCouch, 274.

See LANDLORD AND TENANT.

RES ADJUDICATA. The finding of an auditor upon a question involving matters of fact as well as of law having been confirmed by the Court, and being unappealed from, is conclusive in subsequent proceedings. (C. P.) Hoopes's Estate, 223.

The sustaining of a demurrer to a bill in equity is simply a decision that the complainant has not set out a case entitling him to relief. It is not a decision on the merits, and hence cannot be put in evidence against the complainant in a subsequent proceeding in the same cause of action as a bar to his relief or recovery. Detrick *v.* Sharrar, 287.

The affirmance of a judgment in a road case heard

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RES ADJUDICATA—*Continued.*
before the Supreme Court on certiorari, and not on the merits, is not conclusive of any question involved in the merits. (C. P.) Philadelphia *v.* Kensington T. P. Co., 357.

Under what circumstances an auditor's report is not *res adjudicata*. Woods *v.* White, 19

RESTITUTION. See CRIMINAL LAW. Huntzinger *v.* Commonwealth, 98.

RESULTING TRUSTS. See TRUSTS AND TRUSTEES.

RIVERS. Jurisdiction of State over marginal waters. See CONSTITUTIONAL LAW. (U. S. C. C.) Chambers *v.* Clymene. 537. Comth. *v.* Ferry Co. 509.

ROADS, HIGHWAYS, AND BRIDGES. Where a property owner through whose land a street has been run is injured, both by reason of the taking of part of his land for the construction of the street, and also by reason of the cutting and grading thereof, he must in proceedings to recover damages submit his whole claim to the viewers and the Court, and that part thereof which he neglects so to submit must be taken to have been waived, and no second process can be had for its recovery. Pusey *v.* Allegheny, 561.

Where grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of the damages at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained in a subsequent proceeding instituted in accordance with the provisions of the Act of May 1, 1876. Ib.

The Supreme Court will not on error to a judgment in an appeal under the Act of June 13, 1874, from the report of viewers appointed to assess damages resulting from the opening and grading of a street, take notice of the fact that such grading was done subsequently to the report of the viewers appealed from, where nothing to that effect appears upon the record. Ib.

Under the Acts of April 21, 1855, and April 1, 1864, allowing damages and benefits to land-owners for the opening and widening of streets, the actual taking of land is the ultimate basis of the right to have damages; hence, where the opening of the street is not a legal possibility, there can be no recovery. In re Thirty-ninth St., 384.

Amount of damages recoverable for compelling a property owner making alterations to recede to the south line of Chestnut Street as now established. See DAMAGES. Philadelphia *v.* Linnard, 148.

Since the Act of May 3, 1869, it is the duty of the Court of Quarter Sessions of Philadelphia County to specify which exceptions are sustained and which dismissed, as well as to state that the report of viewers is set aside in pursuance of exceptions sustained. In re Germantown Avenue, 433.

The award of a road jury cannot be attacked in a collateral proceeding. Scott *v.* Philada., 317.

In proceedings under the Act of March 24, 1869, to appropriate turnpike roads to the use of the public, a corporation owning such road will still be entitled to damages for the taking thereof, though its stock may have no market value, and the property itself be unproductive. In re Kensington Turnpike Co., 177.

Under the Act of May 3, 1869, the Courts of Quarter Sessions cannot set aside the verdicts of road juries for matter dehors the record. Ib.

Where in a road case the report of appraisers is filed, and exceptions are filed thereto by the city against whom the award has been made, at the same term as that in which the report has been filed, and then by agreement of all parties, the exceptions are

ROADS, HIGHWAYS, AND BRIDGES—*Continued.*
disposed of and judgment is entered at the same term; these proceedings were binding on the city, and she could not file new exceptions at a subsequent term on the ground that all parties have until the next term after the report of the appraisers is made to file their exceptions thereto. Ib.

Right to issue mandamus execution. See MANDAMUS. In re Kensington Turnpike Co., 177.

RULE IN SHELLEY'S CASE. See WILL.

SALE. In a sale of growing timber, where no immediate severance is contemplated, the timber is to be deemed to continue real estate. Wilson *v.* Douglass, 527.

Distinction between a conditional sale and a bailment. See CONTRACT. Stadtfeld *v.* Huntsman, 216. Brunswick *v.* Hoover, 219.

SALVAGE. In salvage cases the measure of compensation is what both parties would have contracted for, and is proportionate to the risk run by the salvor in saving and that incurred by the saved vessel in declining assistance at the time of the peril. (U. S. D. C.) The Mary E. Long, 192.

SCHOOLS. Right of colored children to admission to public schools. See CONSTITUTIONAL LAW. (C. P.) Commonwealth *v.* Davis, 156.

SEARCH WARRANT. Sufficiency of. See CRIMINAL LAW. Moore *v.* Coxe, 135.

SET-OFF. Under what circumstances a claim against an agent may be set off against the principal. See PRINCIPAL AND AGENT. Frame *v.* Coal Co., 331.

An attorney at-law or in fact employed to collect a claim, when he has received or recovered the money, has no right to set off an antecedent debt or claim in his own right against his constituent. Simpson *v.* Pinkerton, 423.

Under what circumstances one judgment may not be set off against another. (C. P.) Windle *v.* Moore, 387,

Set-off, when not allowed in replevin. (C. P.) Reeves *v.* Pritchard, 523.

What may be set off as against claim for rent. See LANDLORD AND TENANT. Allegaert *v.* Smart, 29.

Right of mortgagor who conveys subject to mortgage to set off usurious interest paid by him to mortgagee on other mortgages given to secure the same debt. Parker *v.* Sulouff, 26.

Limitation to claim of set off. See LIMITATIONS. Verrier *v.* Guillou, 477.

The board of directors in an insolvent bank having duly made an assessment on unpaid stock subscriptions for the purpose of meeting the liabilities of a bank, a depositor cannot set off the amount due him on account of his deposit against the amount of assessment due by him on account of unpaid stock subscriptions. Bank *v.* Bastian, 71.

SHERIFF. Liability of for wrongful seizure. See TRESPASS.

SHERIFF'S SALES. See EXECUTION.

SHIPPING. Cargo loaded on deck, when jettisoned, is entitled to the benefit of contribution, if there is a general custom so to load. (U. S. C. C.) Wood *v.* Phœnix Iron Co., 277.

See SALVAGE. The Mary E. Long, 192.

SPECIFIC PERFORMANCE. See EQUITY. Mitchell *v.* Steinmetz, 43. Of contract of decedent. See DECEDENTS' ESTATES. Hoffner *v.* Wynkoop, 3.

STATUTES. Title of, when not sufficient. See CONSTITUTIONAL LAW. Ruth's Appeal, 498.

Where the meaning of certain words in a statute

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STATUTES—*Continued.*
has been judicially determined, and subsequently another enactment is passed in a revision of the statutes with reference to the same subject matter wherein the same words are employed, the words will be construed in the sense of the former adjudication. Fulmer *v.* Commonwealth, 437.

The Act of April 26, 1855, is inoperative to enable the Court to appoint a trustee to exercise a discretion under a will where the testator died prior to the passage of the Act. Appeal of the Children's Hospital, 313.

Upon the hearing of a rule for judgment for want of a sufficient affidavit of defence, the Court cannot take judicial notice of a private Act of Assembly. (C. P.) Timlow *v.* R. R., 436.

STOCK. Warranty of genuineness of stock certificate. (C. P.) Bank *v.* Kurtz, 318.

STOCK-GAMBLING. Illegality of contracts for purchase and sale of stocks upon margin. See CONTRACT.

STREETS. Injunction to restrain obstruction of. See EQUITY. See ROADS, HIGHWAYS, AND BRIDGES.

SUBROGATION. The doctrine of subrogation is one of mere equity and benevolence, and will only be applied with a proper equitable discretion, so that it may work no injustice to either legal or equitable rights. Wagner *v.* Elliott, 8.

Where a surety on a guardian's bond was compelled to pay the amount due by the guardian, he is entitled to be subrogated to all the ward's rights, including the right to invoke the jurisdiction of the Court to enforce by attachment a decree for the payment of money to his use. Leiter's Appeal, 225.

SUPREME COURT. General order arranging districts, 557.

See ERRORS AND APPEALS.

SURETY. Construction of a contract of suretyship, whereby one assumes a continuing liability for the debts of another within certain specified limits. (O. C.) Bentz's Estate, 16.

Determination of liability of sureties on bond of Collector of Taxes for the Twenty-third Ward of Philadelphia. Waters' Appeal, 146.

The rule of law, which in the absence of appropriation by the parties, appropriates payments in the way most advantageous to the creditor, will not be applied to the prejudice of a surety. Weightman's Appeal, 155.

Where an error has been made in the form of a recognizance entered in the Orphans' Court, the surety cannot be compelled to give a new obligation whereby the nature of his liability is changed. Shearer's Appeal, 273.

A receipt of part of a claim from a surety only discharges the principal *pro tanto*, even though the creditor agrees to receive such payment in discharge of his claim against the surety. (C. P.) Dejonge *v.* Helmbold, 102.

See SUBROGATION.

TAXES AND TAXATION. Uniformity of taxation, Constitutional provision relative to. See CONSTITUTIONAL LAW. Ruth's Appeal, 498.

The Act of April 23, 1866, § 42, which provides that the taxes within the city of Scranton shall be collected by the city authorities and at the expense of the city, is not repealed by the passage of the Act of April 7, 1877. Hence assessors, appointed by the county commissioners and not by the city authorities are incompetent to levy a tax within the city limits. Ruth's Appeal, 498.

TAXES AND TAXATION—*Continued.*
A sectarian parish school is not a purely public charity within the meaning of Art. IX., § 1, of the Constitution, and therefore is liable to taxation. Miller's Appeals, 168.

A parsonage, although erected on a church lot, is taxable. Church of Our Saviour *v.* Montgomery County, 170.

TAXATION OF CORPORATIONS. The public works of a corporation, used as such, with their necessary appurtenances, are exempt from taxation as land, being subject to it in another form, and a gas company so far partakes of the nature of a corporation for public purposes as to be subject to the same rule. Coatesville Gas Co. *v.* Chester County, 328.

The tax imposed on corporations by the Act of April 24, 1874, § 7, of three cents a ton upon each ton of coal mined by such corporation or by their lessees, is a tax upon the corporate franchises to be measured by the number of tons of coal so mined, and not a tax upon the coal itself. Chevington Coal Co. *v.* Lewis, 196.

The tax on corporations imposed by the 10th section of the Act of January 7, 1879, is a tax on the corporate franchise, to be measured by the annual net earnings or income. Philadelphia Contributionship *v.* Commonwealth, 193.

Income derived from bonds of the United States or from non-taxable loans of the State of Pennsylvania, forms part of the income of the corporation owning them, on which the company is taxable. In computing such income, the corporation is not entitled to a deduction by reason of the fact that bonds which had been bought by them at a premium had been paid off by the government at par. Ib.

A corporation chartered by the Congress of the United States doing business in Pennsylvania is not a foreign corporation under section 16 of the Act of June 7, 1879, and hence is not liable to pay a license tax. Commonwealth *v.* Texas and Pacific R. W. Co., 405.

The phrase in the proviso to section 16 of the Act of June 7, 1879, "or whose capital stock or a majority thereof," etc., refers to the capital stock actually issued and not to capital stock merely authorized. Ib.

The horses used by a city passenger railway company in the drawing of their cars are subject to taxation under the Acts of April 29, 1844, and August 25, 1864. (C. P.) Citizens' Pass. R. W. Co. *v.* Donohugh, 62.

A corporation organized as a purely mutual company, but afterwards accepting an amendment to its charter whereby it was authorized to do business on the cash premium plan, is liable to taxation upon the gross amount of premiums received by it under the Act of March 20, 1877. Lycoming Fire Insurance Company *v.* Commonwealth, 228.

Building Associations are included among the corporations upon whose capital stock a tax is imposed by the Act of June 7, 1879, which operates as an express repeal of the Act of April 10, 1879, exempting building associations from taxation. Bourguignon Building Association *v.* Commonwealth, 161.

Ferry Company. The capital stock of a foreign corporation doing business as a ferry company and running ferry boats across the Delaware River from Camden to Philadelphia, but having no real or personal property in this State other than the lease of a slip or dock, absolutely necessary for the accommodation of its ferry boats, is liable to taxation. Commonwealth *v.* Gloucester Ferry Co., 509.

TAX SALES, regularity of proceedings incident to. Cohen's Appeal, 230.

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TAX SALES—*Continued.*
Liability of terre-tenant to mortgagee for taxes accruing during tenancy. See MORTGAGE. Hogg *v.* Longstreth, 95.

Tax sales. See EJECTMENT.

TENANTS IN COMMON. Relationship of. See JUDGMENT. Batz's Appeal, 172.

TESTAMENTARY CAPACITY. See WILL.

TIMBER. Sale of. See LAND. Wilson *v.* Douglass, 527. See TRESPASS.

TRESPASS. Trespass on the case and not *vi et armis* is the remedy for one who was arrested upon a charge of larceny and against whom a true bill was found, but on the trial was acquitted. Royer *v.* Swazey, 432.

Where the sheriff under an attachment issued under the Act of 1869 seizes and sells the goods of a garnishee, he will be liable in trespass no matter what may be the event of the suit in which the attachment issued. Rothermel *v.* Marr, 421.

In trespass against a constable for an alleged wrongful seizure of goods, he may justify by putting in evidence an execution directed to him, regular in form and containing nothing on its face to indicate want of jurisdiction in the justice by whom it is issued, without showing the judgment, or the regularity of the proceedings on which the execution is founded. Barr *v.* Boyles, 253.

But it would seem to be otherwise in a suit against the plaintiffs in the execution. Ib.

Under what circumstances an action of false imprisonment is maintainable against the Board of Prison Inspectors. (C. P.) Reinhart *v.* Vaux, 222.

Treble Damages, when recoverable in trespass for wrongful cutting of timber. See DAMAGES. Kramer *v.* Goodlander, 469.

TROVER. Conversion of timber. See DAMAGES. Kramer *v.* Goodlander, 469.

TRUSTS AND TRUSTEES. A resulting trust in lands must arise if at all, at the inception of title either through fraud in the acquisition of that title or through the payment of the purchase-money by which it is obtained. Cross and Gault's Appeal, 226.

The fact that one acting in a fiduciary capacity applies money in his hands belonging to the trust to the improvement of his real estate will not entitle the cestuis que trustent to set up any resulting trust in their favor of such real estate. Ib.

Under these circumstances, the cestuis que trustent cannot claim an equitable lien against the real estate. Such a lien is unknown to Pennsylvania jurisprudence. Ib.

No resulting trust will arise as against a purchaser of realty at sheriff's sale by reason of a failure on his part to comply with the terms of a parol contract to buy in such realty in the interest of another, and convey the same to him, unless the promissee has furnished the purchase-money in whole or in part, or has at the time of the contract an actual estate or interest in the land or a *bona fide* claim thereto. Bank *v.* Cowperthwaite, 532.

A wife has no such interest in the real estate of her husband sold during his life as to warrant the raising of a resulting trust in her favor under the circumstances just referred to. Ib.

A resulting trust cannot be established by parol unless it be shown that the alleged cestui que trust paid the money or that there was fraud at the time of the sale. (C. P.) Fricke *v.* Magee, 50.

The fact that in a deed of trust conveying real estate for the sole and separate use of a married woman, there is a power to mortgage with the consent of

TRUSTS AND TRUSTEES—*Continued.*
such married woman to pay off any part of the purchase-money does not validate a bond given by such married woman jointly with the trustee as security for money advanced for the payment of the purchase-money. Grosser *v.* Hornung, 463.

Under what circumstances a trustee will be compelled to exercise a discretion in favor of the erection of a church. (C. P.) Swinney *v.* Fidelity Co., 290.

What not a sufficient designation of a fund out of which a draft is to be paid, to operate as a specific appropriation of the fund. Jordan and Porter's Appeal, 37.

What a sufficient ear-marking of a fund to entitle its equitable owner to follow it through several conversions. (C. P.) Wynkoop *v.* Wynkoop, 65.

Under what circumstances a trust relationship exists between the promoters of a corporation and the stockholders. See CORPORATION. Pennell's Appeal, 297.

An agreement on the part of those acting in a fiduciary capacity to pay counsel more than a reasonable compensation for professional services is against public policy, ultra vires, and void. Chester County *v.* Barber, 350.

The directors of a joint stock company are not liable for mistakes or errors of judgment. In order to charge them gross negligence on their part must be shown. (C. P.) Adams *v.* Manning, 448.

Discretionary power vested in testamentary trustee to be exercised in favor of a charity, when exercisable by administrator *d. b. n. c. t. a.* See DECEDENTS' ESTATES. Appeal of Children's Hospital, 313.

Special dividend, whether to be treated as capital or income of trust estate. See CORPORATION, In re Vinton, 49. (O. C.) Condy's Estate, 319.

Where a defaulting trustee cannot be found, the method of procuring his dismissal is by citation, alias citation and order of publication. (C. P.) Miller's Estate, 81.

TURNPIKE. Measure of damages for taking. See DAMAGES. In re Kensington and Oxford T. P. Co., 177.

TWYNE'S CASE. Rule in. See DEBTOR AND CREDITOR.

ULTRA VIRES. See CORPORATION.

UNDUE INLUENCE. See WILL.

UNINCORPORATED SOCIETY. Liability of members for debts of. See JOINT DEBTORS. Ash *v.* Guie, 198.

Action against, practice in. (C. P.) Hirsch *v.* Kohn, 237.

Liability of directors of. See TRUSTS AND TRUSTEES. (C. P.) Adams *v.* Manning, 448.

USURY. Effect of in mortgage. See MORTGAGE. Parker *v.* Sulouff, 26. Phillipsburg Savings Bank's Appeal, 265.

See NATIONAL BANK. (U. S. C. C.) Farmers' Nat. Bank *v.* Hoagland, 123.

VENDOR AND VENDEE. In a sale of growing timber, where no immediate severance is contemplated, the timber is to be deemed to continue real estate. Wilson *v.* Douglass, 527.

A contract for the sale and purchase of land at a price agreed upon, the purchase-money to be paid after the death of the vendor, and the title to be made by his executors, in the mean time the vendee to occupy the premises at a stipulated rent, is not testamentary, and hence not revocable. Meck's Appeal, 397.

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VENDOR AND VENDEE—*Continued.*

The equitable interest of a vendor who conveys his estate as security for a debt, is bound by a judgment. Merkel and Smith's Appeal, 116.

Under certain circumstances, where a judgment to secure the payment of purchase-money is entered the day following the conveyance, the transactions will be regarded as continuous. Batz's Appeal, 172.

In order that a judgment or mortgage may have the effect of a purchase-money incumbrance, it is not necessary that the fact that it is so should be stated on its face. Cohen's Appeal, 544.

Purchaser for value of personal property, who to be treated as. (C. P.) Boynton *v.* Isaacs, 190.

Warranty of genuineness of stock certificates, when not implied. (C. P.) Bank *v.* Kurtz, 318.

Specific performance. See EQUITY.

VOLUNTARY ASSIGNMENT. See DEBTOR AND CREDITOR. HUSBAND AND WIFE.

WAGERING CONTRACT. Illegality of. See CONTRACT. Ruchizky *v.* DeHaven, 109. Dickson *v.* Thomas, 112.

WAGES. Claim for, against decedent's estate. See DECEDENTS' ESTATES. McConnell's Appeal, 1.

Action for, when bail absolute must be entered upon appeal from magistrate. See JUSTICE OF PEACE. (C. P.) Gallagher *v.* Thornley, 189.

WARRANT OF ATTORNEY. Effect of restrictive provision in. See JUDGMENT. Wilkinson *v.* Conrad, 22.

WILL. Where the testator has been weakened in body or in mind, even though no testamentary incapacity be shown, and the person whose advice has been sought and taken in the making of the will receives a large benefit thereunder, it must be shown affirmatively, in order to support such an instrument, that the testator had full understanding of the nature of the disposition contained in it. Cuthbertson's Appeal, 69.

Every man who draws a will in his own favor, under such circumstances, should be required to prove affirmatively all the circumstances connected with the drawing of the will, and must make it appear that the alleged testator was laboring under no mistaken apprehension as to the value of the property, or as to the amount he was giving his confidential adviser. Ib.

The bequest of a small portion of a testator's estate to the confidential adviser drawing the will affords no evidence of undue influence. Stokes *v.* Miller, 241.

Undue influence of that kind which will invalidate the provisions of a will, must be such as subjugates the mind of the testator to the will of the person operating upon it, and, in order to establish this, proof must be made of some fraud practised, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator, and these influences must be proved to have operated at the very time of making the will. Stokes *v.* Miller, 241.

What instrument not a testamentary paper. See VENDOR AND VENDEE. Meck's Appeal, 397.

Codicil, what a sufficient execution of. Under what circumstances memoranda indorsed upon an envelope

WILL—*Continued.*

will be permitted to explain a testamentary paper. Fosselman *v.* Elder, 210.

Where the contest as to the validity of a testamentary instrument is substantially between two sets of legatees, the executor has no right to espouse the interests of either party to the exclusion of the other, and will not be entitled to credit for legal expenses incurred by him in successfully maintaining the will. Rankin's Appeal, 235.

Practice sur appeal from register upon a demand for an issue devisavit vel non. (O. C.) Mary Whitaker's Estate, 106, 139.

Will, when a sufficient exercise of a power of revocation in deed of trust. See POWER. Taylor's Appeal, 48.

Where land is devised at a valuation or price to be paid by the devisee, the title passes subject to the charge or lien for the price, if the devise be accepted. Fishburn's Appeal, 489.

The legacy to the nephew of testator does not lapse by the death of the nephew during the testator's lifetime, but goes to the children of such nephew. (O. C.) Hook's Estate, 140.

A bequest of the residue of an estate for the construction of a monument construed. Bainbridge's Appeal, 443.

A devise to the two sons of the testator "to be equally divided between them, to them, their heirs and assigns forever," and a direction "if either of testator's two sons should die without legitimate issue, that the survivor should inherit the whole of the deceased's part of the land," will be held to contemplate an indefinite failure of issue, and will, therefore, by implication vest an estate tail in the devisees. Stone *v.* McMullen, 541.

Construction of power to mortgage contained in a will. Miller *v.* Schlegel, 521.

A bequest to a woman of an annuity for the rest of her unmarried life, and on her marriage day the sum of $3000 to be paid to her, and thereupon the annuity to cease, means an annuity until marriage, and the legacy on marriage. Schleppi *v.* Kochler, 448.

The marriage before the death of the testator does not cause the legacy to lapse, but the condition having been fulfilled when the will went into effect, the legacy was absolute. Ib.

"Children" is a word of purchase, unless there be something in a will indicating that it is used by the testator in the sense of his whole line of descendants. Fitler's Appeal, 429.

A will gave all the testator's real and personal estate to the wife for life, and small legacies to the children living at the time of his decease; there was no residuary devisee, no limitation over after the life estate of the wife, and no person named as heir or next of kin. A clause provided that part of the real estate might be converted at the discretion of the widow, and part upon agreement of the widow, sister, and children named, but was silent as to the disposition thereof, whether converted or not: *held*, that no intent could be deduced to disinherit those entitled upon the death of the wife to the real estate under the intestate laws of the Commonwealth. Hoffner *v.* Wynkoop, 3.

END OF VOLUME X.

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